

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1109 OF 2015
IN
WRIT PETITION NO.3409 OF 2013
with
WRIT PETITION NO.3409 OF 2013

Mrs.Annie Kurian nee Sebastian ... Petitioner

Vs.

Ms.Rachana Prasad Acharya & anr. ... Respondents

Ms.V.V. Thorat i/b Ms.Pratibha Shelake for the Petitioner

Ms.Rachana Prasad Acharya, Respondent No.1 – present in person

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: JULY 9, 2015

P.C.:

1. This Court by its order dated 5.7.2013 granted Rule in the Writ Petition and pending the Writ Petition, the proceedings of Marriage Petition No.A-1756 of 2011 was stayed as against the present petitioner. The petition was filed on the ground of cruelty and adultery i.e., under section 27(1)(a) and 27(1)(d) of the Special Marriage Act, 1954 and also for several reliefs in the nature of maintainance under sections 36, 37 and 38 of the Special Marriage Act. The original petitioner/wife has made allegations against the original respondent/husband having adulterous relationship with the present petitioner/applicant and so she was made

party respondent No.2 in the marriage petition. The present applicant/petitioner prayed for deleting her name from the said divorce petition on the ground of misjoinder of parties as she who is joined as respondent No.2, is not a necessary party to the said divorce petition. The said application at exhibit 64 was rejected by the learned Judge of the Family Court under the provisions of Order 1 Rule 10(2) of the Civil Procedure Code and under Order 7 Rule 11 of the Code. The said application below exhibit 64 was rejected by the learned Judge by order dated 4.2.2013, which is under challenge. During the pendency, this Civil Application No.1109 of 2015 is preferred by the petitioner that the order dated 13.1.2015 passed by the Family Court be quashed and set aside and pending the hearing and final disposal of the main writ petition, the proceedings in the Marriage Petition No.A-1756 of 2011 be stayed. So also, issue No.1 framed by the learned Judge of the Family Court by its order dated 13.1.2015 be deleted.

2. During the pendency of this Writ Petition and when the order of this Court dated 5.7.2013 of staying the proceedings against Respondent No.2 was in force, the learned judge of the Family Court framed the issues and the issue No.1 is "Does the petitioner prove that after her marriage with the respondent, the respondent had voluntary sexual intercourse with the co-respondent?" Hence, the application was made and therefore the Writ Petition is heard finally alongwith the application.

3. The learned Counsel for the petitioner has submitted that this Court after considering the pleadings in the marriage petition, found that prima facie, no case is made out against Respondent No.2 on the ground of adultery and therefore, has granted interim stay. Therefore, the Family Court ought not to have framed the first issue of adultery and should have conducted the trial on the ground of cruelty simpliciter. She read over the pleadings in the marriage petition and pointed out that nowhere in the entire petition, the respondent/wife has said that the petitioner and the original respondent No.1 – husband had sexual intercourse at any time. She submitted that as per the requirement u/s 27(1)(d) of the Special Marriage Act, it is necessary for the petitioner to plead averments in respect of the respondent having sexual intercourse when the other spouse is alive and without the consent of the spouse. The details pertain to her suspicion about the character of her husband, which cannot fulfill the requirement under the law. She further submitted that the petitioner is a married woman having children and she was a lawyer of the respondent/husband. She argued that a lady lawyer cannot be subjected to such allegation of adultery when she is doing her duty towards her client. Such wild and stray allegations have adversely affected the family life and reputation of the petitioner.

4. The respondent/wife appearing in person has supported the order passed by the learned Judge of the Family Court. She argued that she

has proof to show that her husband and the petitioner were having sexual relationship. There are many instances and evidence and she can produce them accordingly.

5. Section 27(1)(a) reads as under:

- 27 ...
- (1) ...
- (a) has, after the solemnization of marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
- (b) ...
- (c) ...
- (d) ...
- (e) ...

6. Under section 27 physical advances or mere flirting is not contemplated as adulterous behaviour but there should be an instance of sexual intercourse. It is true that in the marriage petition, the respondent/wife has nowhere stated that the husband and the petitioner had sexual intercourse. She has mentioned in para 42 of her petition that the respondent is having illicit relationship with a woman, namely, the petitioner. In reply, the learned Counsel for the petitioner submitted that having illicit relationship cannot be equated with having sexual intercourse. The submissions of the learned Counsel are incorrect. True, for sexual intercourse, illicit relationship is not a synonym. However, the Oxford dictionary meaning of the word "illicit" is forbidden by law, rules, "custom". Thus, the word 'illicit relationship' is a very wide term. Thus, it is taken as a genus and sexual intercourse is a species. Thus, there may

be different types of relationships which are not approved either morally or by society or due to custom. However, a relationship can be such which is forbidden by law comes under the umbrella of illicit relationship.

7. The Family Court has rightly held that adultery under the criminal law, which is a cohabitation, is required to be proved beyond doubt. However, the same act i.e., the sexual intercourse under the civil law can be proved on the basis of preponderance of probabilities. Thus, the degree of proof required to prove the same act under the civil law and under the criminal law is different. So also the appreciation is. Under such circumstances, in this petition, discussion of the proposed evidence and its evaluation cannot be done as it is a Writ Petition wherein the Court has to see whether the cause of action is made out against the respondent or not and that is to be seen only on the basis of the averments made in the pleadings. In the petition, a number of details are mentioned about the association of the petitioner and the respondent/husband. However, it is to be tested at the time of the trial.

8. In the circumstances of the case, I do not find any reason to interfere with the impugned order. Hence, the petition and the application are dismissed.

(MRS.MRIDULA BHATKAR, J.)