
(1985) 05 DEL CK 0065

In the Delhi High Court

Case No : Letter Patent Appeal No. 30 of 1985

Usborn Lewis

APPELLANT

Vs

Phylis Jordan

RESPONDENT

Date of Decision : 23-05-1985

Acts Referred:

Citation : AIR 1986 Delhi 72 : (1986) RLR 175

Hon'ble Judges : Sunanda Bhandare, J;B.N. Kirpal, J

Bench : Division Bench

Advocate : Lily Thomas, for the Appellant;

Judgement

Sunanda Bhandare, J.

(1) This Letters Patent Appeal is directed against the Judgment of the Single Judge dated 12. 8. 85 whereby the Single Judge remanded the case back to the Adj for a fresh decision and refused to exercise power u/s 8 of the Indian Divorce Act, 1869 as (the"Act") and also without disposing of the main appeal on merits.

(2) The facts of the case lie in a very narrow compass. The appellant and respondent 1 being Christians were married according to Roman Catholic rites at St. Thomas Church, Calcutta on 26.11.49. A female child was born out of this wed-lock on 25.12.56. Since the appellant got a job at Delhi, the Appellant Along with respondent 1 shifted to Delhi in 1967. However, sometimes in 1974 respondent 1 returned to Calcutta and refused to come back to Delhi. The appellant persuaded her to come back but without any success. The appellant, Therefore, filed a petition for judicial separation in the court of Adj, Delhi in 1979. Though notice was sent to respondent 1 she did not appear and Therefore, the Adj on 1. 2 80 granted an ex-parte decree for Judicial separation.

(3) On 15. 10. 80 a petition was filed by the appellant in the court of the Adj, Delhi for dissolution of marriage u/s 10 of the Act on the ground that respondent 1 was living in adultery with respondent 2. Since notice of the petition could not be served on either of the respondents the same was served by publication.

inspire of publication of the notice the respondents did not chose to appear before the Adj in the said proceedings and Therefore, the proceedings were held ex-parte against the wife. The Adj recorded the evidence of the appellant and thereafter passed an order on 30. 3. 82 refusing to grant divorce. While dismissing the petition for dissolution of marriage the learned Adj held that there was lack of sufficient proof to substantiate the allegation made by the appellant regarding the adulterous relations of respondent 1 with respondent 2. The learned Adj Judge further held that though neither the wife nor the correspondent had chosen to contest the petition the onus was on the appellant to substantiate his allegation made by him in the petition against the wife. Against this order dated 30. 3. 82 the appellant filed F.A.O. 155/82 in this court.

(4) The Single Judge issued notice to the respondents but again none of the two respondents could be served. Another publication was made in Anand Bazar Patrika which is a widely read newspaper in Eastern India and particularly in Calcutta where the respondents are alleged to be residing. The Single Judge held that the judgment of the Adj was void ab initio and Therefore, remitted the case back to the Adj for a fresh decision on merits.

(5) A separate application was filed by the appellant being C.M. No. 492 of 1985 praying that the High Court should exercise its power u/s 8 of the Act and dispose of the main petition on merits instead of remitting it back to the Adj for deciding it afresh. This prayer of the appellant also did not find favor with Single Judge and by a separate order dated 14. 2. 85 Single Judge refused to exercise jurisdiction u/s 8 of the Act. The appellant has filed this L.P.A. only against the order of remand made by Single Judge in F. A. O. 155/82

(6) It was contended by the counsel for the appellant that once the Single Judge had held that the judgment and order of Adj was patently illegal and absurd, the Single Judge ought to have allowed the appeal on merits and not remanded the case back for a fresh decision. It was contended that the Single Judge failed to appreciate that since the case had proceeded ex-parte all the evidence that could be available to the appellant to substantiate his contentions and allegations made by him against the respondents was produced by the appellant. The appellant himself had been examined as P. W. 1 and had made a statement on oath. This statement of the appellant was filed as and annexure to the F.A.O. and, Therefore, no useful purpose would be served by remitting the case back to the ADJ. It was, Therefore, contended that the Single Judge ought to have either exercised power u/s 8 of the Act or in the alternative decided the appeal on merits and passed a decree for dissolution of marriage.

(7) It may be useful to re-produce the observations made by the learned Single Judge of this Court while remitting the case back to the Adj for a fresh decision :

"The learned Judge had described this petition as a petition u/s 10 of the Hindu Marriage Act for the decree of judicial separation. The learned Judge held that grounds of cruelty and adultery mentioned in the petition and in the evidence

were not substantiated by necessary particulars. The learned Judge, on these findings, refused to grant decree of judicial separation to be sustained. The impugned judgment to say the least is ab initio illegal and void. It is beyond the imagination how the learned Judge did not even read the petition for dissolution before passing the impugned order. The learned counsel for the appellant, however, substantiated that these are only clerical mistakes which I should correct in my appellate power u/s 8 of the Indian Divorce Act, exercise my extraordinary power mentioned in S. 8 are not meant for such situation where the illegality amounts to the absurdity of the situation. It is not necessary to go further in the matter. The decree passed by the Adj is patently illegal and is hereby set aside. However, considering the fact that the appellant had already gone through the difficulties for over 20 years and also secured a decree for judicial separation, I remit the matter back to the Adj for a fresh decision within one month from today."

(8) It may be necessary to analyze the scheme of the Act in order to determine the jurisdiction of the High Court while deciding an appeal filed against the order of the District Judge refusing to pass a decree for dissolution of marriage. Section 8 of the Act empowers the High Court to remove and try and determine as a Court of original jurisdiction any suit or proceedings under the Act in the Court of any District Judge within the limits of its jurisdiction under the Act. Section 10 provides that any husband or wife may present a petition to the District Judge or to the High Court praying that his/her marriage may be dissolved on the ground specified in the said section. S. 13 empowers the District Judge to dismiss the petition in case he is satisfied that the petitioner's case has not been proved. Section 13 further provides that the petitioner may even after the dismissal of the petition by the District Judge present a similar petition to the High Court. Section 14 confers the power on the Court meaning either the District Court or the High Court to pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in S. 16 and 17 of the Act. u/s 16 every decree for a dissolution of marriage made by a High Court not being a confirmation of a decree of a District Court shall, in the first instance, be a decree nisi not to be made absolute till after the expiry of such time not less than six months from the pronouncement. Thereafter parties are left at liberty to show cause why the said decree should not be made absolute and the High Court on re-consideration may either make the decree absolute or reverse the decree nisi or order further inquiry as the circumstances and justice may demand. S. 16 further provides that whenever a decree nisi has been made, and the petitioner fails, within a reasonable time, to have such decree made absolute the High Court may dismiss the suit. Section 17 of the Act provides that every decree for dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court after following the procedure prescribed in the section. Sec, 55 and 56 deal with appeals from orders and decrees. S. 55 provides that all decrees and orders made by the Court in any suit or proceedings under the Act shall be enforced and may be appealed from in the

like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force. The proviso to S. 55 however bars any appeal from a decree of District Judge for dissolution of marriage or nullity of marriage or from the orders of the High Court confirming or refusing to confirm such a decree. S. 56 provides for an appeal to the Supreme Court from any decree other than the rule nisi or any order under the Act made either by a High Court either in appeal or otherwise. Chapter Xiii relates to provisions regarding re-marriage after a decree for dissolution of marriage is granted.

(9) It will, Therefore, be seen that persons domiciled in India who profess Christian religion may present a petition for dissolution of marriage u/s 10 of the Indian Divorce Act, 1869 on the various grounds contained in the said section either before the High Court or before the District Court. Though concurrent jurisdiction is given to the District Court and the High Court for entertaining a petition for dissolution of marriage the procedure to be followed and the power conferred under the various provisions and the Act are different. Section 17 of the Act provides that when a decree for dissolution of marriage is made by the District Judge it shall be subject to confirmation by the High Court. Where the number of Judges of the High Court is three or upwards the confirmation of the decree has to be made by a Bench composed of at least three judges. The decree for dissolution of marriage passed by the District Court cannot be confirmed under this section till after the expiration of not less than six months.

(10) On the other hand, if a petition is presented before the High Court, S. 16 provides that every decree for dissolution of marriage shall in the first instance be a decree nisi not to be made absolute till after the expiry of six months. Section 55 of the Act provides for appeal against the decrees and orders which reads (...)

(11) It is thus clear that while no appeal from a decree of a D. J. for dissolution of marriage or of nullity of marriage lies an appeal is not precluded from a decree of a D.J. dismissing the petition for dissolution of marriage or nullity of marriage. What is made non-appealable is a decree for dissolution of marriage and not a decree refusing dissolution of marriage or of mollify of marriage. This is so because a decree of D. J. for dissolution of marriage becomes final only after being confirmed by the High Court u/s 17 of the Act. Thus the scope of proviso to S. 55 of the Act is restricted to a decree for dissolution and the substantive provision of S. 55 provides for an appeal to the High Court from a decree refusing dissolution of marriage by D. J. In view of this clear provision of law the appeal before the Single Judge was competent. The erroneous mention of Hindu Marriage Act in the order of D. J. cannot be treated as rendering the judgment as void ab initio. No order is rendered bad only because the provision of power is wrongly mentioned. If in fact the power was there the decision cannot be held to be void. In our opinion, Therefore, since the decision of the D. J. is not void it was necessary for the Single Judge to go into the merits of the case and decide

the appeal.

(12) We have gone through the record of the case and we arc of the opinion that the Judgment of the D. J. cannot be sustained. Both the respondents though served did not chose to appear or deny the allegations of adultery. The appellant has categorically stated that both the respondents are living in adultery. There is no reason why the uncontroverter evidence of the appellant should not be accepted. It is highly improbable that if the allegations were untrue the respondents would allow such a serious allegation to go unchallenged. In our view, the Adj ought to have granted a decree for dissolution of marriage. We accordingly set aside the judgment of the Adj as also the judgment of the Single Judge.

(13) The next question is what relief can be granted to the appellant in this case. Miss Lily Thomas, learned counsel for the appellant with her usual persuasiveness has made a fervent appeal that we should grant decree absolute to the appellant. She prays that the appellant who is ailing and poor should not be made to wait any longer for a final relief particularly because none of the respondents had chosen to appear either before the Adj or before this Court. It was submitted by her that if the case was sent back to the District Judge it would take atleast one year before a decree was confirmed by the High Court. She stated that the appellant who is ailing has to go to Australia for treatment Along with his cousin and any further delay would mean that the appellant would have to completely forgo the opportunity of getting this treatment. She has emphasized that respondent no. 1 has no interest whatsoever and considerable time has passed since the filing of the petition.

(15) We have given our anxious consideration to these submissions made by Miss Lily Thomas, Advocate- While we have every sympathy for the appellant, this Court while acting as a Court of appeal against the District Judge's judgment cannot exercise powers more than what ADJ. He had no power to grant decree absolute since it was subject to confirmation by a Bench of three judges of the High Court. The learned Single Judge could have granted the same decree as could have been passed by the District Judge. Since we are entertaining an appeal against the judgment of the Single Judge we cannot exceed the jurisdiction vested in the Single Judge which is the same as of District Judge. In our opinion the application of the appellant u/s 8 is clearly misconceived. Once the petition is dismissed by the District Judge, the remedy open to the petitioner is either to file an appeal there from u/s 55 of the Act. The power of transfer to High Court u/s 8 can be invoked only during the pendency of the petition and not after its dismissal. We may add that even after transfer of a petition to the High Court u/s 8 of the Act the High Court is empowered to pass only a decree nisi u/s 16 of the Act which may be made absolute after six months as provided u/s 15. Accordingly, we pass a decree nisi for dissolution of marriage subject to the same being made absolute after six months. This undoubtedly is harsh to the appellant but we cannot sidetrack the law.

(16) We cannot part with this appeal without expressing our concern that this archaic Act of 1869 has remained as it was without any major amendment. The law must keep pace with changing times. If it fails to do so it loses its efficacy. Where the marriage has broken down in fact it must also be dissolved by law. Modern law of divorce ought to achieve this object and the Indian Divorce Act is far too removed from this object. Law was brought on the Statute Book during British times when under Hindu law marriage remained a sacrament incapable of dissolution. Both the Hindu law and law of divorce in England has undergone a sea change whereas this Act has remained where it was. The Hindu Marriage Act and the Special Marriage Act provide for divorce by mutual consent. Desertion and cruelty are grounds by themselves for divorce under the Statutes. On the other hand, under the Indian Divorce Act unless adultery is alleged and proved a decree for dissolution of marriage cannot be granted to the wife on the ground of any other matrimonial offence. Under this Act a husband can obtain a decree for dissolution of marriage only on the ground that the wife is guilty of adultery and on no other ground. Under the Special Marriage Act persons professing the same religion can also get a decree for dissolution of marriage on the grounds specified in the Act. However, under the Indian Divorce Act even in case of extreme cruelty and callous desertion there is no relief available unless the spouse is guilty of adultery. Needless to say that whereas the husband or wife may prove matrimonial offence like cruelty and desertion by the spouse without difficulty the proof of adultery is extremely difficult. We do hope that the Legislature will take appropriate and expeditious steps to amend this law to accord with the notions and conditions of modern times.