
(2014) 05 DEL CK 0187
In the Delhi High Court
Case No : FAO No. 527/2011

Sapna

APPELLANT

Vs

Amit Kumar

RESPONDENT

Date of Decision : 15-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 2, Order 47 Rule 1, 24
Hindu Marriage Act, 1955 — Section 24

Citation : (2014) 211 DLT 497 : (2014) 2 DMC 726 : (2014) 144 DRJ 215

Hon'ble Judges : Najmi Waziri, J

Bench : Single Bench

Advocate : A.K. Singh, Pramod Tiwary and Ankur Kr. Panwar, Advocate for the Appellant

Final Decision : Allowed

Judgement

Najmi Waziri, J.—This petition impugns the order of the Family Court, Rohini, Delhi dated 06.06.2011 which had reviewed its own order of 01.11.2010. the latter order fixed an amount of Rs. 1,00,000/- for the maintenance of the wife and the minor child of the respondent from the date of filing of section 24 application under Hindu Marriage Act, 1955. Mr. A.K. Singh, learned counsel for the appellant submits that the Trial Court fell into error by entertaining the application filed by the Attorney of the husband and it was also not supported by an affidavit of the husband. The learned counsel further submits that there is no provision in law for entertaining such a defective application; that it was barred by time by delay of 13 days and nor was there any application seeking condonation of the said delay. He submits that the Court suo moto, could not have condoned the delay since there is strict stipulation under the law of limitation requiring each day of delay to be explained convincingly. He submits that for the delay to be condoned, an application to this effect justifying the grounds of delay ought to be on record; that the Trial Court fell into error in condoning the delay doing suo moto. He submits that the review petition was

time barred, not maintainable and ought to have been dismissed.

2. After taking into consideration the arguments of learned counsel for the parties, the Trial Court reasoned that there no need to grant litigation expenses to the respondent/wife. The learned counsel for the appellant submits that it is settled law that before any motion under the Hindu Marriage Act can proceed, the amount earlier directed to be paid to the respondent/wife should be deposited in the Court and/or be paid to the wife so as to financially empower her to contest the proceeding. He submits that in the absence of the requisite financial empowerment of economically disadvantaged contesting parties, the wife in this case, she would be severally prejudiced in contesting the husband's motion. The learned counsel submits that the Trial Court failed to ensure compliance of its order for payment of the amounts as earlier directed. Therefore, he submits, that proceedings were vitiated on the ground of procedure as well as in equity. He relies upon a judgment of this Court in "Rejeev Preenja vs. Sarika & Ors." In Crl. MC. 1859 and 3089/2-008 and Crl. M.a. 11390/2008 (stay) the relevant para 19 reads as under:-

Keeping in view the fact that interim maintenance applications are likely to take a year for being disposed of and that the payment to the wife is likely to be made only thereafter, it is only just and fair that the revisional court should insist on the deposit in Court of the interim maintenance payable in terms of the order under challenge as a pre condition to entertaining the revision petition. Otherwise the recalcitrant husband can, despite suffering an adverse order, defeat that order merely by filing a revision petition and not being burdened with the responsibility of complying with it.

3. Section 2 of the Power of Attorney Act 2003 reads as under:-

Execution under power-of-attorney-The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the done of the power in the name, and with the signature and seal, of the donor thereof.

This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force

4. The said provision of law has been judicially expounded by the Supreme Court in T.C. Mathai and Another Vs. The District and Sessions Judge, Thiruvananthapuram, Kerala, the relevant para reads as under:-

15. Section 2 of the Power of Attorney Act cannot override the specific provision of a statute which requires that a particular act should be done by a party in person. When the Code requires the appearance of an accused in a court it is no compliance with it if a power of attorney holders for him. It is a different thing that a party can be permitted to appear through counsel. Chapter XVI of the

Code empowers the Magistrate to issue summons or warrant for the appearance of the accused.

Section 205 of the Code empowers the Magistrate to dispense with "the personal attendance of accused, and permit him to appear by his pleader" if he seeks reasons to do so. Section 273 of the Code speaks of the powers of the court to record evidence in the presence of the pleader of the accused, in cases when personal attendance of the accused is dispensed with. But in no case can the appearance of the accused be made through a power of attorney holder. So the contention of the appellant based on the instrument of power of attorney is of no avail in this case.

5. The learned counsel for the petitioner further relies upon Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, to contend that:-

12. In the context of directions given by this Court, shifting the burden of proving on the appellants that they have a share in the property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power of attorney holder does not have the personal knowledge of the principal.

13. Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

14. Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr. Bhojwani to represent them and the Tribunal erred in allowing the power of attorney holder to enter the box and depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.

6. He further submits that review petition was neither maintainable nor could the

re-appreciation of the subsequent documents be done under Order 47 Rule 1 CPC. He relies upon a judgment of the Supreme Court in T. Thimmaiah (D) by LRs. Vs. Venkatachala Raju (D) by LRs., where the court held that:-

3. During the course of hearing, the learned counsel for the appellant has pointed out that a bare perusal of the order in review would reveal that it is based on a complete re-appreciation of the matter on facts and the provisions of Order 47 Rule 1 of the CPC which would govern an application for review, have been completely ignored. It has been submitted by the counsel that the Single Judge had, in the first judgment, examined the facts and dismissed the appeal and on a reconsideration of the same facts, had allowed the same, which was not justified. We find merit in this plea. From a bare perusal of the judgment in review, it is clear that the principles laid down under Order 47 Rule 1 of the CPC have been completely ignored. We accordingly allow the appeal, set aside the order in review dated 26th February, 2001 and dismiss the appeal in the suit. We, however, give liberty to the respondent herein to challenge the judgment dated 16th February, 1999, if so advised.

7. The learned counsel submits that where the Trial Court examined the facts and dismissed the appeal then on a subsequent reconsideration of the same facts it could not allow the appeal. He submits that such an order and action would not be justified in law, and the Trial Court fell into error in reviewing its order not for correction of an error or technicality on the basis of the existing record but upon some new documents adduced to the review application, and furthermore under Order 47 Rule 1 CPC, there is a bar to re-appreciation or re-consideration of the same facts. Learned counsel further submits that section 24 application was filed on 08.01.2010 and the order for maintenance was for the period from the said date till 18.10.2010. However, the documents which were adduced in the review pertain to the period from February 2010 onwards. Therefore, the documents pertaining to the subsequent period could not be taken into consideration. He submits that ever since the petition was withdrawn by the respondent/husband on 18.10.2010, he has never participated in any subsequent legal proceedings nor paid the amount ordered by the Court. He has not adhered to the Court order for long. The Court notices that on 23.8.2013 the respondent was proceeded against ex-parte. None appeared for him on the subsequent dates i.e. 25.9.2013, 6.12.2013, 11.2.2014, 24.3.2014 and finally on 15.5.2014.

8. It is settled law that documents to be taken into consideration for determination of a petition u/s 24 of the Hindu Marriage Act should pertain to the financial position of the non-applicant for the relevant period. Insofar as the Trial Court had already taken into consideration the relevant documents, which were in praesenti and pronounced its judgment thereon, it could not review the same on the basis of documents sought to be adduced later in a review application. The review application would be maintainable only if had it been filed within the limitation period. In the absence of any such application or reason preferred for condoning the delay, the Court would not by itself condone it. Furthermore, the

review application could not be allowed on the premise of new facts, which evidently were adduced in the form of documents pertaining to the period subsequent to February 2010. In any case these documents could have been adduced earlier when the section 24 application was being considered by the Court. In the review petition all that could be looked into was whether there was error apparent on the face of the record. It could not have been allowed on any other ground. This Court in *Hori Lal Vs. Sharwan Kumar*, has held that discovery of new facts could not be a ground for review.

9. The review application should have been supported by an affidavit of the husband. In the present circumstances the documents could not have been taken into consideration in the review petition nor the case could have been re-examined and re-assessed.

10. In view of the above, the impugned order dated 6th June, 2011 is set aside and the maintenance fixed by the order dated 1st November, 2010 shall be payable to the appellant. The appeal is accordingly allowed.