

(1992) 04 BOM CK 0049

In the Bombay High Court

Case No : Family Court Appeal No. 39 of 1992 in M.J. Petition No. 571 of 1988

Mrs. M.

APPELLANT

Vs

Mr. A.

RESPONDENT

Date of Decision : 28-04-1992

Acts Referred:

Foreign Marriage Act, 1969 — Section 18(3)
Special Marriage Act, 1954 — Section 27(1)

Citation : AIR 1993 Bom 110 : (1993) 1 DMC 384

Hon'ble Judges : V.P. Tipnis, J; M.F. Saldanha, J

Bench : Division Bench

Advocate : C.R. Rebello, for the Appellant;

Judgement

Saldanha, J.—There exists a class of litigation where the rule of the Judge requires to be redefined for it is exempted of his in these situations to temper the approach to that of a father and not on impassioned adjudicator of law points alone. Matrimonial litigation has a ring of pathos about it, where relationships have soured, young people have been estranged and unfortunate children are being battled over. True it is that when such cases come before the courts, the decision has to be governed by legal principles, but the approach of the Court must be a benevolent understanding and helpful one, and if there is one field in which the time factor is crucial, [this is it. We prefix our Judgment with these observations because it has been the recurrent complaint in this and several other matters that if a more helpful attitude had been forthcoming from the presiding officer, the case could have been concluded at the trial Court in for less time.

2. The appellant before us, the original petitioner before the Family Court in M. J. petition No. 571 of 1988, has assailed the correctness of the judgment and order dated 27-9-1991 whereby the Family Court has dismissed her petition. The appellant had prayed for a decree of nullity of her marriage solemnised at Houston, Texas, U.S.A. on 27-4-1987. Alternatively, she has prayed for a decree

of divorce on the ground of cruelty. The petition was originally filed before the City Civil Court at Bombay on 22-4-1988 under the provisions of the Special Marriage Act, 1954, which applied to the parties by virtue of the provisions of Section 18 of the Foreign Marriage Act, 1969. The learned trial Judge, in the first instance, dismissed the petition on the ground that the Court was not vested with the requisite jurisdiction. He also held that as far as the question of nullity was concerned that the petitioner had failed to make out any case. As far as the question of cruelty was concerned, strongly enough, the learned trial judge held that even though several instances stood established that they were not of the requisite gravity that would entitle the petitioner to the reliefs asked for by her. It is this judgment that is assailed before us.

3. Mr. Rebello, learned counsel appearing on behalf of the appellant at the stage of admission of this appeal, advanced a strong plea to the Bench that since his client was a young lady who had undergone a lot of hardship and since according to him the order of the Family Court requires rectification on a point of law, that the appeal be taken up expeditiously. After hearing learned counsel and being reasonably satisfied that this position was correct, we directed the appellant to serve the respondent forthwith and also set the appeal down for hearing after 4 weeks. The appellant has filed an affidavit of service and has also satisfied us that the respondent has been duly served. From the record, we have reason to conclude that the respondent is not interested in any contest since the marriage has failed and the petitioner is not making any claims. It is relevant to record that even though the respondent at an initial stage before the trial court filed a short written statement, that he thereafter took no part in the proceedings before that court. It is obvious that he was aware of the fact that the N. J. Petition was pending and that if he did not take part in the proceedings that the Court would pass an ex parte order against him and in spite of this petition, we just did not appear before that court. It is under these circumstances that even though the respondent has chosen not to appear before us that we have heard the appeal on merits and are disposing it of.

4. Mr. Rebello has pointed out to us, in the first instance, that the interpretation of section 18(3)(a) of the Foreign Marriage Act, 1969 as set out in the impugned judgment is erroneous. The relevant section reads as follows:--

"18(3). Nothing contained in this section shall authorise any court -

(a) to make any decree of dissolution of marriage, except where -

(i) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(ii) the petitioner, being the wife, was domiciled in India immediately before the marriage and has been residing in India for a period of not less than three years immediately preceding the presentation of the petition."

It is his contention that the learned trial Judge was certainly in error in having

held that it is a requirement of law that the petitioner should have been residing in India continuously for a period of 3 years immediately preceding the presentation of the petition. Mr. Rebello has submitted, and quite justifiably in our considered judgment, that the section refers to a period of not less than 3 years immediately preceding the presentation of the petition and that the learned trial Judge was not justified in having grafted on the word "continuously". We have heard learned counsel and we have considered carefully the correct position that would emerge in law and it must be recorded that the learned trial Judge was most certainly in error for the reason that it is impermissible to add on something to a statute that is not put there by the legislature. While interpreting the relevant sections, all that the learned Judge ought to have verified was as to whether the petitioner was a resident of India and whether she fulfilled the qualifications of having resided in India for 3 years prior to the presentation of the petition. Admittedly, the petitioner was resident of India since her birth and the fact that she left the country temporarily for some time would not disentitle her from these reliefs. It is a requirement of the section that for conferring jurisdiction on the Indian Court, the petitioner-wife should have been domiciled in India immediately before the marriage, which condition she satisfies. The difficulty that has arisen in this case centres around the fact that the petitioner had left India in December 1986 and returned in August 1987. The petition was filed on 29-4-1988. The learned trial Judge, while considering the second requirement of residence in India for three years immediately preceding the presentation of the petition, has construed the requirement to mean 3 continuous years without a break. Excluding the period of her absence, he has held that the time would run from August 1987, i.e., the date of her return, and that it would thereby mean that she was resident in India for only 8 months prior to the filing of the petition. This computation, in our considered view, is totally faulty. The petitioner had not emigrated from India which is established by the fact that she had gone out of the country only on a "tourist visit" and she did, in fact, return and has been permanently domiciled and resident in India all through. In matrimonial statutes in this country, the law confers local jurisdiction on a Court if the party concerned is in fact resident there and not on the basis of casual short-term visits. It is true that in some parts of the world, like Mexico, it is permissible to obtain matrimonial reliefs if one is physically present for a few hours after arrival and to leave by the next plane. The Foreign Marriage Act does not approve of such frivolous methods and, therefore, confers jurisdiction if the party is resident for a reasonably long time -- the minimum unit being 3 years. It would be quite unreasonable to hold, particularly while interpreting a matrimonial statute, that any break in the period of residence will be fatal to the maintainability of the petition, for in that event the section would have used the word "continuous" or "unbroken". In the absence of these words, it would only be correct to assume the legislative intent as having prescribed the test of ascertaining whether in the preceding 36 months the petitioner was resident in this country. The healthy principle applicable to a Court in these cases would be to adopt a benevolent approach as refusal to pass

a decree in these circumstances would cause immense hardship to the aggrieved spouse who is before the Court. To this extent, therefore, the findings of the trial Judge are liable to be set aside. Admittedly, the Court was invested with the jurisdiction to grant the requisite relief and the Court ought not to have disqualified the petitioner on the hyper-technical ground of jurisdiction.

5. As far as the relief claimed by the petitioner is concerned, we do not propose to examine the question of nullity because on the record that is before us, the petitioner would clearly be entitled to a divorce on the ground of cruelty u/s 27(1) (d) of the Special Marriage Act, 1954. It is unnecessary for us to reproduce in detail the various instances of cruelty that have been deposed to by the petitioner. The learned trial Judge has reproduced this and suffice it to say that during the short period during which the parties lived together, the petitioner has averred that she was not treated either with the love and consideration that she would normally have been entitled to, but, on the other hand, that she was continuously subjected to the type of incessant cruelty that ultimately compelled her to come back to this country within a very short period of time. This circumstance alone is quite eloquent to conclusively establish that the type of treatment meted out was such as would come within the legal definition of cruelty. There is specific reference even to an assault on the petitioner. She has clearly stated in her evidence that the respondent totally disregarded her, that he used to go away leaving her all alone for long periods of time, that he spent all his time with his friends, he used to return home late at night and that there were no sexual relations between the parties. The cumulative effect of this behaviour on the petitioner was sufficient to create the definite apprehension in her mind that her marriage had failed and that it was inadvisable for her to continue with the respondent in that state of affairs. The respondent has not chosen to controvert this evidence by either cross-examining the petitioner or by leading evidence on his own behalf. Under these circumstances, the evidence of the petitioner is liable to be accepted. The learned trial Judge was in error in having disregarded this evidence and in holding that the petitioner was not entitled to the relief that was claimed.

6. In the result, the appeal is allowed. The judgment and order of the Family Court dated 27-9-1991 is set aside. The marriage solemnised between the petitioner and the respondent on 27-4-1987 stands dissolved. The petitioner shall be entitled to a decree of divorce under the provisions of Section 27(I)(d) of the Special Marriage Act, 1954. Decree shall be drawn accordingly. In the circumstances of the case, there shall be no order as to costs.

7. Appeal allowed.