

(1982) 05 CAL CK 0009
In the Calcutta High Court
Case No : C.R. No. 52 of 1982

Sikha Singh

APPELLANT

Vs

Dina Chakrabarty and Others

RESPONDENT

Date of Decision : 05-05-1982

Acts Referred:

Calcutta High Court Rules, 1914 — Rule 10
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 1 Rule 3
General Clauses Act, 1897 — Section 13(1)
Special Marriage Act, 1954 — Section 27, 41, 41(2)

Citation : AIR 1982 Cal 370 : 86 CWN 901

Hon'ble Judges : B.C. Chakrabarti, J;Anil K. Sen, J

Bench : Division Bench

Advocate : G.A. Wilson-de Rose, for the Appellant;Ajoy Roy and S. Dube, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Chakrabarti, J.—This re-visional application at the instance of a co-respondent in a Matrimonial Suit is directed against an order rejecting her prayer for striking out her name from the category of co-respondent.

2. Opposite party No. 1 instituted the suit for a decree of divorce against opposite party No. 2 on the ground of adultery u/s 27 of the Special Marriage Act, 1954. In this suit the wife opposite party No. 1 alleged acts of cruelty and adultery on the part of the husband opposite party No. 2. It is further alleged that the husband committed acts of adultery with the petitioner herein who was made a co-respondent in the suit. The wife also claimed damages against the co-respondent.

3. In this suit, the petitioner co-respondent filed an application under Order 1, Rule 10 of the Civil P.C. for striking out her name. It was contended before the court below that there is no provision in the Special Marriage Act permitting joinder of a woman as a co-respondent in a wife's suit for divorce on the ground

of adultery and that the Rules framed under the Act does not contemplate such a procedure and even if it intended to do so, it acted in excess of the powers conferred by the Act.

4. The prayer was resisted by the wife upon a reference to Rule 10 of the Rules framed by the High Court. The learned Trial Judge overruled the contention of the petitioner co-respondent and rejected her prayer for striking out her name. Hence the revisional application.

5. Mr. Dey Roze appearing on behalf of the petitioner argued that any Rule providing for impleading a woman as corespondent is ultra vires the Rule making power of the High Court conferred by Section 41 of the Act, that the power of the High Court in framing rules is limited by the provisions of Order 1, Rule 3 of the Code and the provisions of the Indian Divorce Act, that the wife has no legal form of relief available against a woman having or intending to have sexual intercourse with the husband and as such no legal proceedings can be instituted against such a woman. It was further contended that Rule 10 as framed by the High Court must be restricted in its application to a male co-respondent when read along with Rules 18 to 24 of the Rules.

6. This application has been seriously contested by the wife respondent No. 1.

7. In order to appreciate the points involved it would be convenient to bear in mind the relevant provisions of the Special Marriage Act and the Rules framed thereunder.

8. Section 27(1)(a) of the Act entitles either party to the marriage to present a petition for divorce on the ground that the respondent has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.

9. Unlike the Indian Divorce Act there is no Special provision that upon such a petition presented by a husband, the petitioner shall be required to make the alleged adulterer a co-respondent unless excused.

Section 41 of the Special Marriage Act, reads as follows:--

"41. Power of High Court to make rules regulating procedure.

(1) The High Court shall, by notification in the official Gazette, make such rules consistent with the provisions contained in this Act and the Code of Civil Procedure, 1908, as it may consider expedient for the purpose of carrying into effect the provisions of Chapter V, VI and VII.

(2) In particular and without prejudice to the generality of the foregoing provision, such rules shall provide for -

(a) the impleading by the petitioner of the adulterer as a co-respondent on a petition for divorce on the ground of adultery, and the circumstances in which the petitioner may be excused from doing so;

- (b) the awarding of damages against any such co-respondent;
- (c) the intervention in any proceeding under Chapter V or Chapter VI by any person not already a party thereto;
- (d) the form and contents of petitions for nullity of marriage or for divorce and the payment of costs incurred by parties to such petitions; and
- (e) any other matter for which no provision or no sufficient provision is made in this Act, and for which provision is made in the Indian Divorce Act, 1869."

10. Different High Courts framed different set of rules under the rule making power conferred by this section. Necessarily the rules framed by the different High Courts could not be and are not identical. For the present we are concerned with the rules framed by this High Court.

11. Rule 10 lays down that "In every petition for divorce on the ground of adultery the alleged adulterer shall be impleaded as a co-respondent. "The provisions to this rule are unnecessary for our present purpose and need not be referred to.

12. Rules 17, 18 and 19 relate to a counter claim by the respondent for relief u/s 35 of the Act. Rule 20 provides that when the answer of the husband alleges adultery by the petitioner, such answer shall state the name, address and description of the alleged adulterer.

13. Rule 24 provides that when a decree for divorce is passed on the ground of adultery, the court may in its discretion award such damages against the co-respondent found guilty of the adultery, as it may think fit and proper.

14. Mr. De Roze in the first place argued that Clauses (a), (b), (c) and (d) of Section 41(2) must be read ejusdem generis with Clause (e) and consequently the powers of the High Court in framing the rules must be limited by and confined to the provisions of the Indian Divorce Act under which no woman can be impleaded as a co-respondent. To confine the powers of the "rule making authority in the manner suggested would be contrary to the provisions of Section 41(1), which lays down that the rules should be consistent with the provisions of the Special Marriage Act and the Civil P.C. Sub-section (2) and the clauses thereunder merely enumerate the subjects regarding which the rules may be framed.

15. This apart, even if the expression "any other matter" referred to in Clause (e) is read to mean a matter of the same kind or nature as enumerated in Clauses (a) to (d), that also would be of no assistance. Impleading an adulterer as a co-respondent is a matter covered by; Clause (a). This is again a matter on which some provision is made in the Indian Divorce Act (vide Section 11) but no sufficient provision is made in the Special Marriage Act. It is not, therefore, incompetent for the High Court to frame rules on such matters. And in fact some of the High Courts have framed rules in this regard in a manner not consistent

with the Indian Divorce Act. For example, under the rules framed by the Patna High Court where a wife's petition alleges adultery with a woman named and contains a claim for costs against her, she shall be made a respondent in the cause. Similarly under the rules of the Bombay High Court it is competent for a female to intervene in a wife's petition where the husband is charged with adultery with such named female person. We are unable to agree that such rules are ultra vires being In excess of the powers conferred by Section 41.

16. Then it was contended that the very concept of different High Courts framing different set of rules in respect of a Central Act is opposed to common sense because in that event there would be different set of rules governing the same field within the country. Mr. De Roze therefore suggested that there should be one body authorised to frame rules so that they may be the same every where in the" country. This contention too can not be supported for the simple reason that what should have been the law is not within the sphere of our present enquiry. That apart it is not inconceivable for different High Courts to frame different set of rules under a central statute. In fact Civil P.C. itself authorises different High Courts to frame their own rules in regard to certain matters and the rules thus framed are not always uniform. Nonetheless they are good and binding. 17. Mr. De Roze then argued that Rule 10 quoted above refers to an adulterer and not an adulteress and consequently the rule is referable only to a male adulterer. Here again we are unable to agree with him. According to the accepted rules of interpretation and the provisions of the General Clauses Act, the use of the masculine gender here includes the feminine as well. It is significant to note that the rule begins with the words "in every petition for divorce". The rule therefore, covers both a petition by the [husband as also a petition by the wife.

18. Mr. De Roze then pointed out that the construction put by the learned Court below to Rule 10 is in direct conflict with the provisions of Rule 20. Section 35 of the Act enables a party to the action to make a counter claim, by way of an answer. Rule 20 provides that where the answer of the husbands alleges adultery by the petitioner, obviously meaning thereby the wife such answer shall state the name, address and description of the alleged adulterer. Since there is no corresponding provision in regard to the answer of the wife containing an allegation of adultery by the petitioner husband, it was argued that in order to give an effective meaning to Rule 10, it should be confined to the case of a male adulterer only.

19. Such contention might have been possible but for some other provisions in the Rules. Rule 24 empowers the Court to award damages against a co-respondent when a decree for divorce is passed on the ground of adultery. The decree referred to in this rule is not confined to a decree passed on a husband's petition only. It applies to a petition for divorce at the instance of the wife as well. Consequently the combined effect of Rules 10, 20 and 24 is that in a petition for divorce whether at the instance of the husband or the wife the adulterer if known should be named. While there may be a compulsion in the

case of a petition by the husband there is none in the case of a petition by the wife. There is no prohibition either. On the other hand the claim for damages against the present petitioner, as laid in the suit makes It all the more necessary that she should remain on record.

20. The decisions cited by Mr. De Roze in support of his contentions do not appear to be relevant. The case of Razia Begum Vs. Sahebzadi Anwar Begum and Others, is beside the point. There the appellant asked for 3 declaration that she was the legally wedded wife of respondent No. 8 and that she was entitled to maintenance from him. Respondent No. 3 in his written statement did not dispute that the appellant was married to him. At this stage respondent No. 1 claiming to be the lawful wife of respondent No. 3, and respondent No. 2 claiming to be the son of respondent No. 3 by respondent No. 1 filed an application for being added under Order 1, Rule 10 (2) as persons interested. In view of the fact that a suit for a declaration of status of this kind, the parties actually before the Court are not the only persons affected but that it affects the future generation as well, it was held that they could be joined as persons interested. In the present matter before us we are concerned with the question of exclusion of a party as unnecessary and not the contrary.

21. The case of Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoj Laljee, again is a case which decides a point entirely irrelevant for our purposes. It only lays down that Articles 14 and 15 of the Constitution read together validates the provisions of Section 497 of the Penal Code which prohibits the woman from being punished as an abettor. Mr. De Roze wanted to argue that since a woman cannot be punished as an abettor in a criminal prosecution for adultery, she ought not to be subjected to answer a similar allegation in a civil action. In fact the whole argument of Mr. De Roze is that an alleged female adulteress is not liable to any action either Civil or Criminal and hence she cannot be made a party to the suit.

22. Whether she can be prosecuted or not as an abettor is provided for in the Penal Code itself. She is not. But that does not by implication mean that no relief can be claimed against her in other forums. The Penal Code exonerates her from entirely different considerations. In framing the law the authors of the Code said "The condition of the woman of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his Zennana with woman is a course which we are most reluctant to adopt". The reasoning may not hold good any longer today. Polygamy is gone. The evils which the frames of the law had in their mind no longer exist and it is time when the question of exemption should be reappraised.

23. That however, is a different issue altogether. Impleading the petitioner in a wife's suit for divorce cannot be equated with the provisions of the penal code.

Therefore, this decision relied on by Mr. De Roze is of no avail.

24. The next case cited, *Sobha Ram Vs. Tika Ram*, lays down that a suit by the husband for damages against a person for enticing away his wife, is competent. Instead of supporting the petitioner it indirectly supports the case of the respondent. This decision holds that a husband has a right to the society of his wife and the infringement of the right by any other person is a tort. Conversely it may perhaps be said that 3 person -- male or female -- who infringes the right of the wife to the society of her husband is equally answerable.

25. The case of *Jeedigunta Ananda Lakshmi Vs. Jeedigunta Bhaskara Narasimham and Another*, decides a different point altogether.

26. Finally Mr. De Roze relied on the case of *Ramsay v. Boyle*, (1903) 7 Cal WN 504. In that case the question was whether in a wife's petition for dissolution of her marriage with her husband on the ground of the latter's adultery, the court has jurisdiction to allow the lady with whom such adultery has been alleged to intervene as a party respondent. That was a suit under the Indian Divorce Act which contained special provisions as to who should be made a party and who need not. Their Lordships while holding that though a grievous injustice is done to a person whose conduct is under investigation while he is not able to say a word in his defence, regretted their inability to help the petitioner. That was because of the law as enacted. On principle their Lordships were against the contentions now put forth by Mr. De Roze.

27. There is yet another aspect of the matter from which the matter may be looked into. Order 1, Rule 3 of the Code provides that all persons may be joined in one suit as defendants where (a) any rights to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative and (b) if separate suits were brought against such persons any common question of law or fact would arise. Considered in the light of such provisions it seems that the petitioner was rightly joined in the suit particularly in view of the claim for damages against her. In view of such a claim she is not merely a proper party but a necessary party. A necessary party is one without whom no order can be made effectively while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final adjudication on the questions involved in decision.

28. The Rule relating to joinder of the adulterer as a co-respondent proceeds on public policy to prevent collusion. In that sense the petitioner is a proper party. In order to facilitate the Court in considering the claim for damages, the petitioner is a necessary party. Therefore in any view of the matter it seems the petitioner cannot claim that her name should be struck off under Order 1, Rule 10 (2) of the Code.

29. In the result the revisional application fails and is hereby dismissed.

30. The Rule is discharged.

31. There will be no order for costs.

32. Let the order be communicated to the Court below forthwith.

Anil K. Sen, J.

33. I agree.