

(2012) 09 MAD CK 0036
In the Madras High Court
Case No : C.M.A. No. 2033 of 2010

Kavitha

APPELLANT

Vs

C. Prabakar, rep. by his Power of Attorney, Dr. A.
Chandrasekaran

RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 2, Order 3 Rule 1
Family Courts Act, 1984 — Section 10, 10(1), 10(3), 13, 19
Hindu Marriage Act, 1955 — Section 13(1)(ia)

Citation : (2012) 5 CTC 587 : (2013) 1 DMC 116

Hon'ble Judges : R. Subbiah, J;R. Banumathi, J

Bench : Division Bench

Advocate : P.B. Balaji, for the Appellant; M. Devaraj, for the Respondent

Final Decision : Allowed

Judgement

R. Banumathi, J.—Challenge in this Appeal is the docket order dated 26.5.2010 in F.C.O.P. No. 54 of 2010 on the file of Family Court,

Salem permitting the Respondent to withdraw F.C.O.P. No. 54 of 2010 with liberty to file fresh Petition in future with the same cause of action.

Marriage between the Appellant and the Respondent was solemnised on 28.5.2007 in Erode. Respondent was employed in Canada for 2 years

before the marriage and he got work permit from Canadian Authorities. After the marriage, Respondent left for Canada and got the work permit

extended. There was some delay in getting Visa to the Appellant and finally, Appellant went to Canada on 18.7.2008 and she is said to have

stayed in Canada for about eight days and thereafter, she came back from Canada. A panchayat is said to have been convened on 9.9.2008 at

Erode and that the said panchayat did not fructify. According to the Respondent, the family members of Appellant left her in the Respondent's

house at Salem and therefore the parents of the Respondent left the house. Alleging that Appellant was abusing and scolding the Respondent and

that she treated the Respondent with cruelty, Respondent filed Divorce Petition in H.M.O.P. No. 12 of 2009 u/s 13(1)(i-a) & (iii) of Hindu

Marriage Act before the Principal Sub-Court, Erode.

2. Appellant filed Transfer O.P. No. 263 of 2009 before the High Court. As per the order in Transfer O.P. No. 263 of 2009 dated 7.12.2009,

H.M.O.P. No. 12 of 2009 on the file of Principal Sub-Court, Erode was transferred to Family Court, Salem and re-numbered as F.C.O.P. No.

54 of 2010. Appellant also filed Maintenance Petition before the Family Court, Salem in M.C. No. 25 of 2009 and obtained order on

19.11.2009, as per which, the Respondent shall pay monthly maintenance of Rs. 1,00,000/- to the Appellant till her life time. Subsequently,

Appellant also filed Petition to execute the same.

3. In F.C.O.P. No. 54 of 2010, Respondent filed Petition in I.A. No. 142 of 2010 under Order 3, Rule 1 to recognise his father Chandrasekaran

as his Power of Attorney Agent and to permit the said Chandrasekaran to proceed with the case on behalf of the Respondent. The said Petition in

I.A. No. 142 of 2010 was allowed on 25.10.2010. Respondent filed Memo on 25.10.2010 attested by Barrister/Notary Public in Canada to

withdraw the Divorce Petition with liberty to file fresh Petition in future with same cause of action. It is stated that the said order is challenged by

way of Revision Petition. Immediately, on the next day of allowing I.A. No. 142 of 2010, on 26.5.2010, a Memo filed by the Respondent was

recorded and the Family Court, Salem passed the following order:

In view of the Memo the Petition is dismissed as not pressed with liberty to file fresh Petition's for same cause of action.

4. Challenging the impugned order, Mr. P.B. Balaji, learned Counsel for the Appellant contended that without proper Application under Order 23,

Rule 1 & 2, C.P.C., the Family Court ought not to have granted the relief of withdrawal of Divorce Petition with liberty to file fresh Petition on the

same cause of action. It was further submitted that as per Order 23, Rules 1 & 2 C.P.C. read with Section 13 of Family Courts Act, the

Respondent ought to have presented Application in person with appropriate Affidavit stating reasons for withdrawing the Petition with liberty to file

fresh Petition on the same cause of action. It was further submitted that Family Court erred in allowing the prayer without assigning any reason. It

was further submitted that Family Court erred in not appreciating that Appellant obtained an order of maintenance of Rs. 1,00,000/- payable by

the Respondent and only to avoid appearance in the Maintenance proceedings, Respondent filed the Memo to withdraw the Divorce Petition

through the third party to the proceedings and that Family Court ought not to have entertained the same and that it amounts to abuse of process of

Court.

5. Placing reliance upon the judgment of the Honourable Supreme Court in Bakhtawar Singh another Vs. Sada Kaur and another, , learned

Counsel for the Appellant contended that the Application ought to have been filed explaining as to what was the defect of jurisdiction or any other

cause of like nature justifying the withdrawal of the Divorce Petition with liberty to file a fresh Petition. Taking us through the typed set of papers

and also the impugned order, learned Counsel for the Appellant would further submit that the Trial Court has not recorded its satisfaction as to the

formal defects and prayed for allowing the Appeal. He has also placed reliance upon the judgment of the learned Single Judge of this Court in

Velusamy and another v. Chenniappan and others, 2010 (5) CTC 330.

6. Mr. M. Devaraj, learned Counsel for Respondent contended that as per Section 10 of Family Courts Act, CPC is applicable to Family Court

proceedings and in Section 10(3), it is also laid down that the Family Court is free to evolve its own rules and procedures and therefore, it was not

incumbent to file Petition under Order 23, Rule 1 & 2, C.P.C. for withdrawal of Divorce Petition. Learned Counsel for Respondent further

submitted that the order passed in the Memo permitting the Respondent to withdraw Divorce Petition with liberty to file fresh Petition is not a final

order and therefore, the Appeal filed by the Appellant is not maintainable. Learned Counsel would further submit that since the Petition suffered

from formal defect and taking into consideration the relevant aspects of the matter, Family Court rightly granted permission to withdraw Divorce

Petition with liberty to file fresh Petition on the same cause of action.

7. The conduct of Suits and proceedings before the Family Court are governed by the provisions of Family Courts Act and Rules framed

thereunder. However, sub-section (1) of Section 10 of Family Courts Act makes a deeming provision of making the Family Court to be the Civil

Court. Therefore, wherever there is no provision under the Act or under the Rules for conduct of Suits and proceedings, the provisions of CPC

shall apply or Code of Criminal Procedure shall apply as the case may be.

8. Section 10(1) of Family Courts Act, 1984 reads as under:

10. Procedure generally.--(1) Subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 (5 of

1908) and of any other law for the time being in force shall apply to the Suits and proceedings (other than the proceedings under Chapter IX of the

Code of Criminal Procedure, 1973 (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, a Family Court

shall be deemed to be a Civil Court and shall have all the powers of such Court.

9. Sub-section (3) of Section 10 of the Act lays down that nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying

down its own procedure with a view to arrive at a settlement in respect of the subject matter of the Suit or proceedings or at the truth of the facts

alleged by the one party and denied by the other.

10. Contention of Appellant is that insofar as withdrawal proceedings, provisions of CPC are applicable and that Petition under Order 23, Rules 1

& 2, C.P.C. ought to have been filed for withdrawal of Divorce Petition and that Divorce Petition ought not to have been allowed to be withdrawn

on the Memo filed by the Respondent, represented through his power of attorney. Before we consider the contention as to non-filing of

Application under Order 23, Rule 1 & 2, C.P.C., it is necessary to refer the circumstances in which Memo came to be filed.

11. Section 13 of Family Courts Act provides notwithstanding anything contained in any law, no party to a Suit or proceeding before a Family

Court shall be entitled as of right to be represented by a legal practitioner. Proviso to the said provision indicates that ""if the Family Court considers

it necessary in the interest of justice, it may seek the assistance of a legal expert as ""Amicus Curiae"" It may be noted that prohibition in respect of

appearance of a legal practitioner is total and that the Proviso only enables the

Court to have assistance of a legal expert as ""Amicus Curiae"" to assist the Court. By virtue of Section 9 of Family Courts Act, a duty is cast upon the Family Court to make endeavour to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the Suit or proceedings and if the Family Court feel that there is a reasonable possibility of settlement between the parties, the proceedings have to be adjourned for a reasonable period to enable the parties to effect such settlement.

12. As pointed out earlier, Respondent was employed in Canada and even after his marriage, he continued his employment in Canada. Even when being in employment in Canada, he filed Divorce Petition before the Principal Sub-Court, Erode in H.M.O.P. No. 12 of 2009. When the Divorce Petition was transferred to the Family Court, Salem and the same was taken on file as F.C.O.P. No. 54 of 2010 (4.2.2010), in view of Section 13 read with Section 9 of the Act, the appearance of Respondent for the hearings in the Family Court became inevitable. It was at that stage, based on the Power of Attorney executed by the Respondent, I.A. No. 142 of 2010 praying to recognise the Respondent's father Chandrasekaran as power agent of the Respondent was filed. I.A. No. 142 of 2010 was allowed on 25.5.2010 permitting the Respondent to be represented through his power agent viz., his father. Simultaneously, Memo was filed on 20.5.2010 to withdraw the Divorce Petition with liberty to file fresh Petition. On 26.5.2010, recording the said Memo, Divorce Petition was dismissed as withdrawn with liberty to file fresh Petition in future for same cause of action.

13. Withdrawal of Divorce Petition with liberty to file fresh Petition is not a ""settlement in respect of subject matter of the Suit or proceeding"" and therefore, seeking permission to withdraw the Divorce Petition cannot be said to be the proceeding u/s 10(3) of Family Courts Act. For granting permission to withdraw the Divorce Petition, Family Court cannot adopt its own procedure. As per Section 10 of the Act, provisions of CPC are applicable to the Suits or proceedings before the Family Court. Therefore, for withdrawal of the Divorce Petition, Petition under Order 23, Rules 1 & 2, C.P.C. ought to have been filed by the Respondent. Had there been Application filed under Order 23, Rules 1 & 2, C.P.C. to withdraw the

Divorce Petition, the Appellant would have put forth her case raising objection for such withdrawal.

14. Order 23, Rule 1(3), C.P.C. contemplates withdrawal of the Suit with a liberty to bring a fresh Suit. Under Order 23, Rule 1(3), C.P.C.,

Court could grant permission to allow the Plaintiff to withdraw the Suit on such terms as it thinks fit with liberty to file a fresh Suit on the same

cause of action where the Court is satisfied: (a) that the Suit must fail by reason of some formal defect; (b) that there are sufficient grounds for

allowing the Plaintiff to institute a fresh Suit for the subject matter of a Suit or part of a claim.

15. For withdrawal of the Suit with liberty to bring a fresh Petition, the party must ask for leave and make out a case falling within "Clause (a) or

(b)" of Order 23, Rule 1(3), C.P.C. The Court has no jurisdiction to allow such withdrawal with liberty to file fresh Petition unless the condition in

either of the clauses is satisfied. Learned Counsel for the Respondent contended that the Respondent is employed in Canada and therefore unable

to personally attend the hearings in Family Court to contest the formal defect to withdraw the Divorce Petition. Any inconvenience or difficulty in

appearance in the Court cannot amount to formal defect justifying grant of permission to withdraw the Suit. "... Formal defect" must be in

consonance with Order 23, Rule 1(3) & Clause (a) or (b), C.P.C.

16. For granting permission to withdraw the Divorce Petition with liberty to file fresh Petition, the Court has to be satisfied about the existence of

"formal defect" and must state the reasons for holding that a case within Order 23, Rule 1(3) & Clause (a) or (b) has been made out. As pointed

out earlier, in this case, the Respondent has filed a Memo stating that the Respondent wants to withdraw the Divorce Petition with liberty to file a

fresh Petition on the same cause of action. In the Memo filed by the Respondent to withdraw the Divorce Petition with liberty to file a fresh

Petition, no reasons are stated as to how the Petition must fail by reason of mere formal defect or that there are sufficient grounds allowing the

Respondent to withdraw the Divorce Petition.

17. After we have heard the arguments, on being mentioned by the learned Counsel for the Respondent, the matter was listed on 11.9.2012 under

the caption "for being spoken to". Learned Counsel for the Respondent produced

the typed set of papers containing copy of the Memo filed by the Respondent. Respondent filed a Memo dated 20.5.2010 stating that he is not pressing the Divorce Petition and seeking permission to withdraw the Divorce Petition with liberty to file fresh Petition on the same cause of action. The said Memo was filed on 20.5.2010 and the Appellant received copy of the said Memo.

18. Of course, the Memo was filed in the Family Court on 20.5.2010 and served upon the Appellant on the same day i.e. 20.5.2010. By perusal of the order sheet, it is seen that I.A. No. 142 of 2010 filed by the Respondent seeking permission to be represented by power agent was allowed on 25.5.2010. Thereafter, on 26.5.2010, the Memo was recorded and Divorce Petition was dismissed as not pressed with liberty to file a fresh Petition on the same cause of action.

19. When Memo was filed to withdraw the Divorce Petition, evidently Memo was recorded and orders came to be passed. When Memo was filed, in normal circumstances, Court may not even ask for Counter. For withdrawal simplicitor, Memo may be sufficient but granting permission to withdraw the Petition with liberty to file a fresh Petition on the same cause of action, the Application has to set forth the grounds as to how the Suit/Petition suffers from formal defect. Only when an Application is filed to withdraw the Suit/Petition, the opposite party would have had the opportunity of explaining that (i) the Suit/Petition does not suffer from formal defect, and (ii) explain how prejudice would be caused to the opposite party if permission is granted to withdraw the Suit/Petition with liberty to file a fresh Petition.

20. Learned Counsel for the Respondent contended that in any event, the order permitting the Respondent to withdraw the Divorce Petition is only an interlocutory order and therefore, the Appeal is not maintainable. The learned Counsel would further submit that in any event, if the Appellant is aggrieved by the impugned order granting permission to withdraw the Divorce Petition with liberty to file a fresh Petition, she ought to have challenged the same only by Revision and the Appeal is not maintainable.

21. The above contention does not merit acceptance. Section 19 of Family Courts Act specifically describes that Appeal shall lie from every judgment or order not being an interlocutory order of the Family Court to the

High Court both on facts and on law except as prohibited under sub-section (2) of Section 19. Hence, no Appeal lies against any interlocutory order. The learned Counsel has drawn our attention to the various definitions of "Interlocutory Order" in Oxford Law Dictionary and Black's Law Dictionary.

22. The impugned order cannot be said to be an interlocutory order by grant of permission to withdraw the Divorce Petition with liberty to file

fresh Petition. The rights of the Appellant was prejudiced and that she was not in a position to put forth her objection against the withdrawal of the

Divorce Petition. Keeping in view the nature of the allegations made in the Divorce Petition, in our considered view, the impugned order granting

permission to the Respondent to withdraw the Petition with liberty to file fresh Petition cannot be said to be an "interlocutory order" and the

objection raised by the learned Counsel for the Respondent regarding the maintainability of the Appeal is to be rejected.

23. Contending that Application seeking permission to withdraw the Suit/Petition by the Plaintiff is not mandatory and that such permission could

be granted even on oral request, learned Counsel for the Respondent placed reliance upon the judgment of the learned Single Judge of the Andhra

Pradesh High Court in V. Govindamma and another v. T. Subrahmanyam Chetty and others, CDJ 1972 APHC 182. Observing that code of

procedure and like all Procedural Laws is designed to further the ends of justice and not to frustrate them by introduction of hairsplitting

technicalities, the learned Single Judge of the Andhra Pradesh High Court held that the Defendants thereon have not suffered any prejudice by the

grant of leave to the Plaintiff without any Written Application as the Trial Judge awarded costs of the Suit to the Defendants. We do not endorse

the views of the learned Single judge. Any litigating party has got the liberty to contest the matter. If permission is granted to withdraw the

Suit/Petition with liberty to file a fresh Suit/Petition on the same cause of action, the party has to undergo the ordeal from the beginning of the

litigation. In the fresh proceedings to be initiated, the Plaintiff filed the Suit/Petition might try to overcome the defence put forth by the opposite

party. In such circumstances, whenever permission is sought for to withdraw the Suit/Petition with a liberty to file a fresh Suit/Petition on the same

cause of action, the Court has to be satisfied about the existence of a formal defect as contemplated under Order 23, Rule 1(3) clause (a) or (b).

24. Grant of leave envisaged in sub-rule (3) of Order 23, Rule 1, C.P.C. is at the discretion of the Court but the said discretion of the Court is to

be exercised with care and caution. When the Court passes an order allowing withdrawal with liberty to file fresh petition, the Court has to briefly

record its reasons as to how it is satisfied about the existence of formal defect and record reasons for granting permission.

25. As pointed out earlier, the Respondent failed to show as to what was the defect of Jurisdiction or any other cause of like nature by reasons on

which the Divorce Petition filed by him was not entertainable. Since the Divorce Petition was pending for some time, in the interregnum period,

there were number of other proceedings between the parties. In such circumstances, an opportunity ought to have been afforded to the Appellant

to put forth her objection, which could have been possible only on Application being filed by the Respondent stating as to what was the defect of

jurisdiction or any other cause of like nature. As discussed above, the Respondent failed to show as to what was the defect of jurisdiction or the

other cause of like nature by which the Divorce Petition was not maintainable. The Family Court has also not recorded any reasoning, recording its

satisfaction about the existence of formal defects and reasons for granting permission to withdraw the Divorce Petition with liberty to file a fresh

Petition. In such circumstances, the impugned order cannot be sustained and is liable to be set aside.

26. Absolutely, no reasons are recorded by the Family Court for permitting the Respondent to withdraw the Petition with liberty to file a fresh

Petition. By a perusal of the Divorce Petition, it is seen that serious allegations are levelled against the Appellant. Therefore, before granting

permission to withdraw the Divorce Petition, the Family Court ought to have afforded sufficient opportunity to the Appellant to put forth her case.

Since no reasons are recorded in the impugned order, the impugned order granting permission to the Respondent to withdraw the Petition with

liberty to file a fresh Petition cannot be sustained and is liable to be interfered with. The impugned order made in F.C.O.P. No. 54 of 2010 dated

26.5.2010 is set aside and this Appeal is allowed. The Family Court, Salem is directed to restore F.C.O.P. No. 54 of 2010 on file and proceed

with the matter in accordance with law after affording sufficient opportunity to both parties. No costs.