

ANIL KUMAR MAHSI
v.
UNION OF INDIA AND ANR.

JULY 20, 1994

[P.B. SAWANT AND YOGESHWAR DAYAL, JJ.]

Indian Divorce Act, 1869—S.10—Dissolution of Marriage—Grounds available for husband and wife—Whether discriminatory against husband and violative of Art. 14 of the Constitution of India—Held : No.

Constitution of India, 1950—Art. 14—Grounds available for dissolution of Marriage under S.10 of the Indian Divorce Act, 1869—Held not discriminatory against the husband.

In this Writ Petition, the petitioner's challenge is directed against S.10 of the Indian Divorce Act, 1869 as being discriminatory against the husband and hence violative of the equality clause enshrined in Art. 14 of the Constitution of India.

Negating the challenge and dismissing the Petition, this Court

HELD : 1. As far as the ground of adultery is concerned, it is the husband who is in a favourable position as against the wife, since it is not enough for the wife to prove adultery simpliciter on the part of her husband. To that extent, undoubtedly, it is the wife who is discriminated against, because she has to prove adultery which is (i) incestuous, (ii) coupled with bigamy, (iii) coupled with marriage with another woman, (iv) coupled with cruelty which without adultery would have entitled her to divorce, *a mensa et tora*, (v) coupled with desertion without reasonable excuse for two years or upwards. [5-A]

2.1. The other grounds which are available to the wife to claim dissolution of the marriage, which grounds are impliedly not available to the husband, are (a) that the husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman, and (b) that the husband is guilty of rape, sodomy or bestiality. It will be evident from these two grounds that a mere exchange of the profession of Christianity for the profession of

- A another religion on the part of the husband is not enough. The wife has also to prove that the husband has married another woman. Since, however, the husband can seek dissolution of the marriage only on the ground of adultery, the husband is not at a disadvantage as against his wife because a mere marriage with another man whether after exchanging the profession of religion or not, would give a ground to the husband to seek dissolution of marriage. [5-C-D]

- 2.2. Although the modern usage of the word 'rape' extends also to the forcible sexual intercourse by a woman with a man, the dictionary meaning of the said word as well as the offence of rape as defined in the Indian Penal Code speak only of forcible sexual intercourse by a man with a woman. One has to accept the latter meaning of the said word while construing the provisions of the Act which is one of the vintage enactments on our statute book. Hence, it cannot be said that there is any discrimination between husband and wife because the ground of rape is not available to the husband for dissolving the marriage. [5-F-G]

State v. Young, 140 Qr. 228, 13 P. 2d 604, referred to.

Black's Law Dictionary, (5th Edn.) & *Shorter Oxford English Dictionary*, referred to.

3. Going by S. 377 IPC, it can be said that a woman can also be guilty of sodomy. So will be the position in the case of the offence of bestiality. The discrimination therefore, can be alleged by the husband only on the basis that these two grounds, viz., sodomy and bestiality, are not available to him for claiming dissolution of his marriage whereas the same are available to the wife for that purpose. Taking into consideration the muscularly weaker physique of the woman, her general vulnerable physique and social condition and her defensive and non-aggressive nature and role particularly in this country, the legislature can hardly be faulted if the said two grounds are made available to the wife and not to the husband for seeking dissolution of the marriage. [6-D-F]

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 1285 of 1989.

(Under Article 32 of the Constitution of India)

- H D.K. Garg for the Petitioner.

K.K. Venugopal and K. Vishwanathan for the Respondents.

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The Judgment of the Court was delivered by

SAWANT, J. The hearing of this petition is confined only to examining the vires of Section 10 of the Indian Divorce Act, 1869 [hereinafter referred to as the "Act"]. The petitioner was married to respondent No. 2, Monika on 8th October, 1986 as per the Christian rites in a Methodist Church at Muzaffarpur in Bihar. After marriage, the parties returned to Delhi on 10th October, 1986. Respondent-Monika, however, left the matrimonial home on 26th December, 1986, i.e., two months and a fortnight thereafter and never returned to it again. It is not in dispute [respondent-Monika has not filed any counter to the petition] that the parties have been living separately since the day of the desertion by Monika on 26th December, 1986 as alleged in the petition. The petitioner further alleges that she has been working as a teacher in St. Mary Girls High School, Deogarh, Bihar.

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2. In spite of notice to respondent-Monika and intimation to her that the petitioner had deposited Rs. 3,000 for her costs in attending the Court and the assistance of a senior advocate, Shri K.K. Venugopal is given to her to conduct her case, she has neither filed counter, nor attended the Court. On the other hand, by a letter of 5th January, 1993 she has intimated the Court that she is unable to attend the Court and that she would abide by the decision of the Court.

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3. Since the vires of Section 10 was under challenge, notice was issued to the Attorney General. The Attorney General, however, did not choose to put in his appearance. We were, however, ably assisted by Shri Venugopal, learned senior advocate appointed to represent respondent-Monika. After the matter was heard, oral directions were given to the parties to submit their written submissions. The petitioner was to file his written submissions first and the respondents were to file the written submissions within two weeks thereafter. In spite of our listing the matter on 19th January, 1994 again for reminding the parties to file their written submissions, the petitioner has not done so and consequently the respondents have not filed their written submissions. We are, therefore, proceeding to deliver this judgment on the basis of the oral submissions and in the absence of the assistance of the Attorney General.

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A 4. The Petitioner had initially challenged vires of Section 10 of the Act as being arbitrary, discriminatory and violative of Articles 14, 19, 21 and 44. However, the challenge on the ground of violation of Articles 19, 21 and 44 has not been pressed. We may mention here that Article 44 was invoked since the other prayer of the petitioner was to direct the first respondent-Union of India to enact a common civil code. That relief is no longer pressed and, as stated earlier, the petition is confined to the challenge to Section 10 of the Act on the ground of the violation of Article 14 of the Constitution. The relevant portion of Section 10 reads as follows :

B "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.

D 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 with another woman;

E or, has been guilty of incestuous adultery,

or of bigamy with adultery,

F or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et tora*,

G or of adultery coupled with desertion, without reasonable excuse for two years or upwards."

It will be apparent from the aforesaid provisions that while the husband can seek dissolution of marriage on the ground that his wife has been guilty of adultery simpliciter, the wife has to prove that the husband

has been guilty of adultery which is (i) incestuous, (ii) coupled with bigamy, (iii) coupled with marriage with another woman, (iv) coupled with cruelty which without adultery would have entitled her to divorce *a mensa et tora*, (v) coupled with desertion without reasonable excuse for two years or upwards. It is, therefore, clear that as far as the ground of adultery is concerned, it is the husband who is in a favourable position as against the wife, since it is not enough for the wife to prove adultery simpliciter on the part of her husband. To that extent, undoubtedly, it is the wife who is discriminated against. As regards the other grounds which are available to the wife to claim dissolution of the marriage, which grounds are impliedly not available to the husband, the same are as follows : (a) that the husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman, and (b) that the husband is guilty of rape, sodomy or bestiality. It will be evident from these two grounds that a mere exchange of the profession of Christianity for the profession of another religion on the part of the husband is not enough. The wife has also to prove that the husband has married another woman. Since, however, the husband can seek dissolution of the marriage only on the ground of adultery, the husband is not at a disadvantage as against his wife because a mere marriage with another man whether after exchanging the profession of religion or not, would give a ground to the husband to seek dissolution of marriage. It would thus be seen that even as far as this ground is concerned, it is the wife who is at a disadvantage.

As regards the only other ground unavailable to the husband, they are of rape, sodomy or bestiality. Although the modern usage of the word 'rape' extends also to the forcible sexual intercourse by a woman with a man, the dictionary meaning of the said word as well as the offence of rape as defined in the Indian Penal Code speak only of forcible sexual intercourse by a man with a woman. We have, therefore, to accept the latter meaning of the said word while construing the provisions of the Act which is one of the vintage enactments on our statute book. Hence, it cannot be said that there is any discrimination between husband and wife because the ground of rape is not available to the husband for dissolving the marriage.

As regards sodomy, the word is defined in Black's Law Dictionary (5th Edn.) to mean "a carnal copulation by human beings with each other against nature, or with a beast. *State v. Young*, 140 Or. 228, 13 P. 2d 604,

A 607. Sodomy is oral or anal copulation between persons who are not husband and wife or between consenting adult members of the opposite sex, or between a person and an animal, or coitus with an animal. Kansas Criminal Code". Shorter Oxford English Dictionary defines the word 'sodomy' to mean "... An unnatural form of sexual intercourse, esp. that of one male with another". Section 377, IPC defines "unnatural offences" as follows :

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C **"377. Unnatural Offences.** - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation. - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

D It can, therefore, be said that a woman can also be guilty of sodomy. So will be the position in the case of the offence of bestiality. The discrimination, therefore, can be alleged by the husband only on the basis that these two grounds, viz., sodomy and bestiality, are not available to him for claiming dissolution of his marriage whereas the same are available to the wife for the purpose.

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F 5. Taking into consideration the muscularly weaker physique of the woman, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role particularly in this country, the legislature can hardly be faulted if the said two grounds are made available to the wife and not to the husband for seeking dissolution of the marriage. For the same reasons, it can hardly be said that on that account the provisions of Section 10 of the Act are discriminatory as against the husband.

G We, therefore, find that there is no substance in the challenge by the petitioner-husband to the vires of the provisions of Section 10 as being discriminatory against the husband and, therefore, violative of Article 14 of the Constitution.

H 6. What is further, the individuals not willing to submit to the Indian Divorce Act or any other personal law are not obliged to marry exclusively

under that law. They have the freedom to marry under the special Marriage Act, 1954. Having, however, married under the Act and accepted its discipline, they cannot be heard to complain of its rigours, if any. A

7. In this view of the matter, we find no merit in the petition and it is dismissed. In the circumstances of the case, there will be no costs. B

G.N.

Petition dismissed.