
(1967) 03 CAL CK 0014
In the Calcutta High Court
Case No : A.F.O.O. No. 536 of 1965

Annalie Prashad

APPELLANT

Vs

Romesh Proshad

RESPONDENT

Date of Decision : 02-03-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 40
Constitution of India, 1950 — Article 227
Special Marriage Act, 1954 — Section 28(2), 39, 40

Citation : AIR 1968 Cal 48 : (1967) 1 ILR (Cal) 471

Hon'ble Judges : P.N. Mookerjee, J;A.C. Gupta, J

Bench : Division Bench

Advocate : Pravat Kumar Mukherjee, for the Appellant; Sib Sankar Sarkar, for the Respondent

Judgement

P.N. Mookerjee, J.—The appellant before us and her husband, who is the respondent were the first petitioner for divorce by mutual consent. That petition was filed in the court below on December 20, 1963. Thereafter, on November 25, 1964, an application was filed by the present appellant for being allowed to give evidence by affidavit under circumstances stated in the said petition

2. The application does not appear to have been opposed by the respondent but the learned trial Judge, being of the opinion that, having regard to the language of Section 28(2) of the Special Marriage Act, under which the instant proceeding was filed for divorce by mutual consent, affidavit evidence could not be allowed and Order 19 rule 1 of the Code of Civil Procedure, which permits such evidence, had no application rejected the said application. The learned trial Judge relied for the purpose upon the following words in the statute (Section 28(2)) namely, "the District Court shall be satisfied after hearing the parties" and he seems to have been of the opinion that, when the statute says "hearing the parties", the parties should be personally present in Court and, that being his view of the position under the statute, he ruled out affidavit evidence. He also expressed the view that, as divorce was sought by mutual consent, it was desirable that the parties

themselves should be present in Court.

3. In our opinion, neither of the above two reasons can be sustained in law. The Special Marriage Act by Section 40 attracts the CPC subject, of course, to the other provisions of the said statute and to such rules as the High Court may make in that behalf. The learned trial Judge does not say that there is anything in the statute or in the rules, which would conflict with the view that affidavit evidence would be permissible, unless we agree with him that the Act, having prescribed that the parties should be heard, would necessarily require their personal appearance or presence before the Court. We do not, however, think that that is the consequence of the words "hearing the parties" and, accordingly, the reason given by the learned trial Judge in that behalf cannot be accepted. We are also unable to agree that, in a case of divorce by mutual consent, affidavit evidence should be excluded on the ground that in such a case, it is desirable that the parties themselves should be present in Court. In the premises, Order 19 of the CPC would be attracted by the above special statute as part of the Code and would not be excluded either expressly or by necessary implication.

4. We would, accordingly, set aside the order of the learned trial Judge and allow the petitioner's application and direct the trial court to proceed with the main application on that footing.

5. Before concluding this judgment, we deem it necessary to observe that the maintainability of the appeal in the instant case, it being an appeal from an order, refusing affidavit evidence, that is, in the nature of an appeal from an interlocutory order, may be open to question in spite of the decisions of this Court in *Smt. Sobhana Sen Vs. Amar Kanta Sen*, and *Pratima Bose v. Kamal Kumar Bose* (1964) 68 Cal. WN 316 under the parallel Act (Hindu Marriage Act), but it is not necessary for us to go into that question as, in any case, the order in question will be open to revision in the exercise of our revisional jurisdiction, either u/s 115 of the CPC or under Article 227 of the Constitution, and we would have been inclined, having regard to the circumstances of this case, to interfere with the order in question in the exercise of such power.

6. In the above view, the impugned order is set aside and the case is remitted to the court below to be dealt with further in accordance with law in the light of the observations, contained in this judgment.

7. There will be no order for costs in this Court, as the respondent, though he has appeared before us, has not raised any objection to the setting aside of the impugned order.

8. Let the records go down as quickly as possible.

Gupta, J.

9. I agree.