

(2016) 06 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition Nos. 70 and 341 of 2016

Vivekanand Karekar

APPELLANT

Vs

Sneha Karekar alias Shilpa Karekar

RESPONDENT

Date of Decision : 30-06-2016

Acts Referred:

Citation : (2016) 4 ALLMR 918 : (2016) 6 BCR 73 : (2017) 1 DMC 705 : (2016) 5 MhLJ 366

Hon'ble Judges : C.V. Bhadang, J.

Bench : Single Bench

Advocate : Mr. S.N. Joshi and Ms. S. Mandrekar, Advocates, for the Appellant;
Ms. S. Gawas, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

C.V. Bhadang, J.(Oral)—Rule in both the petitions. The learned Counsel for the respondent waives service. Heard finally, by consent of parties.

2. Both these petitions are between the same parties and can be conveniently disposed of by this common judgment.

3. The petitioner has filed Matrimonial Petition No. 51/2013 against the respondent, for annulment of marriage under Articles 18, 19 and 20 read with Articles 1, 2 and 3 of Law of Marriage, which petition is pending before the learned Senior Civil Judge at Bicholim.

4. The case made out in the petition is that the respondent is a transgender and as such, is not able to discharge the matrimonial obligations.

5. The petitioner filed an application (Exhibit-24), for a direction to the respondent to subject herself for medical examination. It was contended that looking to the controversy involved, it is necessary that the respondent is medically examined. That application, was opposed by the respondent.

6. The learned trial Court by the impugned order dated 03.02.2016, has

dismissed the said application, which is subject matter of challenge in Writ Petition No. 341/2016.

7. It is contended on behalf of the petitioner that the learned trial Court was in error in rejecting the application on the ground that such a direction will affect the right of privacy of the respondent. The learned Counsel further submits that the learned trial Court could not have placed reliance on the decision in the case of National Legal Services Authority v. Union of India and Others, passed in Writ Petition (Civil) No. 400/2012 and Writ Petition (Civil) No. 604/2013 dated 15.04.2014. The learned Counsel has placed reliance on the decision of the Hon"ble Apex Court in the case of Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another, (2010) 8 SCC 633 and Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365. It is submitted that the application could not have been dismissed on the ground of the right of privacy of the respondent being affected.

8. The respondent/wife, filed an application (Exhibit D-18), for interim maintenance purportedly, under Section 24 of the Hindu Marriage Act, 1955 and the learned trial Court, by the impugned order dated 08.04.2015 granted interim maintenance of Rs. 5,000/- per month. That is challenged by the petitioner in Writ Petition No. 70/2015.

9. It is contended on behalf of the petitioner that the application under Section 24 of the Hindu Marriage Act, 1955, was not maintainable in as much as the provisions of the said Act are not extended to the State of Goa.

10. In reply, the learned Counsel for the respondent pointed out the Marriage Registration Certificate dated 03.12.2010, issued by the Registrar of Marriages, Belgaum (Karnataka). It is submitted that the parties are not domiciled in Goa. The marriage was solemnized at Belgaum, (Karnataka), in accordance with the Hindu Marriage Act and the marriage is also registered under the said Act.

11. The learned Counsel for the respondent submits that the respondent has filed an application under Order 7, Rule 11 (d) of the Civil Procedure Code (CPC) before the trial Court, for rejection of the petition on the ground of want of jurisdiction, which application is pending. The learned Counsel has supported the impugned orders.

12. On hearing the learned Counsel for the parties, I find that both the applications, namely, the one filed by the respondent for interim maintenance, as also the application filed by the petitioner, for a direction to the respondent to subject herself for medical examination, presuppose that there is properly constituted Marriage Petition, pending before the competent Court. In other words, unless the Marriage Petition is shown to be ex-facie maintainable, the application for maintenance and/or the application seeking direction to the respondent to subject herself to medical examination, cannot be considered.

13. I find that there is an arguable issue, which arises as to the maintainability of

the petition under the local Family Laws, which goes to the root of the matter. I would hasten to add that this Court has not expressed any opinion on the rival contentions in this regard and the learned trial Court shall decide the application under Order 7, Rule 11 (d) of CPC on its own merits.

14. However, in as much as the application filed by the respondent under Order 7, Rule 11 (d) of CPC, is pending before the trial Court, Mr. Joshi, the learned Counsel appearing for the petitioner, in all fairness states that the application (Exhibit- 24) seeking direction to the respondent to subject herself for medical examination, can be sent back to the trial Court for deciding the same afresh. The learned Counsel for the respondent has no objection for the same.

15. This takes me to the issue of interim maintenance. It is the contention of the petitioner that as he has been since placed under suspension, he is unable to pay maintenance to the respondent. It is also contended that the respondent is working and is able to maintain herself. It is contended that this aspect has not been considered by the learned trial Court.

16. On the contrary, it is submitted by the learned Counsel for the respondent that the petitioner has reached the respondent to her maternal place and has neglected to maintain her. She submits that being an able bodied person, the petitioner is liable to maintain the respondent.

17. I find that as per the order dated 20.01.2016 passed by this Court, the petitioner is depositing an amount of Rs. 1,500/- per month, towards maintenance. I find that the petitioner can be directed to continue to deposit the said amount, till the application for interim maintenance is decided by the trial Court. In the event, the application under Order 7, Rule 11 (d) of CPC is decided against the respondent and the petition is held to be maintainable, the trial Court shall hear and decide the application for maintenance afresh. In other words, the petitioner shall continue to deposit Rs. 1500/- per month, as an ad-interim relief, till the trial Court decides the application for interim maintenance. The amount deposited before this Court shall be transferred to the learned trial Court, which shall pass appropriate orders, after hearing the parties in accordance with law.

18. In such circumstances, the following order is passed:

ORDER

- (a) Writ Petition No. 70/2016 and Writ Petition No. 341/2016, are partly allowed.
- (b) The impugned order dated 08.04.2015 (below Exhibit D-18) and the order dated 03.02.2016 (below Exhibit 24), are hereby set aside.
- (c) The applications (Exhibit D-18 and Exhibit-24), are sent back to the trial Court for deciding the same afresh, in the event, the application under Order 7, Rule 11 (d) of CPC is dismissed and the petition is held to be maintainable.
- (d) The petitioner shall continue to deposit Rs. 1500/- per month as ad interim relief, till the application (Exhibit D-18) is decided.

(e) The amount deposited before this Court shall be transferred to the learned trial Court, which shall pass appropriate orders, after hearing the parties in accordance with law.

(f) The learned trial Court shall decide the application under Order 7, Rule 11 (d) of CPC as expeditiously as possible and preferably within a period of three months from the receipt of this order.

(g) All the rival contentions of the parties are left open.

(h) Rule is made absolute in the aforesaid terms, with no order as to costs.