

(1974) 08 AHC CK 0015
In the Allahabad High Court
Case No : Second Appeal No. 1501 of 1969

Udai Narain Bajpai

APPELLANT

Vs

Smt. Kusum Bajpai

RESPONDENT

Date of Decision : 12-08-1974

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 6
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 6 Rule 17
Hindu Marriage Act, 1955 — Section 10, 11, 12, 13, 21

Citation : AIR 1975 All 94

Hon'ble Judges : Yashoda Nandan, J

Bench : Single Bench

Advocate : A.K. Banerjee and Santosh Kumar, for the Appellant; S.K. Dhawan, for the Respondent

Final Decision : Allowed

Judgement

Yashoda Nandan, J.—This is an appeal filed by the husband and arises out of proceedings initiated by him u/s 13 of the Hindu Marriage Act (hereinafter referred to as the Act) for dissolution of his marriage with the respondent Smt. Kusum Baipai by a decree of divorce. It was alleged in the petition that the parties had last resided at Kanpur and consequently the court at Kanpur had jurisdiction to entertain the petition. The petition was based mainly on the allegation that the respondent had committed adultery with persons named in paragraphs 9 and 10 thereof. However, those with whom the respondent was alleged to have committed adultery were not impleaded as respondents in the petition. The petition was resisted by the respondent. It was pleaded in defence that the parties had resided together at Lucknow and it was Lucknow court which had jurisdiction and not the court at Kanpur. It was further pleaded that since the appellant had filed his petition for divorce on the ground of adultery but had neither impleaded the alleged adulterers as respondents nor had along with the petition filed a separate application supported by an affidavit as required by Rule 6 (d) of the Rules framed by this Court (hereinafter referred to as the Rules) in

exercise of powers under Sections 14 and 21 of the Act giving reasons for his omission to implead as co-respondents the alleged adulterers, the petition was not maintainable and was liable to be rejected. Issues were framed by the trial court of the issues framed one was with regard to maintainability of the petition in view of its being in disregard of Rule 6 and the other was as to whether the Kanpur Court had jurisdiction to entertain the petition. These two issues were taken up by the trial court as preliminary issues.

2. Before the decision of these issues the appellant filed an application purporting to be under Order 1 Rule 10, Order 6 Rule 17 and Section 151 of the CPC (hereinafter referred to as the Code) praying for permission to amend the petition by impleading the alleged adulterers as co-respondents to the petition. While deciding the issue with regard to the maintainability or otherwise of the petition in view of non-compliance with Rule 6, the trial Court took up the application for amendment of the petition. On the issue of jurisdiction, of the Court at Kanpur to entertain the petition, evidence was led by the parties. The trial Court held that the failure of the appellant to have either impleaded the alleged adulterers as co-respondents or in the alternative to have presented along with the petition an application in accordance with Rule 6 (d) of the Rules did not bar the Court from permitting amendment in the pleadings and allowing the alleged adulterers being impleaded as co-respondents subsequently. In this view of the matter, the learned Civil Judge, Kanpur who tried the petition allowed the application purporting to be under Order 6, Rule 17 read with Order 1, Rule 10 and Section 151 of the Code and permitted the appellant to implead the alleged adulterers as co-respondents in the petition. To compensate the respondent for any inconvenience caused to her the application for amendment was allowed on payment of Rs. 25 as costs. Summonses were ordered to be issued to the newly arrayed respondents. The respondent was allowed to file additional written statement. In the view taken by it, the trial court held that Issue No. 6 which related to the maintainability or otherwise of the petition on account of non-compliance with Rule 6 of the Rules had been rendered infructuous. The trial Court consequently struck off that issue. On a consideration of the evidence led, the trial Court held that the parties had last resided together at Kanpur and consequently the court at Kanpur had jurisdiction to entertain the petition. Issue No. 5 which was concerned with the jurisdiction of the Kanpur court to entertain the petition was accordingly decided in favour of the plaintiff. Both these matters were decided by the learned II Civil Judge, Kanpur by the same order on the 12th of September. 1967.

3. Aggrieved by the decision of the trial Court on the two preliminary issues the respondent Smt. Kusum Bajpai filed an appeal which was heard and decided by the learned II Additional District Judge, Kanpur, by his judgment and order dated the 3rd of May, 1969. The learned Additional District Judge concurred with the finding recorded by the trial Court on Issue No. 5 and held that the petition presented by the appellant was maintainable in the Court at Kanpur. The decision of the trial Court on the application for amendment of the petition was reversed

by the Appellate Court. The learned Additional District Judge took the view that Rules 6 (a) and 6 (d) were mandatory. According to him since the petition was founded on allegations of adultery by the respondent with persons named in the petition it was incumbent for the appellant either to have impleaded as co-respondents the alleged adulterers as required by Rule 6 (a) or to have in the alternative filed along with the petition itself a separate application supported by an affidavit giving reasons for his omission to do so in accordance with Rule 6 (d). The view was taken that the defect in the petition could not be allowed to be rectified subsequently by allowing amendment of the petition. The court below appears to have taken the view that Order 6, Rule 17 and Order 1, Rule 10 of the Code were inconsistent with Rules 6 (a) and 6 (d) and consequently had no application to proceedings u/s 13 of the Act go as to permit the addition as parties the adulterers at a subsequent stage. In this view of the matter the court below allowed the appeal with costs to the respondent Smt. Kusum Bajpai and set aside the order of the trial Court allowing amendment of the petition and its finding on issue No. 6. The petition u/s 13 of the Act itself was dismissed.

4. Aggrieved by the order of the court below the husband has appealed. It has been urged that u/s 28 of the Act no appeal lay against the order of the trial Court allowing amendment of the petition by addition of the alleged adulterers as respondents in the petition, and consequently the order of the court below appealed against was without jurisdiction and unsustainable in law. It was contended that against mere findings recorded on preliminary issues in a petition u/s 13 of the Act no appeal is contemplated by the Act. On the other hand learned Counsel for the respondent urged that Section 28 of the Act permits appeals against "all decrees and orders made by the Court in any proceeding under this Act", and since the order passed by the trial Court undisputably was an order in proceedings u/s 13 of the Act, Section 28 of the Act in terms was attracted and the order of trial Court was appealable. On a consideration of Section 28 of the Act I am of the view that the objection taken on behalf of the appellant with regard to the maintainability of the appeal before the Lower Appellate Court has substance and must prevail. Section 28 of the Act runs as follows:--

"All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under any law for the time being in force,"

According to the learned Counsel appearing for the respondent every variety of order, interlocutory or otherwise passed by a Court in any proceeding under the Act is appealable u/s 28 of the Act. This contention, in my opinion, has no merit. It has been held by various courts which had occasion to interpret Section 28 of the Act that it provides a substantive right of appeal to a party to proceedings under the Act and the words "under any law for the time being in force" merely are intended to provide that the forum for an appeal, the jurisdiction of the court

entertaining the appeal and the procedure during the appeal shall be in accordance with any other law for the time being in force. This is the view taken by the Calcutta High Court in Smt. Sobhana Sen Vs. Amar Kanta Sen, : Anita Karmokar and Another Vs. Birendra Chandra Karmokar, : Rukhmanibai Vs. Kishanlal Ramlal, ; Kadia Harilal Purshottam Vs. Kadia Lilavati Gokaldas, and D.S. Seshadri Vs. Jayalakshmi, . I agree with the view taken in the above mentioned decisions that the right of appeal against decrees or orders passed in proceedings under, the Act has to be found in Section 28 of the Act itself and we do not have to look to any other law for that purpose.

5. There are various provisions in the Act which provide for the passing of decrees or orders in proceedings under the Act, Proceedings under Sections 9, 10, 11, 12 and 13 of the Act lead to "decrees" under the Act while proceedings under Sections 24, 25 and 26 are determined by "orders" passed under the Act. When Section 28 speaks about decrees and orders made by the court in any proceeding under the Act it contemplates decrees passed under Sections 9, 10, 11, 12 and 13 of the Act and orders passed under Sections 24, 25 and 26. The words "decrees and orders" in Section 28 have reference only to decrees and orders designated and described as such in the Sections of the Act mentioned above and not to various other interlocutory orders which a Court must of necessity be called upon to pass during proceedings under it.

6. By reason of Section 21 of the Act subject to its provisions and to such rules as the High Court may make in that behalf proceedings under the Act are to be regulated as far as may be by the Code. Thus while deciding petitions under various sections of the Act mentioned above the court concerned has to follow the procedure prescribed by the Code in so far as such procedure may be applicable. Before a decree is passed by the Court in proceedings under Sections 9, 10, 11, 12 and 13 or orders are passed under Sections 24, 25 and 26 the Court at interlocutory stages is bound to pass various orders. For instance the Court has to issue summons for service on the respondent. It may be required to adjourn the case or to pass an order of stay or to issue an interim injunction against a party to the proceedings. Orders of the nature mentioned above are not orders or decrees passed under the Act and are not appealable u/s 28. They are orders passed under the Code. In certain decisions the view has been taken that orders other than those treated as such by the Act and passed under the Code are appealable not u/s 28 of the Act but u/s 104 read with Order 43, Rule 1 of the Code. In this appeal I am not called upon to decide as to whether the orders passed by the trial Court could be appealed against u/s 104 and Order 43, Rule 1 of the Code because they are not orders of the nature provided for in those provisions of the Code. The decrees and orders appealable u/s 28 of the Act are the ultimate decrees and orders treated as such by the Act itself. Since neither of the order of the trial Court allowing amendment of the petition by addition of the alleged adulterers as co-respondents nor its decision on Issue No. 5 were either decrees or orders contemplated by the Act, I have no hesitation in holding that no appeal lay against them. The order of the courts below is liable to

be set aside on this ground alone.

7. Even on merits the view taken by the Lower Appellate Court that the trial Court had no jurisdiction to permit amendment of the petition in exercise of powers under Order 6, Rule 17 and Order 1, Rule 10 of the Code by addition of the alleged adulterers as co-respondents cannot legally be justified.

8. Section 21 of the Act which makes provisions of the Code applicable to proceedings under the Act runs as follows:--

"Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908."

As already stated that court has taken the view that the provisions of Order 1, Rule 10 (2) and Order 6, Rule 17 are inconsistent with Rules 6 (a) and 6 (d) framed by this Court and consequently have no application so as to empower a court trying a petition u/s 13 of the Act to permit amendment of the petition by addition of the adulterers as co-respondents once a petition not complying with these rules has been presented. It has been held that Rules 6 (a) and 6 (d) are mandatory and failure to strictly comply with them cannot be rectified subsequently by taking recourse to Order 1, Rule 10 (2) and Order 6, Rule 17 of the Code. The question consequently arising for consideration is as to whether Rules 6 (a) and 6 (d) are mandatory in the sense that if a petition u/s 13 as originally presented does not conform to them the defect cannot be subsequently removed and as to whether there is any legal real inconsistency between the provisions of those rules and Order 1, Rule 10 (2) and Order 6, Rule 17 of the Code. Rule 6 of the Rules framed by this Court in exercise of powers conferred on it by Sections 14 and 21 of the Act as far as are relevant for our purposes runs as follows:--

"6 (a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make the alleged adulterer or adulterers a co-respondent to the petition unless he or she is excluded by the Court from doing so on any of the following grounds:

(i) That the name of such person is unknown to the petitioner although he has made due efforts for discovery;

(ii) that such person is dead;

(iii) that the respondent if a woman is leading the life of a prostitute and that the petitioner knows of no person with whom adultery has been committed; or

(iv) any other reason that the court considers sufficient.

(b)

(c)

(d) If a petitioner does not make the alleged adulterer or adulteress a co-respondent he shall at the time of presenting the petition file a separate application supported by an affidavit giving the reasons."

It is a special requirement of the rule extracted above that in a petition for divorce based on the ground of adultery the alleged adulterer must be impleaded as a co-respondent or in the alternative the petition must be accompanied by a separate application supported by an affidavit giving reasons for failure to implead the adulterer as party to the proceedings. Neither the Rules nor the Code provide that if there is non-compliance with Rule 6 (a) or 6 (d) the petition must be rejected. On the other hand, Order 1, Rule 9 of the Code specifically provides that no proceedings shall be defeated merely because of non-joinder of any party. In order to find out as to whether the requirements of Rules 6 (a) and 6 (d) are mandatory in the sense that failure to comply with them at the stage of presentation of the petition itself would entail rejection or dismissal of the petition and there is no scope for rectification of the omissions, we must examine the scope and object of the rules. It was held by the Supreme Court in *Banwarilal Agarwalla Vs. The State of Bihar and Others*, , that:

"As has been recognised again and again by the courts, no general rule can be laid down for deciding whether any particular provision in a statute is mandatory, meaning thereby that non-observance thereof involves the consequence of invalidity or only directory, i.e., a direction the non-observance of which does not entail the consequence of invalidity, whatever other consequences may occur. But in each case the court has to decide the legislative intent. Did the legislature intend in making the statutory provision that non-observance of this would entail invalidity or did it not ? To decide this we have to consider not only the actual words used but the scheme of the statute, the intended benefit to public of what is enjoined by the provisions and the material danger to the public by the contravention of the same,"

9. When divorce is sought on imputation of adultery by the respondent spouse with persons named and known evidence is bound to be led to establish such adultery. In such an event the court will be called upon to decide and hold as to whether the contesting respondent has or has not been guilty of adulterous relations with persons mentioned in the petition. It would be contrary to all rules of natural justice that a Court deciding a petition u/s 13 of the Act should record a finding destroying the character and reputation of those alleged to have adulterous relations with the respondent spouse without their being provided an opportunity to defend themselves. It is to prevent such injustice that Rule 6 (a) provides that the alleged adulterer shall be impleaded as a co-respondent unless the petitioner is excused by the court for doing so on the grounds mentioned in that rule itself. Rule 6 (d) goes on to prescribe that in case the alleged adulterer or adulterers are not impleaded as co-respondent in the petition, the petition shall be accompanied by an application supported by an affidavit giving reasons for the petitioner's failure to do so. The object of Rule 6 (d) is merely to provide

a procedure by which the petitioner is required to satisfy the court that he had sound reasons for not impleading the adulterer or adulterers as co-respondent to the petition. Another object of the rules is to prevent collusive divorces. The objects sought to be achieved by the rules would not be defeated merely because in the petition as initially presented neither the alleged adulterer or adulterers are impleaded as respondents nor is the petition accompanied by an application and affidavit disclosing the reasons for the petitioner's failure to do so. The objective of the rules under consideration can well be achieved even if at a subsequent stage the defects are removed. I am consequently of the opinion that Rules 6 (a) and 6 (d) are not mandatory in the sense that failure to comply with them leaves the court with no option but to reject or dismiss the petition. I am consequently of the opinion that there is no inconsistency between Rules 6 (a) and 6 (d) on the one hand and Order 6. Rule 17 and Order 1, Rule 10 of the Code on the other and that even if in the petition as originally filed the alleged adulterers are not impleaded as co-respondents and the petition is also not accompanied by an application and an affidavit explaining the reasons for the petitioner's failure to do so in appropriate cases the court has jurisdiction to permit amendment of a petition u/s 13 of the Act and allow the alleged adulterers to be added as co-respondents.

10. There is yet another reason which leads me to the same conclusion if the petition does not comply with the requirements of Rule 6 (a) or 6 (d), the Court concerned can at best reject it in exercise of powers under Order 7, Rule 11 of the Code. It has been held in *Radha Kishan v. Wali Mohammad* ILR (1956) Hyd 514 : AIR 1956 Hyd 133) and the various authorities relied upon therein that Order 7, Rule 11 is not exhaustive of the grounds on which a plaint can be rejected and the court can reject the plaint on other grounds also, if it does not comply with the requirements of law. If a petition u/s 13 of the Act is rejected on the ground that it is not in accordance with the requirements of Rule 6 (a) or 6 (d), the petitioner would not be debarred from presenting another petition seeking divorce on the same grounds as alleged in the earlier petition on the principle of Order 7, Rule 13 of the Code. By presenting another petition u/s 13 of the Act, the petitioner would thus achieve the same result as he could by obtaining an order for amendment of the petition permitting impleading of the alleged adulterers as co-respondents. It is inconceivable that this Court while framing Rule 6 as a mandatory measure intended it to serve no fruitful purpose. The trial Court was thus legally competent to allow the appellant's application for amendment of his petition and permit the alleged adulterers to be impleaded as co-respondents and the view to the contrary taken by the court below is erroneous. Considerable support to the view taken by me is provided by the decision in *William Percy Bowman v. Harriet Dorothy Bowman* AIR 1942 All 223. That decision was rendered in a matrimonial suit instituted in this Court. The material facts giving rise to the decision were that the husband petitioned this Court for a decree for dissolution of his marriage with his wife on the ground of alleged adultery by her with an unknown person. It was alleged in the plaint with

regard to the alleged adultery that the petitioner had received a letter from his wife in which she had confessed that she was pregnant by a man who was not the petitioner. The letter which was filed by the petitioner did not disclose the name of the father of the child. In the petition itself by the last line of the relief the petitioner asked to "be allowed to proceed with the suit without making the adulterer a co-respondent." No separate application had been made to dispense with the necessity of adulterer being impleaded as a co-respondent and presumably the petitioner relied on being granted that indulgence at the trial itself. It was held that this was both contrary to law and contrary to public interest. Section 11 of the Indian and Colonial Divorce Jurisdiction Act applied to the case. The section made it obligatory on the husband petitioning for dissolution of marriage on the ground of adultery to make the alleged adulterer a co-respondent unless he was excused from doing so on one of the three grounds mentioned in the section. One of the grounds on which the petitioner could be excused from impleading the alleged adulterer as a co-respondent was that the name of the alleged adulterer remained unknown to the petitioner although he had made due efforts to discover it. It was held by the learned Judge who decided the case that,

"When the legislature enacted that the co-respondent must be made a party to divorce proceedings at the instance of the husband, it did so for a very good reason, in order to prevent any form of collusive divorce. It is, therefore, not a mere formality to dispense with the presence of the co-respondent. But the legislature has also recognised that in certain specific cases it may be impossible to know who he is.

In the present case all there is, is a mere letter written by the wife to the husband in "which she refused to divulge the name of the co-respondent. There is no evidence whatever that the petitioner has made the slightest effort to discover who the co-respondent is. The matter does not quite end there because it has been established both by the practice of English Courts and by a long series of cases that until leave to dispense with the presence of the co-respondent has actually been obtained, the suit cannot proceed. It is not sufficient to apply for leave at the trial. A formal application has to be made before the trial and it has to be supported by proper evidence that the conditions of Section 11 of the Act have been complied with. For these reasons, I cannot treat the present suit as being in a fit condition to proceed to trial and I cannot, therefore, settle any issues in it. All I can do at this stage is to adjourn the settlement of issues for a period of six weeks, in order to enable a proper application to be made."

11. The requirements of Section 11 were very similar to those of Rules 6 (a) and 6 (e) under consideration. Though the requirements of Section 11 had not been complied with, this Court instead of rejecting the petition allowed time to the husband to take steps to rectify the error. If non-compliance of Section it had been considered to be mandatory, this could not have been done and the learned

Judge would have had no option but to reject the petition for divorce.

12. Learned Counsel for the respondent also placed reliance on the decision in AIR 1942 All 223 (supra) for the purpose of contending that till such time as the appellant's application for amendment of his petition by addition of the alleged adulterers as co-respondents was allowed and the petition was amended accordingly, it was not in accordance with law and not maintainable. It was urged that till the co-respondents were impleaded it was not open to the court either to frame issues in the petition or admit evidence on Issue No. 5 and consequently the framing of the issues by the trial Court as well as the finding on Issue No. 5 are without jurisdiction. There is force in this contention which must be accepted.

13. I consequently while allowing the appellant's appeal and setting aside the order of the court below, in exercise of my powers under Article 227 of the Constitution quash the order of the trial Court framing issues in the petition and the finding on Issue No. 5. The trial Court will proceed afresh with the petition from the stage the alleged adulterers are impleaded as co-respondents to the petition and frame issues after all the respondents are duly served. The evidence already recorded shall not be treated as evidence in the case. In the circumstances of the case, parties shall bear their own costs of this appeal.