

(2012) 03 AHC CK 0017

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2323 of 2011

Anirudh Kumar Dwivedi and Another

APPELLANT

Vs

Principal Judge, Family Court and Another

RESPONDENT

Date of Decision : 01-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 89
Constitution of India, 1950 — Article 142, 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Dowry Prohibition Act, 1961 — Section 3, 4
Family Courts Act, 1984 — Section 20, 21
Family Courts Rules, 1988 — Rule 57, 63
Hindu Marriage Act, 1955 — Section 13(1), 13A(1), 13B, 13B(1), 13B(2)
Penal Code, 1860 (IPC) — Section 323, 498A, 504, 506, 509

Citation : (2012) 4 ADJ 565 : AIR 2012 All 107

Hon'ble Judges : Abhinava Upadhyaya, J

Bench : Single Bench

Advocate : Shiv Kant Pandey, for the Appellant;

Final Decision : Allowed

Judgement

Hon'ble Abhinava Upadhyaya, J.—By means of this writ petition the petitioners have challenged the order of the Principal Judge, Family Court, Allahabad dated [19.11.2011]1 As per Correction Application at 21.03.2012. The brief facts of the case are that a marriage was solemnized between the petitioner No. 1 and petitioner No. 2 on [7.7.2007]1. Unfortunately, differences arose between them and a suit being Suit No. 181 of 2009 for dissolution of marriage u/s 13 (1)(a) of the Hindu Marriage Act, 1955 (in short the Act) was filed by the wife-petitioner No. 2 before the Family Court, Allahabad, seeking dissolution of marriage on account of cruelty by the husband and constant demand of dowry. Simultaneously, other cases were also filed u/s 498A, 323, 504, 506 and 509 IPC and also u/s 3/4 of Dowry Prohibition Act, 1961.

2. The allegations and the counter allegations ensued and an FIR was also lodged

against the husband-petitioner No. 1, which led to filing of an application u/s 482 Cr.P.C. for quashing of the FIR being Application No. 28220 of 2008.

3. This Court vide order dated 19.2.2010 referred the matter to the Mediation & Conciliation Centre, High Court, Allahabad. Before the Mediation Centre both the parties appeared and in presence of a neutral mediator, arrived at a compromise wherein both the parties decided to obtain a decree of divorce by mutual consent on the condition of permanent alimony of Rs. 3,00,000/- to be paid to the wife. Both the parties agreed that the compromise be treated as their consent for mutual divorce and shall be free to take formal decree of divorce through the divorce petition, which was already pending before the Family Court. Both the parties agreed to withdraw all the cases filed by them against each other. Both the parties agreed that they will not harass each other either mentally, physically or socially and both the parties agreed that all civil and criminal cases filed against each other will be treated to be withdrawn. The said compromise as endorsed by the Mediation Centre by settlement order dated 23.3.2010 (Annexure-1 to the writ petition) and was placed on record in the application u/s 482 Cr.P.C.

4. This Court vide order dated 26.10.2010 passed the following order, operative portion of which is quoted below:

"In view of the submission of the learned counsel for the parties, the above mentioned petitions are being disposed of finally with the observation that parties will move withdrawal/ compounding application of their cases in view of the settlement agreement before the Court concerned who will dispose of their applications keeping in view the fact that parties have already settled their dispute before the Mediation and Conciliation Center, Allahabad."

5. Pursuant to the aforesaid compromise and the direction of this Court, a joint application was moved before the Court below in Suit No. 181 of 2009 showing the intention of the parties that they have mutually agreed for divorce and in terms of the compromise they are ready to perform their part of compromise. The said application was filed on 17.4.2010. The order sheet filed as Annexure-8 to the writ petition, reveals that the Court accepted the compromise of the parties along with an application, which was registered as document 10-A and directed the matter for disposal on 7.5.2010.

6. Thereafter, on several occasions, the case was listed, however, in spite of the direction of this Court dated 26.10.2010 and in spite of intention of the parties to seek a decree of divorce by mutual consent, no orders were being passed, which led to filing of the writ petition being Writ Petition No. 1525 of 2011 under Article 227 of the Constitution of India with the prayer that the Family Court be directed to decide Suit No. 181 of 2009 on the basis of compromise arrived at between the parties, which was already filed before the Family Court along with an application which was registered as 10A dated 17.4.2010.

7. It is relevant to note that the said Writ Petition No. 1525 of 2011 was filed by

petitioner No. 2 herein that is the wife.

8. After considering the arguments of the parties this Court vide order dated 28.7.2011 finally disposed of the writ Petition with the following order :

"Under the circumstances, if there is no contest, the Court below is directed to decide the suit in terms of the agreement between the parties within a period of three months from the date of production of a certified copy of this order. It is made clear that the Court below would not grant any unnecessary adjournment and shall decide the matter. ""

9. The order sheet, which is filed as Annexure-8 to the writ petition, reveals that the order of this Court dated 28.7.2011 was filed along with an application which was registered as 17-Ka dated 24.8.2011 and it was directed that the matter be listed on the date fixed which was 10.10.2011.

10. Surprisingly, instead of deciding the matter as directed by this Court, the Principal Judge, Family Court vide order dated 27.8.2011 directed the matter to be placed before Lok Adalat. Surprisingly again the same Principal Judge, Family Court by order dated 28.8.2011 while presiding over the Lok Adalat held that there is no compromise between the parties and directed the matter to be listed for adducing evidence by the parties.

11. In the meantime, it is submitted that the Court below instead of complying with the order dated 28.7.2011 of this Court insisted upon filing an amendment application for amending the application dated 17.4.2010 registered as 10 Ka. It is alleged that there was no requirement of any amendment but upon the insistence of the Court such an application was filed on 29.9.2011 but no orders were passed and the matter was again adjourned.

12. The petitioners then again came up to this Court by filing another writ petition jointly being Writ Petition No. 59125 of 2011 stating therein that instead of complying with the earlier order dated 28.7.2011 the Principal Judge, Family Court vide order dated 28.8.2011 has held that there is no compromise between the parties and directed the matter to be listed for leading of evidence.

13. This Court in order to re-assure itself directed both the petitioners, i.e., husband and wife to appear before the Court. They appeared and made statement before the Court that they are abiding by their compromise and the Court below has erroneously recorded that there is no compromise in the matter.

14. Learned counsel for the petitioners submits that the compromise was already filed along with the application for divorce by mutual consent dated 17.4.2010 registered as 10-Ka, thus the order impugned dated 28.8.2011 is in violation of the order passed by this Court in earlier writ petition as the Principal Judge, Family Court was directed to pass appropriate orders on the divorce petition on the ground of mutual consent.

15. This Court considering the submissions made by the learned counsel for the

petitioners and after perusal of the averments made in the writ petition set aside the order dated 28.8.2011 passed by Principal Judge, Family Court presiding over the Lok Adalat and vide order dated 18.10.2011 passed the following orders:

"In view of the aforesaid, the order dated 28.8.2011 is set aside and the writ petition is finally disposed of with the direction to the Court below to pass appropriate order, as earlier directed by this Court vide order dated 28.7.2011, in view of the compromise arrived at between the parties dated 23.3.2010 on the next date fixed or on any subsequent short date which the Court may fix for the aforesaid purpose. In case this stay order is not complied with, liberty is granted to the petitioners to approach this Court again by way of appropriate petitioner and prayer."

16. The said order was filed before the Court below on 24.10.2011 along with an application, which was registered as document No. 23-C and the High Court's order was numbered as 24-A and the Court below directed the document to be taken up on record and further directed to put up the case on the date fixed. Thereafter, on 25.10.2011 the date was fixed as 2.11.2011 for evidence as the Presiding Officer was not present. On 2.11.2011 the case was directed to come up on 5.11.2011 for considering the amendment application filed by the applicants seeking to amend application dated 17.4.2010, document No. 10 Ka.

17. On 5.11.2011 the amendment application was allowed and the application dated 17.4.2010 was amended. It is submitted that thereafter on 19.11.2011 the Court below passed an order, which is impugned as Annexure-8 to the writ petition, by which the Principal Judge, Family Court treating the amendment dated 5.11.2011 to be an application for divorce by mutual consent directed the matter to be listed after six months, i.e., 14.5.2012. The Principal Judge, Family Court while so directing has relied upon a decision of the Supreme Court in the case of Anil Kumar Jain Vs. Maya Jain, , wherein the Apex Court has held that in a petition of divorce on account of mutual agreement u/s 13B of the Act mandatory period of six months for reconciliation between the parties cannot be waived off by any other Court or authority except by the Supreme Court in exercise of power conferred under Article 142 of the Constitution of India.

18. Learned counsel for the petitioners has then submitted that Rule 57 of the Family Court Rules, 2006(in short the Rules of 2006) provides that the proceedings before the Court should be heard and disposed of, as expeditiously as possible, preferably within three months, and in achieving this objective the rules or procedure may not rigidly be adhered to and, therefore, the mandatory period of 6 months as provided u/s 13 B(2) of the Hindu Marriage Act can be reduced to 3 months.

19. It is also submitted that Rules 57 of 2006 will have overriding effect as these rules have been framed u/s 21 of the Family Court Act, 1984 and Section 20 of the said Act provides that the Family Court Act will have an overriding effect notwithstanding anything contrary contained in any other law. Therefore, the

embargo of 6 months imposed by Section 13 B (2) of the Hindu Marriage Act will not be enforceable.

22. The said submission has to be rejected at the very outset out rightly as both the Act operate in different fields. The Family Court Act has been framed with the object to provide for establishment and functioning of Family Court to promote conciliation and early settlement of dispute whereas the Hindu Marriage Act is the codification of law relating to marriage among Hindus and also provides for grounds upon which divorce can be sought. Section 13B is a provision under which the married couple can ask for decree of divorce on mutual consent. But, it also imposes embargo upon the Court not to grant such a decree before the expiry of six months to facilitate any chances of conciliation between the partners. Secondly, Rules 63 of 2006 Rules itself speaks of that the proceedings before the Court will not be rendered invalid for the reason of non compliance with any of the procedural requirement prescribed in the said Rules.

21. That apart, the Supreme Court in the case of A.K. Jam (supra) has mandated that no other Court except the Supreme Court under Article 142 of the Constitution of India has the jurisdiction to waive off 6 months mandatory period prescribed for grant of decree of divorce upon mutual consent.

22. Now so far as the order dated 19.11.2011, impugned in the writ petition is concerned, the Principal Judge, Family Court, on the strength of the judgment of the Supreme Court in A.K. Jain's case, has held that by way of amendment the petition which was earlier filed u/s 13(A)(1) for divorce on account of cruelty by the wife has been converted to a petition by mutual consent of the parties for divorce u/s 13B of the said Act and, therefore, the mandatory period of six months will run from the date of such an amendment. The said amendment was allowed on 5.11.2011.

23. Apparently, the order dated 19.11.2011 is in the teeth of the orders passed by this Court in earlier Writ Petition No. 1525 of 2011 dated 18.7.2011 as well as Writ Petition No. 59125 of 2011 dated 18.10.2011 whereby a clear direction was issued to the Family Court to decide the suit in view of the compromise arrived at between the parties before Mediation Centre, Allahabad dated 23.3.2010 which was numbered as 11 -Ka filed along with an application dated 17.4.2010 numbered as 10-Ka.

24. It was not open for the Principal Judge, Family Court to take recourse to any other evasive method but to comply with the order of this Court which was passed in exercise of power conferred to it under Article 227 of the Constitution of India. By the order impugned dated 19.11.2011 the Principal Judge, Family Court, has violated the sanctity of judicial hierarchy.

25. It is indeed surprising that the Principal Judge, Family Court would insist upon in not deciding the case as directed by this Court by orders passed in two writ petitions on two separate occasions. The Family Court has relied upon a decision of the Supreme Court in the case of A.K. Jain, (supra) treating the same

as if this Court was not aware of the law of the land.

26. The Supreme Court, while deciding the aforesaid case, has held that no Court has the authority to waive off the mandatory period of 6 months for reconciliation and grant a decree of divorce u/s 13B of the Hindu Marriage Act. There is no, and there cannot be any dispute over the aforesaid proposition as the Section 13B itself clearly mandates the aforesaid.

27. What the Principal Judge, Family Court appears to have lost sight of was the application dated 17.4.2010 filed by the petitioners jointly. The said application was an application for bringing on record the compromise arrived at between the parties before the Mediation Centre on 23.3.2010 with the prayer that a divorce petition filed by the wife u/s 13 (A) (1) of the Hindu Marriage Act be converted into a petition for divorce upon mutual consent and divorce be granted.

28. It is relevant to note that on the date of presentation of the application dated 17.4.2010 all the requirements of Section 13-B(1) were in existence. Although the said application was taken on record on the same date but had it been taken cognizance of treating it to be a petition u/s 13-B(1) of the Act then the limitation as prescribed u/s 13-B(2) would run from the date of presentation of that application, i.e., 17.4.2010.

29. Presentation of a plaint/petition discloses the reason and intention of the parties for approaching a Court of Law. Initially, petitioner No. 2, i.e., the wife had filed suit for dissolution of marriage u/s 13-A(1) of the Act on the ground of cruelty and the same would have been proceeded with by the Court considering the allegations and counter allegations made against each other. But, under the proceedings initiated by petitioner No. 1 u/s 482 Cr.P.C. this Court intervened and upon direction of this Court dated 29.2.2010 the parties agreed to sit face to face and iron out their differences to arrive at some workable solution. This is the most desirable and welcome method of resolution of differences between the contesting parties, instead of making allegation and counter allegation and entering into long drawn and tedious legal battle. Settlement by mutual agreement being somewhat permanent in nature is always preferable.

30. Therefore, the compromise entered into before Mediation Centre, which is a legally recognized Forum u/s 89 of the CPC and some legal sanctity has to be attached to the same, the Court below ought to have taken 17.4.2010 as the date for presentation of the prayer seeking divorce by mutual consent. In such an event, the embargo of 6 months u/s 13 B(2) of the Act was over on 17.10.2010 and, therefore, both the orders of this Court dated 28.7.2011 and 18.10.2011 being much beyond the mandatory reconciliation period, the Court below ought to have complied with the orders.

31. Learned counsel for the petitioners submits that the amendment in the plaint/petition would relate back to the date of presentation of such plaint and therefore, when the application along with the compromise was filed on 17.4.2010 the limitation would run from that date and, therefore, mandatory

period of six months was already over and in view of the decision of this Court vide order dated 28.7.2011 and the subsequent order dated 18.10.2011, there was no impediment in deciding the matter as directed. The case of A.K. Jain (supra) in the facts and circumstances of this case, is not applicable as the mandatory period of 6 months was already over on 17.10.2010.

32. Considering the facts and circumstances of the case showing deep anguish upon the attitude of the Principal Judge, Family Court, this Court direct that within a period of one month from the date a certified copy of this order is presented before the Court below, the Court below will consider and decide the said suit in view of the compromise arrived at between the parties and pass appropriate order.

33. Before parting the Court notes with appreciation and efforts made by the learned counsel for the petitioners Sri Shiv Kant Pandey in assisting the Court for adjudicating the aforesaid matter. In view of the discussions above, the order dated 19.11.2011 cannot be sustained and is hereby set aside and the writ petition is, accordingly, allowed. No order as to costs.