

(1995) 03 DEL CK 0065

In the Delhi High Court

Case No : Civil Miscellaneous (Main) Appeal No. 484 of 1993

Manjit K. Singh

APPELLANT

Vs

S. Kanwarjit Singh

RESPONDENT

Date of Decision : 14-03-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16

Citation : (1995) 58 DLT 208

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : S. Pappu, J.K. Seth, Pramod Sehgal, Y.K. Jain and F.K. Jain, for the Appellant;

Judgement

Devinder Gupta, J.

(1) The orders passed on 2.12.1993 and 6.12.1993 by Shri J.D. Kapoor, Additional District Judge, Delhi in Hindu Marriage Case No.181/90 are under challenge in this petition filed under Article 227 of the Constitution of India at the behest of the wife who is a respondent in the petition for grant of a decree for divorce preferred by the husband, pending in the Court below.

(2) On 26.2.1990 a petition for dissolution of marriage by a decree of divorce u/s 13 of the Hindu Marriage Act, 1955 (Hereinafter referred to as "the Act") was preferred by the husband on the ground that the wife after the solemnisation of marriage had voluntarily sexual intercourse with persons other than her spouse; that after solemnisation of marriage the wife treated the husband with cruelty; and that the wife has deserted the husband for a continuous period of not less than 2 years immediately preceding the date of presentation of the petition. On 7.1.1991 the wife filed her reply. Replication thereto was filed by the husband on 28.5.1991. On 29.7.1991 the following issues were framed: 1. Whether this Court has no territorial jurisdiction? OPR 2. Whether the petitioner was treated with cruelty by the respondent? OPP 3. Whether the respondent had after the solemnisation of marriage voluntarily sexual intercourse with persons other than

her spouse, i.e., the petitioner? If so, its effect. OPP4. Relief. The Presiding Officer while framing of issues recorded "No other issue arises or is prayed".

(3) The husband opened his evidence on 1.12.1993. On 2.12.1993 the Court observed that there was some confusion about the issues framed on the basis of the pleadings. One of the issues framed was as regards the husband's allegation that the wife had voluntarily sexual intercourse after marriage with persons other than her spouse. It amounted to taking up the ground of adultery. It was further observed that irrespective of the allegations the stand taken by the husband was that he is not seeking dissolution of marriage on the ground of adultery but the acts alleged in the petition amounted to cruelty. In view of this the Court suomotu reformulated the issues. The order passed on 2.12.1993 reads:"2.12.93P: Parties with Counsel. Since there is confusion about the issues framed on the basis of pleadings of parties, as one of the issues framed was with regard to allegation made by the petitioner of the respondent having voluntary intercourse after marriage with persons other than her spouse i.e. the petitioner. Counsel for respondent contends that this issue tantamounts to ground of adultery, whereas the Counsel for petitioner states that he is not seeking dissolution of marriage on the ground of adultery but these acts amount to mental cruelty. In order to obviate the legal objection as well to make the position clear regarding the grounds for dissolution of marriage, the issues are re-formulated as under:-

1. Whether this Court has no territorial jurisdiction? OPR2. Whether the petitioner was treated with cruelty by the respondent?OPP3. Whether the petitioner has been deserted by the respdt, for a continuous period of more than two years preceding the filing of petition? OFF4. Relief.

Since the examination-in-chief of the petitioner is in the midst, so there is no necessity for re-examination of the petitioner after reformulation of issues. Let his examination be continued. Sd/-ADJ"On the same day further statement of the husband was recorded. Cross-examination was deferred for 6.12.1993 on which date an application was made on behalf of the wife seeking directions of the Court for deleting certain portions of THE petition on the ground that the allegations being scandalous, frivolous, vexatious and unnecessary, the same be ordered to be deleted. Another application was made for deletion of issue No. 3, as framed on 2.12.1993. Both the applications were dismissed on the same day. These orders are now under challenge.

(4) I have heard the learned Counsel for the parties who have taken me through the entire pleadings also.

(5) It is contended that since the husband had given up the ground of adultery and no issue on the ground of desertion had been claimed when issues were framed on 29.7.1991, impugned orders are liable to be quashed. After the husband had made a statement that he was not seeking decree of divorce on the ground of adultery, allowing the petition to stand as it would have the effect of

the husband being permitting to continue asserting the same allegations for a different ground. It will amount to causing serious prejudice to the wife and embarrass the fair trial. On behalf of the husband it is contended that the husband is not seeking divorce on the ground that the wife had after the solemnisation of marriage voluntary intercourse with persons other than the husband but the same allegations can be made use of by the husband for pressing the other ground which survives for consideration, namely, ground of cruelty. The fact that the Court while framing issues observed that "no other issue arises or claimed" does not amount to the husband giving up the ground of desertion and cannot be a bar in the Court suomotu framing the issues. The issues were reformulated by the Court on the basis of the pleadings of the parties. The order was within the Court's jurisdiction and the power of superintendence under Article 227 cannot be invoked. Otherwise also the impugned orders being interim in nature, no interference is called for under Article 227 of the Constitution of India. Provisions of Order 6 Rule 16 of the CPC will not apply to the facts and circumstances of the case.

(6) It is not in dispute that the Rules framed governing the trial of proceedings under the Act, provide that in every petition for divorce on the ground that the respondent has committed adultery with any person, the petitioner "shall make such person a co-respondent." It is also not in dispute that there is no other person impleaded to the petition filed by the husband other than the wife. In the course of his statement while under cross-examination, the husband has stated:

"I have withdrawn the ground of adultery involving the allegation of her having had voluntary sexual intercourse with other persons other than me after marriage."

Before the aforementioned statement in cross examination, on 2.12.1993 when the statement of husband was in progress, an objection was raised on behalf of the wife that the husband had pleaded that he was entitled to dissolution of marriage on the ground of adultery but had failed to implead the alleged adulterer as corespondent. On such an objection that in this background the ground of adultery was not maintainable, a statement was made on behalf of the husband that he was not seeking divorce on the ground of adultery but the allegations made amounted to cruelty. It was on this objection on behalf of the wife and on the statement of the Counsel for the husband which gave rise to the passing of the order on 2.12.1993 by which the issue "whether the wife had after solemnisation of marriage voluntarily sexual intercourse with persons other than her spouse" was deleted. No objection was raised on behalf of the husband for deletion of that issue.

(7) In view of the above the question that arises is to whether in a petition when divorce is not sought either on the ground of adultery or on .the ground of the respondent having had sexual intercourse with persons other than the spouse after solemnisation of marriage, the same can be allowed to be tried without directing the deletion of those paragraphs of the petition which contain

allegations of adultery or the respondent having sexual intercourse with persons other than his/her spouse. The submissions made on behalf of the husband that the same allegations also amount to the wife treating the husband with cruelty and can be allowed to be retained and proved on record in support of the issue of cruelty. It is contended on behalf of the wife that permitting such allegations to be retained on record and allowing the husband to lead evidence thereupon will not only embarrass the fair trial of the proceedings but would also amount permitting the proof of a fact indirectly which cannot be permitted to be done directly. Allegations otherwise are scandalous and are liable to be deleted for a fair trial.

(8) The manner and the context in which the offending allegations have been made in the petition deserves to be noticed. It has been alleged in para F: "That sometime in the middle of 1976 the petitioner was shocked when the wife of a common friend complained to the petitioner that the respondent was having an affair with her husband. "The petitioner was again shocked when the wife of a leading Japanese Dentist informed the petitioner that the respondent was having an affair with her husband and wanted the petitioner to put a immediate stop to it." In para G, the allegations are: "The petitioner had almost decided to separate from the respondent because of her cruel acts and unchastely.." "The respondent promised to mend her ways and be faithful to the petitioner." In para J, it is alleged: "In the-night before the parties to the petition could sleep as the petitioner was to leave for Japan by the early flight, at about 10.30 Pm there was a ring at the door and the petitioner discovered that a youngman had come to see the respondent. The youngman had come to stay with the respondent and on inquiry of the petitioner she explained that the youngman was only being helped by her in his studies. A little later the mother of that youngman telephoned and after having found that the youngman was staying in the house, the mother had blown a storm saying that the respondent has spoiled the youngboy. "In para L the following allegations have been made:

"L. That the petitioner was shocked when he came to know that the respondent was not continuing with. her studies of Hotel Management in England. He was further shocked to know that the respondent was having an affair with a Britisher who was living with her. The respondent would not bring the daughter to the apartment as she was carrying affair with the Britisher."

"THAT the petitioner further came to know that after her break with the Britisher the respondent was planning to ask for a divorce from the petitioner as she had become serious with some Indian who wanted to marry her. This extra marital relation with the Indian was discovered by the daughter of the parties and she was extremely hurt as the daughter loved the petitioner a lot and did not want that there should be separation between the parties."

"That as the petitioner was in very bad financial state and after having learnt the unchaste life which was being lived by the respondent the petitioner reduced the amount of money which was being sent by him to the respondent in England."

Para M states; "That the petitioner further discovered that the respondent was having a gay life in Delhi. She was never at home, coming back very late night from the parties and was involved with her another Indian friend who had lived in America and married to an American lady." In para O the allegations are: "In fact Nagisa had objected to the affairs of the respondent with her Indian friend and staying with him." In paras R and S the husband has alleged that the respondent is having illicit relations and affairs with different people "as stated above and has refused to perform her marital duty" ... "from the facts stated hereinabove it is quite clear that the respondent had sexual intercourse with persons other than her spouse after solemnisation of the marriage."

(9) In spite of the fact that a clear statement was made by the husband during his cross-examination and in spite of the fact that the second issue as initially framed was given up, still a resistance is being shown on behalf of the husband that the aforementioned allegations cannot be ordered to be deleted from the pleadings since the same very allegations can be used by the husband in claiming divorce on the ground of cruelty since these allegations also amount to the wife treating the husband with cruelty. I am afraid that such a submission cannot be accepted. The act which cannot be done directly cannot be allowed to be done indirectly. Allowing the husband to have these allegations retained in the petition would amount to allowing him to press these allegations on which the Court will be obliged to give findings. In other words. Court will be obliged to record findings on the question that whether in view of the averments made in the petition, husband's stand that the wife had sexual intercourse with persons other, than the husband after the solemnisation of the marriage stands proved and whether such an act on the part of the wife amounts to cruelty or not. It will amount to returning a finding on such of the facts which make out an independent ground for. divorce u/s 13 of the Act. u/s 13, expression "adultery" has not been used. Instead the expression used in clause (i) of Sub-section (1) of Section 13 is "had voluntarily sexual intercourse with any person other than his/her spouse". Adultery in matrimonial law is one of principal grounds of relief and has been defined as a "consensual sexual intercourse between a married person and another person of opposite sex during the subsistence of marriage." When adultery is a separate ground other than cruelty and divorce is not sought on the ground of adultery and allegations to that effect are given up, there is no reason why such allegations deserve to be allowed to be retained in the petition or allowed to be proved. The same in view of the statement of the husband must be ordered to be deleted.

(10) Section 21 of the Act provides that except as is otherwise provided, all matters of procedure under the Act are to be regulated by the Code of Civil Procedure. In matters relating to which there is no provision made in the Act and are not regulated by the Rules made by the High Court, the procedure to be followed under the Act in all proceedings must be regulated, as far as may be, by the Code of Civil Procedure. Sub-section (1) of Section 20 of the Act requires a petition for relief under the Act to distinctly set out the nature of the case and

the facts on which claim to the relief is founded. Claim in the husband's petition for the relief of divorce now after he has given up the ground of adultery is the allegation of cruelty. Any allegation which would amount to adultery cannot be allowed to be retained in the petition. In the absence of any Rule in the Rules framed by the High Court to the contrary provisions of Order 6 Rule 16 of the Code will definitely apply which says: "The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading -(a) which may be unnecessary, scandalous, frivolous or vexatious, or (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or (c) which is otherwise an abuse of the process of the Court. "Court has ample power to order the striking out of pleadings which may be unnecessary or which may tend to prejudice, embarrass or delay the fair trial of a suit. After the husband has given up the ground or in that behalf the allegations of adultery, allowing the same now to remain a part of pleadings, more especially in the absence of the alleged adulterers being a party will definitely tend to prejudice the fair trial of the petition which will have to be tried on the basis of allegations which may amount to cruelty whether physical or mental. The allegations as noticed above are not only unnecessary but might tend to prejudice and also delay the fair trial of the proceedings.

(11) On the second question of deletion of the issue as regards desertion, needless to add that no grievance was made on behalf of the husband when petition was not taken to trial on that ground. Issues were framed on 29.7.1991 in the presence of Counsel for the parties and the Court clearly recorded that no other issue has been claimed. Issue on the plea of desertion was not framed. It will amount the husband voluntarily giving up the plea of the wife having deserted him. There was also no prayer made by the husband for framing such an issue. Court in these circumstances ought not to have suo motu framed an issue on desertion. Irrespective of the fact that no express statement was made on the date when issues were initially framed but the very fact that the Court recorded that no further issue is claimed and for more than two years thereafter no grievance was made on behalf of the husband it will amount to the husband voluntarily giving up the ground of desertion also.

(12) The argument that jurisdiction under Article 227 of the Constitution of India ought not to be exercised in the facts and circumstances cannot be accepted. No doubt as a matter of course power of superintendence ought not to be exercised for setting aside interim orders but powers are wide enough and can always be exercised to advance the cause of justice when glaring irregularities flagrant error in procedure committed by the Courts came to the notice of the High Court. In the instant case, the Court failed to take notice of the vital aspects of the case and the orders, if allowed to remain, will not only cause embarrassment to the wife in a fair trial against her, more especially after the husband had given up and withdrawn such allegations on which such plea of adultery was raised. Orders if allowed to stand will result in manifest justice.

(13) In view of the above, petition is allowed. The impugned orders are quashed and set aside. The petition will now be tried on the following issues: 1. Whether the Court has no territorial jurisdiction? OPR 2. Whether the petitioner was treated with cruelty by the respondent? OFF 3. Relief. The allegations in the petition which amount to the husband alleging adultery, more especially the ones quoted above are ordered to be deleted. The husband is directed to suitably readjust the allegations for the ground on which petition is now to be tried. Needful be done within a period of four weeks from today. CM(M) stands disposed of. Record be sent back forthwith. Parties to appear before the learned Additional District Judge on 24/04/1995.