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HIGH COURT OF DELHI AT NEW DELHI

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MAT. Appeal No.32/2009

Decided on : 28th May, 2015

SUMAN KUNDRA

..... Appellant

Through: Mr. A.S. Chandhiok, Senior Advocate
with Mrs. Avnish Ahlawat & Ms. Rashmi
Chopra, Advocates.

Versus

SANJEEV KUNDRA

..... Respondent

Through: Mr. Jai Bansal & Mr. Nath Mohan
Prafulla, Advocates.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This is an appeal filed under Section 28 read with Article 227 of the Constitution of India by the appellant against the order dated 16.3.2009 by virtue of which the application of the appellant for dismissal of the petition for divorce filed by the respondent herein under Section 13 (i) (a) of the Hindu Marriage Act was sought to be dismissed on the ground that the marriage between the parties had been contracted under the Special Marriage Act, therefore, the petition for divorce ought to have been filed under the Special Marriage Act.

2. The question which is arising for consideration is as to whether the court can reject an application for dismissal of the divorce petition which has been filed under the Hindu Marriage Act on the ground of cruelty and desertion when admittedly the parties have contracted a marriage under the Special Marriage Act and yet give a direction *suo motu* to the respondent to amend the petition.

3. Both Mr. Chandhiok, the learned senior counsel for the appellant and Mr. Jai Bansal, the learned counsel for the respondent have vehemently canvassed for their point of view with number of judgments but before dealing with their respective submissions, it may be pertinent here to give a brief background of the case.

4. The respondent/petitioner filed a petition against the appellant/wife for grant of divorce under Section 13 (i) (a) and (i) (b) of the Hindu Marriage Act on the grounds of cruelty and desertion. It was not disputed that the parties are Hindu by religion and got married on 29.10.1986 as per Hindu rites and ceremonies. The marriage though a love marriage could not continue for very long and the relationship soured as a consequence of which the marriage got dissolved by a decree of divorce on 2.6.1988.

5. After the decree of divorce having been passed, the parties were drawn against each other once again and they decided to get re-married for second time. This time on 3.5.1990, the marriage was solemnized before a Marriage Officer, Tis Hazari Court, Delhi under the Special Marriages Act. The parties could not reconcile their inherent differences and the husband on 21.07.2005 filed a petition for divorce on the ground of cruelty and desertion under Section 13 (i) (a) and (i) (b) of the Hindu Marriage Act.

6. The appellant contested the petition and filed her written statement on 8.9.2005. Issues were framed on 27.9.2008 and the case was set down for trial. The respondent/petitioner filed his affidavit of evidence on 28.11.2008 and 7.1.2009 and the case was adjourned to 11.2.2009.

7. On 9.2.2009, the appellant/defendant filed an application under Section 151 CPC seeking dismissal of the petition on the ground that a false averment has been made in the petition with regard to the status of the respondent/petitioner and further that the divorce petition has been filed under HMA while as admittedly the marriage has taken place under Special Marriage Act. Therefore, the petition on the face of it was not maintainable.

8. The respondent/petitioner filed his reply to the application and stated that the petition for divorce cannot be dismissed on account of the error which has crept in the petition with regard to the mentioning of the provision for grant of divorce which admittedly was cruelty and the said ground of cruelty apart from being a ground under Section 13 (1) (a) of the HMA is also a ground for grant of divorce under Section 27 of the Special Marriage Act. It was also contended that the learned ADJ who is to try the divorce petition under the HMA is also to try the divorce petition under the Special Marriage Act and therefore, this being only a technical objection should not come in the way of processing and dealing with the petition on merits.

9. The learned ADJ after hearing the arguments of both the sides dismissed the application of the appellant by holding that he has the jurisdiction to entertain the petition for divorce both under the HMA as well as Special Marriage Act and the cruelty being a ground for divorce under both the Acts, therefore, the petition could continue as there is a cause of action for the same. However, while dismissing the application, the learned Judge distinguished the judgment relied upon by the appellant in *Harshad Chiman Lal Modi vs. DLF Universal & Anr.*; (2005) 7 SCC

791, which was relied upon by them in order to contend that a forum which did not have the jurisdiction could not entertain the same. These judgments were distinguished by the learned ADJ by observing that they related to territorial jurisdiction and not to subject-matter jurisdiction which admittedly the ADJ had in the instant case. The learned ADJ in support of his reasoning relied upon two judgments cited by the learned counsel for the respondent/petitioner to contend that it had the jurisdiction because the ground of cruelty was a ground for which a provision existed as a ground for divorce under both the enactments. The cases relied upon are titled *Anupam Das v. Smt. Mampi Das*; AIR 2008 Gau (3) 2007 and *Prabir Chandra Chatterjee vs. Kaveri Guha Chatterjee*; AIR 1987 Calcutta 191.

10. I have heard both Mr. Chandhiok, the learned senior counsel for the appellant as well as Mr. Jai Bansal, the learned counsel for the respondent.

11. Mr. Chandhiok, the learned senior counsel for the appellant has made the following submissions :-

12. The first contention is that if the marriage is solemnized under the Special Marriage Act, then one cannot invoke the jurisdiction of the court

exercising the powers under Hindu Marriage Act as in that case, the court will not have the jurisdiction over the subject-matter unless and until it is not a family court under the Family Court Act. In order to support his submissions, he has placed reliance on *Stephen Joshus & Anr. Vs. JS. Kapoor*; (1995) 58 DLT 57; *Mohan Raj vs. Violet Chandra*; (1993) 1 ALL India HLR 108; and *D. Jacintha Kamath vs. K. Padmanabha Kamath*; AIR 1992 Kant 372.

13. In Stephen Joshus's case (supra), the question which had arisen was whether a Christian married under the Christian Marriage Act could be granted divorce on the basis of mutual consent under Special Marriage Act. The submission which was made before the Hon'ble High Court of Delhi was that since under the Special Marriage Act, 1954, mutual consent is a ground of divorce it is equally applicable to all the citizens of India irrespective of the fact that as to whether the marriage is solemnized under the same or other provisions of law. Section 28 of the Christian Marriage Act does not create a bar on grant of divorce by mutual consent.

14. This contention was negated by the High Court stating that the divorce can be granted only on the grounds which are available under a particular act under which parties have got married meaning thereby that since parties were married under the Christian Marriage Act and under the said Act there was no provision for grant of divorce by mutual consent and therefore their marriage could not be dissolved by mutual consent. Similar is the judgment in *Mohan Raj's case (supra)*.

15. In *D. Jacintha Kamath's case (supra)* the question which had arisen was whether a Christian marriage where one of the parties is Hindu can be dissolved by a decree of divorce under Section 13 of HMA at the instance of either of the parties. This contention was also negated by Karnataka High Court on the ground that for the purpose of dissolution of marriage under Hindu Marriage Act the parties have to be necessarily Hindus and married according to Hindu rites and ceremonies, customary or ones which are prescribed under the said Act.

16. None of the aforesaid three judgments, in my view, are helpful to the petitioner because the ground on the basis of which the divorce is sought in the instant case is cruelty and/or desertion under the Hindu Marriage Act which are also the grounds under the Special Marriage Act.

Therefore, the question which arises for consideration is whether a divorce petition under Section 13 of HMA filed by one of the parties both being Hindu but married under Special Marriage Act, be dismissed merely on the premise that the same ought to have been filed under Section 27 of Special Marriage Act.

17. In the instant case, the learned Trial Judge had rejected the application of the appellant/wife for dismissal of the divorce petition holding that such a petition for divorce was maintainable and the only mistake which had taken place was instead of mentioning the relevant provisions for grant of divorce under the Special Marriage Act, the provisions of the Hindu Marriage Act were mentioned.

18. It has been contended by Mr. Chandhiok that no doubt under the Family Courts Act, it is the same Family Judge who deals with the personal laws and the matrimonial laws of all the religions, but before the constitution of the family courts as this is an old case, the jurisdiction is vested with the District Judge and it is not necessary that the same District Judge may be assigned the task. Therefore, there will be lack of jurisdiction to entertain the petition by the District Judge which passed the impugned order.

19. What is involved in the present case is special jurisdiction and admittedly it cannot be said to be inherent lack of jurisdiction to entertain a matter with regard to the special jurisdiction that a matter pertaining to personal law or a law pertaining to grant of divorce by the Trial Judge. The reason for this is that the Trial Judge under the Hindu marriage as well as the Special Marriage Act has to be the District Judge and incidentally in the instant case, it is the same additional District Judge who is to decide the application for amendment both under the Special Marriage Act and the Hindu Marriage Act.

20. Therefore, the same District Judge dealing with the divorce petition under the Hindu Marriage Act as well as Special Marriage Act in my view does not lack the jurisdiction to entertain the application of the respondent.

21. It may also be stated that objections with regard to the jurisdiction so far as the subject matter is concerned, ought to have been taken by the respondent at the earliest possible stage to avoid wastage of time and energy of both the litigants as well as of the court staff. In the instant case, the matter has been filed in 2005 the evidence by way of affidavit has been filed in 2008 and the cross examination of the witness is yet to

be completed. The matter has been pending now in courts for the last more than a decade and, therefore, to dismiss the divorce petition on the ground of lack of inherent jurisdiction when the same is due to an inadvertent drafting error which can be corrected by an amendment simplicitor, would be to take a hyper technical view by this court when the thrust of the concern in matrimonial matters should be the question of grant/non grant of divorce and other ancillary reliefs to the parties.

22. The learned senior counsel's arguments flow from the assumption as if the divorce under the Special Marriage Act and the divorce petition under HMA are dealt with by two different authorities. Both the powers are with the same District Judge.

23. I do not agree with this submission of the learned senior counsel for the appellant for the simple reason as stated above that in the instant case it is the same District Judge who was hearing the objections for grant of divorce, restitution of conjugal rights as well as grant of maintenance and other peripheral orders.

24. Therefore, this contention of the learned senior counsel in view of the aforesaid does not persuade me to accept his argument.

25. The second submission is that wrong mentioning of provision is different from invoking jurisdiction under a different statute. Reliance in this regard is placed on *Jeet Mohinder Singh vs. Harinder Singh*; (2004) 6 SCC 256.

26. In *Jeet Mohinder Singh*'s case (*supra*), the Supreme Court has dealt with the purpose of mentioning the correct provision for filing the application and it was held as under:

6. Though the nomenclature of an application is really not material and the substance is to be seen, yet it cannot be said that a party shall be permitted to indicate any provision and thereafter contend that the nomenclature should be ignored. Duty is cast on the parties to properly frame their applications and indicate the provisions of law applicable for making the application. Nomenclature may not be normally material. But there is a purpose in indicating the nomenclature in a clear and precise manner. Though it is the substance and not the form which is material but as indicated above, that cannot be a reason to quote an inappropriate provision of law and then say "Don't look at the nomenclature". The care and caution which is required to be taken cannot be diluted to absurd limits. The care and caution required to be observed while making an application in the highest Court of the State are sadly missing in this case. Order XVIII Rule 17 deals with recall and examination of a witness and reads as follows:

"The Court may at any stage of a suit recall any witness who has been examined and

may subject to the law of evidence for the time being in force put such questions to him as the Court thinks fit."

27. In the aforesaid case, although the application for recalling and examination of a witness was filed but wrong provision of law was mentioned. The Supreme Court although impressed upon correct mentioning of the provisions of law for filing the application, but on merits of the matter as the application was filed under a wrong provision, the aggrieved party was permitted to file a fresh application under Order 18 Rule 17 which if it chose to do and the same was to be dealt with by the trial court meaning thereby that although the court impressed upon the mentioning of the correct provisions of law for the purpose of filing of an application or for that matter which would be applicable to a petition also, but it did not oust the aggrieved party in the said case only on technicalities of not granting it an opportunity to rectify the deficiency by filing a fresh application under the relevant provision.

28. There is no quarrel with the proposition of law laid down in the said judgment that correct provision of law must be mentioned in the application or the petition, but at the same time in case a correct provision

of law has not been mentioned, a party be that in an application or a petition, the said petitioner/applicant should not be made to suffer on account of these inadvertent technical errors which have cropped up. Further, much would depend of the case on the nature of the case, the stage of the case as well as the nature of mistake. In case the case or an application is at the threshold perhaps court may dismiss the application or the petition for want of mentioning of correct provision or the party may itself like to withdraw the application or the petition with liberty to file afresh. But situation would be different in case the case is at an advance stage or considerable time has already been spent by the court dismissing the application would be a hyper technical approach rather than doing substantive justice.

29. The learned counsel for the respondent relying on N.Mani v.Sangeetha Theatre; (2004) 12 SCC 278 has submitted that in the instant case there was only a technical problem, which was already removed by the learned ADJ court by directing the respondent to file amended petition of divorce under Special Marriage Act.

30. No Doubt, the pleadings are of utmost importance and so are the provisions of law under which they are filed. But courts are by and large

guided by the substantive justice rather than ousting a party on hyper technicalities. This is more so in matrimonial cases which are not like commercial disputes. In matrimonial cases both the parties are disturbed because of their matrimonial discord, therefore, they need to be dealt with humane approach with a view to find a solution to their vexed problem through adjudication if it is not possible through mediation and conciliation. Therefore, in my view, this judgment does not help the appellant.

31. The third submission is non-raising of 'No objection as to inherent lack of jurisdiction' in the written statement will not create any bar against the appellant to raise this plea at any time of the proceedings. Reliance in this regard was placed on the following three judgments *Sarwan Kumar vs. Madan Lal Aggarwal*; (2003) 4 SCC 147; *Hira Lal Patni vs. Kali Nath*; (1962) 2 SCR 747; and *Union of India vs. Baleshwar Singh*; 1994 Supp. (2) SCC 587.

32. The three judgments with regard to the timely objection regarding the inherent lack of jurisdiction not being taken by the appellant, does not create any bar against the appellant raising that objection now.

33. In the instant case, there is no lack of inherent jurisdiction of the forum to deal with the divorce petition. It is the same district judge who deals with the divorce petitions under different enactments. The question was whether persons who had got married under Special Marriage Act can be given divorce when the petition for divorce has been filed under H.M.A., certainly answer to this question is in negative. But then the question would arise should the petition be amended? The trial court has *suo moto* given direction to amend the petition.

34. The next submission is also connected with the earlier submissions that the appellant's conduct or his participation in the proceedings will not confer jurisdiction on a court or a Judge who inherently lacks the same.

35. Since I have already held above that there is no inherent lack of jurisdiction, therefore, this submission of the learned senior counsel for appellant that the appellant's participation will not confer the jurisdiction is of no merit. There was no inherent lack of jurisdiction. The only thing was wrong provision was invoked by the respondent. Having said so, the appellant ought to have raised this object at the earliest stage. Since this was not done there, it could be taken as an objection having been waived

or the appellant is decreed to be estopped from raising the same. But still the question would have remained whether the cause of action for grant of divorce existed under the provision in which petition was filed. That would be question to be decided on merits.

36. The next submission is that the divorce petition is liable to be dismissed as the same has been filed after suppressing material facts from the Hon'ble Court and reliance in this regard was placed on *Satish Khosla vs. Eli Lilly Ranbaxy Ltd.*; 741 (1998) DLT 1; and *A. Janaki vs. John Keneddy*; MANU/TN/0394/2009.

37. At the outset, it stated so far as the question of concealment of facts, as alleged, is concerned, that is a question of merit of the matter and need not and cannot be gone into when the dismissal of the petition is sought on account of certain procedural irregularity.

38. Mr. Jai Bansal, the learned counsel for the respondent is concerned, has primarily placed reliance on the two judgments of the Bombay High Court and Guwahati High Court. These are *Anandrao, s/o Marotrao Kharabe vs. Madhuri posing herself to be w/o Anandrao Kharabe &*

Anr.; 2009 (111) Bombay LR 832 and Anupam Das vs. Smt. Mampi Das; AIR 2008 Gau 3.

39. So far as *Anupam Das's* case (*supra*) is concerned, the same is distinguishable on the premise that this was a case which had come up before the High Court of Gauhati when a petition under Article 227 of the Constitution of India was filed challenging an interlocutory order passed under Section 25 of the Hindu Marriage Act, 1955 and Section 20 (3) of the Hindu Adoptions and Maintenance Act, 1956 by the learned District Judge, Shillong directing the revision-petitioner to pay a sum of Rs.1,000/- per month to the respondent and another sum of Rs.500/- per month to her minor child for the purpose of maintenance. One of the grounds for challenging the maintenance order was that the marriage between the petitioner and the respondent/wife was solemnized and duly registered under the Special Marriage Act, 1954 and the learned District Judge had no inherent jurisdiction to entertain and proceed with the divorce petition filed by the respondent under Section 13 (1) (i-a) of the Hindu Marriage Act, 1955 and therefore, the application under Section 25 of the Hindu Marriage Act which was for permanent alimony which is to be granted at the time of divorce was itself not maintainable. The

Hon'ble High Court did not accept this plea of the petitioner for setting aside the order by giving the reasoning that there is no dispute that the learned District Judge, Shillong had the jurisdiction to entertain the divorce petition, both under the provisions of Hindu Marriage Act and Special Marriage Act. It was also noted that incidentally, cruelty which was a ground for filing a petition for grant of divorce under the Hindu Marriage Act was also a ground for divorce under the Special Marriage Act under Section 27 (1) (d). It was also taken note that Section 36 of the Special Marriage Act provides interim maintenance and a similar provision for ad interim maintenance is made under Section 38 for the minor child. The High Court observed that the learned counsel for the petitioner was not able to show that the petition filed by the respondent for grant of divorce on the ground of cruelty under Section 27 (1) (d) of the Special Marriage Act did not have requisite cause of action. One important fact which may be noticed in that case is that although the marriage was performed under Special Marriage Act and got registered on 28.08.2002 but just after two months on 03.10.2002 marriage was solemnized again at Kamakhya Temple, Gauhati according to Hindu rites and ceremonies. It was in this background that the Hon'ble High Court

had observed that the order with regard to grant of maintenance by the learned District Judge, Shillong had not committed any illegality or impropriety in passing the order of maintenance. At the same time, the High Court observed that henceforth, the petition for grant of divorce which has been filed under the Hindu Marriage Act shall be entertained as an application filed under the Special Marriage Act.

40. In *Anandrao's* case (*supra*) is also distinguishable from the instant case as the issue involved was whether it was open to the parties whose marriage is solemnized under the Special Marriage Act by mutual consent to dissolve their marriage can be legally dissolved as per customs which are saved by Hindu Marriage Act even though marriage is solemnized under Special Marriage Act. While referring to Section 4 read with Section 29 (2) and 29 (4), the Bombay High Court negated both these contentions that a marriage which is solemnized under Special Marriage Act can neither be dissolved under the Special Marriage Act as there is no ground for mutual consent divorce under the Special Marriage Act and secondly even though the parties are Hindus even then it could not be assumed that the marriage according to their customary rights could be dissolved by mutual consent because Section 29(4) even though expressly

laid down that nothing contained in Hindu Marriage Act shall be deemed to affect the provisions under the Special Marriage Act, 1954 has to be read in context of Section 4 of the Hindu Marriage Act which gives an overriding affect over the customary rights which were in existence under the custom governing the relationship of the parties. Therefore, this judgment also at least recognizes one principle that if a mutual consent is not a ground for divorce and both the parties are Hindus by their religion, they cannot get their marriage dissolved by a provision which was nonexistent in the Special Marriage Act.

41. As against this, in the present case, the marriage originally had taken place according to Hindu Rights and Ceremonies in the year 1986. The said marriage was dissolved by a decree of divorce from a competent court on 02.06.1988. The parties had again got married under the Special Marriage Act and once they got married under Special Marriage Act, therefore, their conduct with regard to the grant of divorce or relationship would be covered under the Special Marriage Act only. The respondent filed a petition for divorce under the Hindu Marriage Act. It is only incidental that some of the grounds which are available in Hindu Marriage Act may be available as a ground for divorce under the Special

Marriage Act or under the other matrimonial laws like Christian Marriage Act, but that would not be a ground to convert a petition which is filed under one enactment to a petition under another enactment as that would be resulting in chaos because then there will be no end to the plea which will be available to a party though the marriage had taken place in a particular law but the ground of divorce is available in the different law and that is why the petition is maintainable. Therefore, this judgment in my considered opinion does not help the respondent in any manner.

42. Because of these reasons, I feel that the acceptance of both these judgments as making a basis of dismissing the application by the learned Trial Judge was misplaced.

43. The next question which arises for consideration is though the learned Trial Judge has dismissed the application of the appellant filed under Section 151 CPC for dismissal of the divorce petition, but still it has directed the respondent to amend the divorce petition and for this purpose it has given time. The law regarding amendment of the plaint or a petition is incorporated under Order 6 Rule 17 CPC. The said order reads as under:

17. Amendment of Pleadings.- the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

44. A perusal of the aforesaid provision would clearly show that Order 6 Rule 17 CPC envisages amendment of a plaint or a written statement on an application and not on direction of the court meaning thereby that only when an application is filed by either the plaintiff or the defendant for amendment of its pleading, the court will be called upon to decide the said application at that point of time. The court has no power of its own unlike under Section 151 CPC or under Order 14 Rule 5 CPC or Order 1 Rule 10 CPC to pass an order which may be warranted under law in those contingencies. As has already been discussed in the previous paras, the learned Trial Judge, in my considered opinion, has exceeded its jurisdiction of also giving a direction to the respondent to amend the

plaint and treat the provisions of Section 13(1) (a) i.e. ground of cruelty as a ground for grant of divorce under the Special Marriage Act.

45. But at the same time, it is pertinent to note that the courts must act in a manner so as to deliver substantive justice and to ensure that a litigant is not made into a litigant non grata for inadvertent deficiencies as the same might lead to a meritorious case being thrown out at the very threshold for mere technicalities.

46. In B.K.Narayana Pillai v. Parameswaran Pillai; AIR 2000 SC 614, the Hon'ble Apex Court has held as under:

“ The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. **The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and the Supreme Court.** It is true that the amendment cannot be claimed as a matter of right and under all circumstances. **But it is equally true that the courts while deciding such prayers should not adopt hypertechnical approach.** Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. **Technicalities of law should not be permitted to hamper the courts in, the administration of justice**

between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation.

47. When a party approaches a counsel for legal advice and entrusts the matter to him, it is presumed that the same shall be dealt with utmost professionalism and due despatch. In *Rafiq v. Munshilal*; (1981) 2 SCC 788, the Hon'ble Supreme Court has held that once a person engages his counsel his botheration goes and it is the duty of the counsel to take care of the case. In the instant case, the inadvertent drafting error seems to have crept in on the part of the drafting counsel which mistake should not prejudice the interest of the party.

48. The Hon'ble Supreme Court in *Bhuvan Mohan Singh v. Meena*; AIR 2014 SC 2875 has observed that all such applications pertaining to maintenance, divorce, custody of child must be decided expeditiously by the court owing to the factum that the lis before it pertains to emotional fragmentation and delay can feed it to grow. The instant case was filed in 2005 and we are in 2015, in the last ten years, the matter has not seen any substantial progress on account of the same being lying pending in the docket of this court merely due to an inadvertent drafting error which can be rectified on an amendment simplicitor.

49. In the light of the aforesaid facts, the appeal is partly allowed holding that the court had no power suo moto to amend the plaint or give directions to that effect to any party. However, keeping in view the peculiar facts and circumstances of the case, that the case has been pending in court for the last nearly ten years and it would advance substantive justice between the parties, an opportunity is given to the respondent to take corrective steps within a period of six weeks to rectify his mistake. In case such an application is filed, it shall be dealt within accordance with law.

50. The parties are directed to appear before the learned District Judge on 3rd August, 2015. With this direction, the appeal is partly allowed.

V.K. SHALI, J.

MAY 28, 2015
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