

(1962) 04 GUJ CK 0008

In the Gujarat High Court

Case No : Civil Revision Application No. 860 of 1960

Jaswantrai Jethalal Vaidya

APPELLANT

Vs

Vimal and Another

RESPONDENT

Date of Decision : 30-04-1962

Acts Referred:

Bombay Court Fees Act, 1959 — Article 21
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 3
Hindu Marriage Act, 1955 — Section 13 , 21

Citation : AIR 1963 Guj 152 : (1963) GLR 514

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Advocate : B.J. Bhatt, for the Appellant; G.P. Vyas and B.K. Gandhi, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Raju, J.—The petitioner filed a petition for divorce u/s 13 of the Hindu Marriage Act, 1955. against his wife VimaI on the ground that she was living in adultery with one Madnukar, opponent No. 2. He also claimed Rs. 10,000/- as damages from Madhukar. The learned Civil Judge held that the claim for damages was not tenable in proceedings under the Hindu Marriage Act. It is against this order that the present revision application has been filed.

2. In revision, it is contended that under Rule 5 at the Bombay High Court Rules, it is obligatory for a petitioner who files a petition for divorce on the ground of adultery, to name and cite the co-respondent. It is, therefore, urged that under Order 2, Rule 2, and Order 2 Rule 3, C. P. Code, the claim for damages against an adulterer can be joined in the petition for divorce in view of the provisions of Section 21 of the Hindu Marriage Act, 1955. It is also contended that under the Hindu Marriage Act, the forms attached to the Indian Divorce Act have to be followed as far as possible and that the form in Schedule II of the Indian Divorce Act makes a provision for a claim of damages. It is also contended that under

Article 21 of Schedule II of the Bombay Court Fees Act, as amended, there is a provision for court-fees in a claim for damages against adulterer, in proceedings under the Hindu Marriage Act. It is therefore contended that under the court-fees Act a claim for damages can be joined in a petition for divorce. It is lastly contended that unless there is a provision barring such a joinder, the joinder of a claim for damages against an adulterer in proceedings under the Hindu Marriage Act should be allowed, which lies under the law of Torts.

3. In my opinion, there is no merit in any of these contentions for the following reasons:

4. In Rule 5 of the Rules framed by the Bombay High Court u/s 21 of the Hindu Marriage Act, it is provided that the alleged adulterer should be joined as co-respondent. Section 21 of the Hindu Marriage Act reads as follows:-

"Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (V of 1908)."

As provided in the section, all proceedings under the Hindu Marriage Act shall be regulated, as far as may be, by the CPC and by the rules made by the High Court in this behalf. But the section does not provide that the CPC and the High Court Rules shall decide what proceedings shall lie under the Act. What proceedings lie under the Act must be found in the provisions of the Act itself. There is no provision in the Hindu Marriage Act whereby in a petition for divorce the husband can claim damages against the alleged adulterer. There is such a provision in Section 34 of the Indian Divorce Act, 1869, but there is no such provision in the Hindu Marriage Act, 1955. That is why in the form attached to the Indian Divorce Act there is a provision relating to claim for damages against the adulterer. But forms attached to the Indian Divorce Act are only to be used, as far as possible, in a petition under the Hindu Marriage Act. As the Hindu Marriage Act makes no provision for a claim for damages against the alleged adulterer, such a claim does not lie simply because in the form attached to the Indian Divorce Act claim for damages is shown as follows:-

"Petition by husband for a dissolution of marriage with damages against co-respondent, by reason of adultery."

This was in view of Section 34 of the Indian Divorce Act, 1869.

5. As regards the contention that under Order 2 Rule 2 and Order 2 Rule 3 of the Civil Procedure Code, there can be a joinder of causes of action, we must remember that under the Hindu Marriage Act a petition is filed for divorce. Assuming without deciding that a suit lies against the alleged adulterer for damages under the law of Torts, such a suit could not be joined in the petition under the Hindu Marriage Act. A petition under the Hindu Marriage Act is not a suit under the Civil law. A petition for divorce under the Hindu Marriage Act has to be filed in the District Court, whereas a suit for damages has to be filed in the

Court of Civil Judge, section 15 of the CPC provides that every suit shall be instituted in the Court of the lowest grade competent to try it. Even if the District Court is a principal Court of civil jurisdiction, a suit for damages will have to be filed in the Court of Civil Judge, Junior Division or Senior Division as the case may be. Such a suit cannot be joined with a petition for divorce under the Hindu Marriage Act, which has to be filed in the District court. In my opinion Order 2 Rule 2 and Order 2 Rule 3, c.p. Code have no application to the present case. Section 21 of the Hindu Marriage Act does not make them applicable. Section 21 of the said Act does not deal with the question as to what proceedings lie under the Hindu Marriage Act, 1955 but deals with the question of the procedure to be adopted after a proceeding has been instituted under the Hindu Marriage Act.

6. Article 21 of Schedule II of the Bombay court-tees Act, as amended in 1959, reads as follows:-

It is true that the provision is made in it for payment of court-fees in regard to a claim for damages. It is contended that there is no specific provision for a claim for damages either in the Parsi Marriage and Divorce Act or in the Special Marriage Act, 1954, or in the Hindu Marriage Act, 1955, and that therefore Article 21 of Schedule II of the Bombay Court-fees Act must have intended the joinder of a claim for damages against the alleged adulterer in a petition under the Hindu Marriage Act. But the provisions of this Act cannot widen the scope of the Hindu Marriage Act. As to what proceedings lie under the Hindu Marriage Act is a matter to be decided after considering the provisions of that Act. Although there is a provision in section 34 of the Indian Divorce Act, 1859 allowing the claim for damages to be made under the Indian Divorce Act, no provision is found in the Hindu Marriage Act.

7. As regards the contention that unless there is something to bar the joinder in question, the Court should not hold the joinder to be barred, I think the proposition is just the reverse. Unless there is a clear provision allowing such a joinder, such a joinder cannot be permitted, when one is a claim of the nature of a suit for damages against the adulterer and the other is a person under the Hindu Marriage Act, 1955. Divorce is not a civil remedy but a special remedy.

8. It is contended that in the written statement of the wife and the alleged adulterer, the only objection taken was to the payment of court-tees and the objection was not taken that a claim for damages as such is not tenable. But whether such a claim is tenable or not does not depend on the nature of a written statement. The Court has no jurisdiction to try a claim which it has no jurisdiction to try.

9. I, therefore, agree with the view taken by the learned Judge of the Court below that a claim for damages is not tenable in the proceedings under the Hindu Marriage Act, and dismiss this civil revision application. No order as to costs.