1971 KHC 146
Kerala High Court
V. R. Krishna Iyer, J.

ABOOBACKER HAJI v. MAMU KOYA
Parallel citation(s): 1971 KHC 146 : 1971 KLT 663 : 1971 KLJ 754 : ILR 1971 (2) Ker. 338 : 1971 KLR 501

Family Law -- Matrimonial law -- The philosophy of justice in the matrimonial jurisdiction behoves the Court to strive to restore conjugal harmony

Important Para(s):5

Dissolution of Muslim Marriages Act, 1939 -- S.2(ii) -- Where there has been an actual failure to provide for the maintenance of the wife even if it because the wife has improperly declined to live with the husband, S.2 Clause.(ii) is fulfilled

Important Para(s):7

Dissolution of Muslim Marriages Act, 1939 -- S.2(viii) -- Husband departs from standards of suffocating orthodoxy is not a cruelty, as a ground for divorce

Important Para(s):8, 9,10, 11

Family Law -- Matrimonial law -- When an intolerable situation has been reached, the partners living separate and apart for a substantial time, an inference may be drawn that the marriage has broken down in fact and so should be ended by law

Important Para(s):13

Mohammedan Law -- Only if chronic and irreversible collapse of the

relationship is proved, not if only casual or superficial misunderstandings are made out, can divorce be granted

Important Para(s):13, 14, 15, 16

Advocates:

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T. L. Viswanatha Iyer; E. R. Venkiteswaran; Respondent

JUDGMENT

1. The matrimonial misfortune, of a Muslim couple, Mammu Koya and Mariyambi, has forced its way into court from both ends, each spouse instituting a lawsuit, the husband soliciting the wife's society in an action for restitution of conjugal rights and the wife demanding a divorce snapping the ties between the two as intolerable to continue. The tragic feature of this marital estrangement is that a child born to the couple has to share the mishap by being denied the healthy environs of a happy parental home.

2. The parties are relatively young although the profile of their conjugal life bears scars and wounds which form the subject matter of the two suits. According to the husband, (who is the plaintiff in O. S. No. 213 of 1962, which has given rise to S. A. No. 281 of 1970) his wife (the 2nd defendant in the suit, her father being the 1st defendant) was living with him in comparative quiet and a son was born to them. The lady left for her father's house with the child some two years before the suit and did not return. The husband was not allowed access to his father inlaw's house and thus, without reason, the wife has withdrawn her consortium thanks to the wrongful obstruction of her father. The plaintiff's further version is that he had been sending sums of money for the maintenance of his wife, but they were being refused at the instance of the 1st defendant. So, he seeks the remedy of restitution of conjugal rights.

3. The wife who has filed a separate suit for divorce (O. S. No. 292 of 1963 out of which S. A. No. 656 of 1971 arises) has put forward defences which also form the foundation of her action for divorce. She sets up a case of neglect and cruelty and vaguely urges an irreparable breakdown of the matrimony. Issues were framed in both the suits in rather general terms, and while the Trial Court granted

a decree for the husband and dismissed the claim for divorce made by the wife, the appellate court concurred in the conclusions of the first court. The lady has come up in second appeal against the decrees in both the suits.

4. The case that claims logical priority is the one where divorce has been sued for. The next question turns on the right and propriety of the court granting a decree for restitution of conjugal rights as an automatic sequel to the dismissal of the divorce suit; and finally arises the point whether grounds have been made out for the restitution of conjugal rights in the event of the divorce action failing.

5. When the facts were explained, the case was postponed so that the parties could be sent for by the advocates with a purpose. The philosophy of justice in the matrimonial jurisdiction behoves the court to strive to restore conjugal harmony. The family being the unit of the nation, its internal unity is the strength of the nation. So it is that the lifestyle of man and wife should reflect this 'inner landscape" of the Indian community. A Judge may, and I even think should, actively stimulate a rapprochement process without involvement in any specific proposal, in the spirit of S.23(2) of the Hindu Marriage Act and I acted on this basis. Counsel did their part to help heal the marital wounds, fancied and real, but could not make much headway. The Assistant Registrar of the Court, a gracious lady, took the estranged parties into her room at my request and tactfully reasoned with them to motivate a reunion. However, these reconciliation efforts were baulked and arguments had to be revived. Now to the points I have set out earlier.

6. The parties are Muslims and the case is governed by the Dissolution of Muslim Marriages Act, Act 8 of 1.939, which is a consolidating statute, although it has also been assumed in some cases that the Act is a declaratory one. S.2 sets out the grounds entitling a woman to obtain a decree for the dissolution of her marriage and the plaintiff has relied upon sub-s.(ii) and (viii). The former makes her eligible for divorce if her husband has neglected or has failed to provide for her maintenance for a period of two years and the latter justifies the snapping of wedlock if the husband has treated her with cruelty including obstruction in the observance of her religious profession or practice. I have stated that there is an nonspecific reference to a breakdown of the marriage as if that were a ground for legal disruption of wedlock and, in this connection, counsel for the appellant has drawn my attention to S.2(ix) of the Act which preserves other grounds

"recognised as valid for the dissolution of marriages under Muslim law". If this clause were to be pressed into service, an investigation into the causes regarded as sufficient under the Muslim law for scuttling a marriage may have to be undertaken.

7. The husband's action for restitution was the first in the field and the suit for dissolution was instituted soon after and so smacks of a reprisal. Admittedly, at least one remittance sent by the husband was refused. The evidence of the wife discloses the unfriendly terms between her father and her husband. Viewing the testimony of the witnesses against the suspicious background, the courts below concurrently disbelieved the case of neglect. The lower courts have assumed that when the wife withdraws her society from the husband she has no right to maintenance and no neglect to maintain arises at all. This is a wrong view with a masculine slant, reading into S.2 more than it says. I have examined this subject at some length in the case reported in Yusuf Rowthan v. Sowramma (1970 KLT 477) and summed up the law to mean that where there has been an actual failure to provide for the maintenance of the wife even if it be because the wife has improperly declined to live with the husband' S.2 clause (ii) is fulfilled. We cannot, in this jurisdiction, confuse between the factum of failure to maintain the wife with the duty under the law to do so. Even on this liberal interpretation, the finding of fact that the woman, instigated If by her father, refused the husband's offer to look after her expenses stands. Conceding an equal status for wife with husband, how can her tears of neglect carry conviction, coming in the wake of 'no' to his invitation and readiness to pay for her upkeep? Her refusal to accept writes off her case of failure to be 8 looked after.

8. The story of cruelty set up here is of a species too subtle for legal forceps. The man is not reported to be living an unislamic way of life, although'. I do not understand it to be within the puritan rights of an obscurantist wife to cry 'cruelty' if her husband departs from standards of suffocating orthodoxy. No female can hold the male chained to bigoted beliefs and ritualistic observances on pain of jettisoning him out of wedlock if he subscribes to religious reforms and a modern mode of living. And, yet, that is the trend of the evidence in the case. The statute prohibits her being obstructed in her religious observances but does not arm her with a whip to lash her partner into five daily prayers and observance of fasts and celebration of feasts according to the book or the mullah. The courts of fact have declined to swallow her tale of religious torture, a plea too statutorily tailored to be

true in actual life. On the evidence, I agree with the courts below that the young woman's grievance of religious molestation is not credible.

9. The next charge is that Mamu Koya inflicted on Mariyambi the pain of witnessing a picture in a cinema house. May be, many a film is so commercially boosted that the viewer actually buys three hours of celluloid ordeal. But I am baffled by the false alarm raised by a comely damsel, not too old to witness a picture an unholy act her pious eyes wished to resist! Any judge with common sense would not and the two judges did not accept such a version of fake coercion. Mariyambi has accused Koya of another heinous act. This young man, it is alleged (though denied), has been romantically suggesting, to his darling wife to present herself in public daintily clad in sari and shorn of the purdah which banned even the sun and moon from looking at her face. If this be cruelty, it is the limit. For, in the seventies of this century when the youth of either sex are experimenting with minidress to the point of near nudity, it is strange that wearing that lovely, colourful, flowing Indian apparel, the sari, which has many fans even in Manhattan is set up as a cruel step. That amounts to laughing at the law, not talking seriously to the court.

10. It must be remembered that marriage is a great compromise, that I husband and wife in the intimacy of flesh and soul interact on each other and " produce chemical changes in their social habits and philosophy of life. To rush to court peevishly for every small quarrel is to misunderstand the sweep and depth of matrimony, whether the complaining party be man or woman. The grammar of conjugal life does not permit it. Religious practices, the obstruction of which amounts to statutory cruelty under S.2(viii)(e) are those basic observances, the performance of which makes a man or woman Muslim and departure from which deserves to be castigated as unislamic not deviation from every inconsequential, though orthodox, ritual or mode of life. The a statutory vice lies in fundamental violations and obstructions. Again, if every I fugitive passion for fashion coming from either spouse can, with las vegas levity, work a legal disruption of wedlock, marriages will become the plaything of passing fancies and too fluid to be regarded as a firm institution a view most subversive of our cultural heritage. It will be cruel to the concept of cruelty and outraging the modesty of the statute to cast the net of guilt so wide as to catch within it such pleasurable pressures as persuasion to see a cinema or don a dainty saree on her young figure.

11. If the law takes a different view, life will become stagnant and the present generation will be caged in the usages of a by gone age. The backlash of such rigid insistence on our youth obeying outmoded ways of life may conceivably be a breaking away from our cultural - religious ethos. We just can't force the twentieth century youth man or woman, Mopla, Brahmin or Catholic to linger in the lifestyle of the nineteenth and the statute in question must be interpreted in the light of the zeitgeist of the day. The grounds of neglect and cruelty alleged in this case, therefore, deserve to be discarded.

12. But -- but that is not the end of the battle for divorce in this case. Daily, trivial differences get dissolved in the course of time and may be treated as the teething troubles of early matrimonial adjustment. While the stream of life, lived in married mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds breaks up the flow of the stream? In such a situation, we have a breakdown of the marriage itself and the only course left open is for law to recognise what is a fact and accord a divorce. Such a fact situation has been set up in the pleadings of the female spouse, says counsel for the appellant, although we do not find an investigation into that case in the judgments of the courts below.

13. Modern legal systems are veering round to the view that while no party can be permitted to benefit by his own wrong conduct and obtain divorce, pleading a breakdown of marriage, public interest demands that formal ending of marriages which remain marriages in name only is but right. Sir John Salmond laid down this principle in a few New Zealand decisions:
"In general it is not in the interest of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact."
When an intolerable situation has been reached, the partners living separate and apart for a substantial time, an inference may be drawn that the marriage has broken down in fact and so should be ended by law. This trend in the field of matrimonial law is manifesting itself in the Commonwealth countries these days. (See A. C. Holden Divorce in the Commonwealth, A Comparative Study The International and Comparative Law Quarterly, Vol. 20, Part I, 4th series, p. 58). this principle is of Quoranic vintage as I have explained in Yusuf Rowthan's case (1970 KLT 477). The Prophet stressed: "of all things which have been permitted divorce is the most hated by Allah" (A. D. 13:3). The holy Quoran says "And

women have rights similar to those against them in a just manner. ....." Tyabji C. J. in Noer Bibi v. Pir Bux (AIR 1950 Sind 8) quoted himself from an earlier judgment and explained the realism of the Muslim Law with its roots in the Quoranic texts, thus: -

"The Muslim marriage differs from the Hindu and from most Christian marriages in that it is not a sacrament. This involves an essentially different altitude towards dissolutions. There is no merit in preserving intact the connection of marriage when parties are not able and fail 'to live within the limits of Allah', that is to fulfil their mutual marital obligations, and there is no desecration involved in dissolving a marriage which has failed. The entire emphasis is on making the marital union a reality, and when this is not possible, and the marriage becomes injurious to the parties, the Quoran enjoins a dissolution. ..... The attitude of the Prophet is illustrated by the well known instance of Jameela, the wife of Sabit Bin Kais, who hated her husband intensely although her husband was extremely fond of her. According to the account given in Bukhari (Bu. 03.11; Jameela appeared before the Prophet and admitted that she bad no complaint to man against Sabit either as regards his morals or as regards his religion. She pleaded, however, that she could not be whole heartedly loyal to her husband, as a Muslim wife ought to be, because she hated him and she did not desire to live disloyally (in Kufr). Prophet asked her whether she was willing to return the garden which her husband I had given to her, and on her agreeing to do so, the Prophet sent for Sabit, asked him to take back the garden, and to divorce Jameela. From the earliest times Muslim wives have been held to be entitled to a dissolution when it was clearly shown that the parties could not live 'within the limits of Allah', when (1) instead of the marriage being a suspension of the marriage had in fact occurred, or (2) when the continuance of the marriage involved injury to the wife. The grounds upon which a dissolution can be claimed are based mainly on these two principles ..... husband and a wife have been living apart, and the wife is not being maintained husband, a dissolution is not permitted as a punishment for the husband who had failed to fulfil one of the obligations of marriage, or allowed as a means of enforcing the wife' s rights to maintenance. In the Muslim law of dissolutions, the failure to maintain when , it has continued for a prolonged period in such circumstances, is regarded as an instance where a cessation or suspension of the marriage bad occurred. It will be seen therefore that the wife's disobedience or refusal to live with her husband does not affect the principle on which the dissolution is allowed."

We have also the tradition personal to the holy Prophet himself. Asma, one of the wives of the Prophet, asked for divorce before he went to her and the prophet released her as she had desired. Yusuf Ali, in his Commentary on the Holy Quoran, says:

"While the sanctity of marriage is the essential basis of family life, the incompatibility of individuals and the weaknesses of human nature require certain outlets and safeguards if that sanctity is not to be made into a fetish at the expense of human life. Here is a significant verse from the Quoran:

"And if we fear a breach between husband and wife, send a judge out of his family, and a judge out of her family; if they are desirous of agreement, God will effect a reconciliation between them: for God is knowing and apprised of all." (Chap.4. Verse 35).

Maulana Muhammad Ali has explained this verse thus:

"This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case Nor should divorce cases be made too public. The judge is required to appoint two arbiters, one belonging to the wife's family and the other to the husband's. These two arbiters will find out the facts, but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed, but the final decision for divorce rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."

Mulla has referred to a Pakisthani decision taking a similar stand.

"In an important recent judgment the Pakisthan Supreme Court in Kurshid Bibi v. Mohd. Amin, PLD. 1967 SC 97, has endorsed the Lahore High Court's view in Mat. Balqis Fatima v. Najmul Ikram, (1959) 2 (W. P.) p. 321 (1959 Lah 566), that under Muslim Law the wife is entitled to Khulla, as of right, if she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union."

If I may excerpt from ray own earlier judgment, the legal position with reference to the Quoranic law may be summed up thus:

"the Holy Prophet found a dissolute people dealing with women as mere sex satisfying chattel and he rid Arab society of its decadent value through his doings and the Quoranic injunctions. The sanctity of family life was recognised; so was the stubborn incompatibility between the spouses as a ground for divorce; for it is intolerable to imprison such a couple in quarrelsome wedlock. While there is no

rose but has a thorn if what you hold is all thorn and no rose, batter throw it away. The ground is not conjugal guilt but actual repulsion."

14. The sanctity of marriage is preserved not merely by the morality that permeates it, but by the reality that holds the family together; one without the other spells a breakdown; and so, a ground for divorce may well be made out if there is a total irreconcilability between the spouses. The Muslim laws independently of Act 8 of 1939, accepts this ground for dissolution of marriage, as I have held in Yusuf Rawthan's case; and the statute itself in S.2(ix) preserves "any other ground which is recognised as valid for the dissolution of marriages under Muslim law". It, therefore, follows that we have to see whether any ground of breakdown has been set up and, if so, whether it has been made out. Nor is this an Indian innovation in Muslim Law for, Prof. J. N. D. Anderson has stated recently commenting on modern trends in Islam that:
"Very considerable relief has been given, almost everywhere, to ill used wives ..... In Tunisia, Pakisthan and Iran things have gone further than this. The Tunisian Code allows a wife to insist on divorce, whatever her reason may be, provided she is prepared to pay such financial compensation as the court may decree. In Pakisthan judge made law has opened the door to a wife demanding a divorce, where she alleges that her marriage has become intolerable, on condition that she pays back her dower and returns any gifts which she may have received in respect of the marriage. And in Iran she can apply for a divorce, after first obtaining a certificate of impossibility of reconciliation, "on a wide variety of grounds (in which virtual equality between husband and wife has been achieved)"

15. The Islamic ethos accepts irreconcilable breach as a ground for dissolution. In the plaint the wife alleges that for reasons of neglect and cruelty et cetera life with the husband has become insufferable and so she does not intend to cohabit with him at all and desires a divorce. These facts approximate to what has been recognised under Muslim law as a ground for divorce, preserved by S.2(ix) of the Act. Issue 1 is general and embraces this ground. There is some evidence led on the question of irreconcilable breach but neither court has recorded a finding on it, having missed its importance as a separate ground for claiming dissolution. It is therefore necessary to ascertain the truth of this allegation.

16. The recalcitrance of the wife should not necessarily win an easy divorce. In this case the pointed charge of Koya is that Mariyambi privately wishes to share

the conjugal home with him but that her father is the evil genius standing in the way. The court has to be satisfied that the woman, of her own volition, has irrevocably determined to sunder the marital tie. Towards this end the learned judge may, with the help of counsel, even question the spouses or adopt other methods in his discretion, taking great care not to take sides or appear to do so. Ultimately, a finding on the issue must rest only on the evidence on record, not on subjective impressions of the judge or attitudes of parties. Counsel before me assure that they will instruct their counter parts in the lower appellate court to explore possibilities of restoring the union. Only if chronic and irreversible collapse of the relationship is proved, not if only casual or superficial misunderstandings are made out, can divorce be granted. Nor can the mere long pendency of the litigation be relied on as evidence; for, then, all that a plaintiff has to do is to try dilatory devices and draw dividends therefrom. That is a case of reductio ad absurdem and has to be rejected. Let me again emphasise the correct approach on the point I am asking the lower appellate court to decide. Not some stresses and strains marring the matrimonial broadsheet, inevitable everywhere in the world, but deeper incompatibility which threatens to burn up the bond altogether that is the test. The Prophet has placed profound emphasis on divorce being the last reluctant step of law and religion, and the court must act in that spirit.

17. Supposing the court is unable to uphold this surviving ground for divorce, it does not follow that restitution of conjugal rights must be directed willy nully. The court has a residuary discretionary power still to be used carefully and in extreme cases only. If divorce were granted, the son will remain a sad memory can't help. If both suits are dismissed, a stalemate may ensue unless well wishers of both work for a reunion. These matters belong to the future and to local social statesmanship. The court can only decide for the present and on materials on record.

18. For these reasons, I allow the appeal, holding, as the courts below have done, that neither neglect nor cruelty has been made out, but directing the consideration of the only question of a total breakdown of the marriage, irreparable even after serious mediatory efforts have been made. The court will decide this issue after hearing both sides and, if felt absolutely necessary, after bringing in such additional evidence as the parties may desire to adduce. If the lower appellate court thinks that it is essential to call for a finding on this question,

it is free to do so. Both the appeals will be disposed of together in the light of the law laid down above and subject to the findings confirmed by me. I allow both the appeals and set aside the decrees of the lower appellate court and remand the cases to the Sub Court for fresh disposal. Parties will bear their costs in this court, and remand entitles the appellants to refund of court fee.