

(1966) 12 KL CK 0013
In the High Court Of Kerala
Case No : C.R. P. No. 1398 of 1966

Vijayamma

APPELLANT

Vs

Gangadharan

RESPONDENT

Date of Decision : 20-12-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Hindu Marriage Act, 1955 — Section 29, 29(2), 4, 4(b), 4(b)

Citation : (1967) KLJ 280

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : K. Chandrasekharan and T. Chandrasekharan, for the Appellant;

Judgement

M. Madhavan Nair, J.—This Civil Revision Petition has arisen in a proceeding before the Subordinate Judge, Trichur, for restitution of conjugal rights instituted under S. 9 Hindu Marriage act, 1955, by a Nair husband. The wife in her turn has moved a petition before the Munsiff, Perumbavoor, for divorce under the Travancore Nayar Act, 1100. Both the petitions have been filed in 1955 and are pending trial. On November 15, 1966, the wife sought stay of the former proceedings against her under S. 151 C.P. C., but was dismissed by the Subordinate Judge. She has therefore come up for a revision of that order. Obviously, if the two petitions above said are tried by different Courts and they arrive at different conclusions thereon it may lead to an absurd state of affairs. The husband would compel the wife to conjugal union and the wife would refuse to see him, under the respective decrees in their favor. The circumstances therefore call for a joint or contemporaneous trial in the same Court of both the petitions.

It is pointed out that a petition for divorce under the Travancore Nayar Act is to be tried by a Munsiff with help of delegates appointed for his Court and that therefore a transfer of the proceedings to another Court is difficult. Under the Hindu Marriage Act, a matrimonial petition can be moved only in a District Court

as defined in the Act-which, in this State, would include a Sub Court as well, because of a notification by the State Government. But, without a transfer of the petition for divorce from the Munsiff's Court to the District Court, the (sic)mentioned above cannot be avoided. It is my experience at the bar that in cases that arose in the erstwhile Travancore of a petition for divorce and a counter-suit for restitution of conjugal rights they were tried jointly before the District Judge in whose Court the suit for restitution of conjugal rights lay.

2. In the light of the above facts, I proceed to examine the provisions of the Hindu Marriage Act, 1955. The relevant provisions of the Act read thus:

S. 4. Save as otherwise expressly provided in this Act,-

(a)....

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the, provisions contained in this Act.

S. 29. (1)....

(2) Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for...dissolving any marriage...pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

The provision in the Nayar Act allowing institution of petition for divorce in the Court of a Munsiff, being inconsistent with the provision of the Hindu Marriage Act prescribing such petitions to be presented to a District Court has to be taken as repealed under S. 4(b) unless it is saved as is contended at the bar, by S. 29 (2) of the lower Act. S. 29 (2) refers to and saves "a right to obtain dissolution of a marriage". A right to a particular relief is different from a provision of procedural law for enforcement thereof. Under the Nayar Act, a right to obtain dissolution of a marriage may be worked out by execution of a registered instrument: no petition to a Court is then needed. The provision of the Nayar Act permitting execution of a registered instrument of divorce by mutual consent not being inconsistent with any provision of the Hindu Marriage Act is not within the repeal of S. 4 (b). A right to obtain dissolution of a marriage arises when particular causes occur. The law that enumerates such causes as may give rise to the right is different from the law that prescribes the forum for institution of proceedings to enforce it. In my view, what is saved by S. 29 (2) is the substantive right to have a marriage union dissolved, what is repealed by S. 4 (b) is the provision for institution of a petition for divorce in the Court of a Munsiff.

The expression of sub-section (3) of S. 29 seems to corroborate this inference. It provides that proceedings under any other law for dissolution of marriage which have been "pending at the commencement of this Act" may be continued and determined under that other law "as if this Act had not been passed." By the well known maxim of statutory construction expression units exclusion alterius, when the Parliament has permitted proceedings pending at the commencement of the Act to be continued and determined under the old law it must be taken to have disallowed future proceedings being instituted tried under the old law or else the specification of "pending" proceedings in the statute would become meaningless, it then follows that after the commencement of the Hindu Marriage Act, the forum for institution of proceedings for dissolution of a marriage even under the Travancore Nayar Act that is to say on grounds permitted by the Travancore Nayar Act is the District Court as defined in the Hindu Marriage Act. I would therefore transfer the petition for divorce instituted in the Munsiff's Court, Perumbavoor, to the Court of the Additional District Judge, Parur, and as it is expedient and necessary to order a joint or contemporaneous trial with it of the counter-petition for restitution of conjugal rights transfer the petition pending before the Subordinate Judge, Trichur, also to the Additional District Judge, Parur.

Order accordingly. No costs.