

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.08.2016

DELIVERED ON : 23.12.2016

CORAM

THE HONOURABLE MR.JUSTICE C.T.SELVAM

Civil Revision Petition (PD) No.2454 of 2016

RamanathanKavasseri
S/o. K.N.Ramanatha

... Petitioner

VS

1. GayathriVasudevan
c/o Mr.Raman

2.Mr.Mohammed Nawaz

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the docket order of learned II Additional Judge, Family Court, Chennai, passed in H.M.O.P.No.2214 of 2016.

For Petitioner : Ms.Rohini Ravikumar

For Respondents : Mr.M.K.Kabir Senior Counsel
for
M/s. Kingsly Solomon

ORDER

This revision challenges the decision of II Additional Family Judge, at Chennai to refer the parties in H.M.O.P.No. 2214 of 2016 for counselling by way of docket order dated 20.07.2016.

2. Heard learned counsel for petitioner and the learned Senior counsel for first respondent.

3. Learned counsel for petitioner submitted that petitioner had preferred H.M.O.P. No.2214 of 2016 under Sec.13(1)(i), 13(1)(ii) and 13(1)(i-a) of the Hindu Marriage Act, 1955 seeking dissolution of marriage and grant a decree of divorce.

4. Under the impugned order, Court below has required the petitioner and first respondent/wife to attend counselling. Learned counsel submitted that first respondent/wife had an adulterous relationship with the second respondent, who was a Muslim and she had also converted to Islam. In such circumstances, there was absolutely no possibility of reconciliation or rapprochement. Under Sec. 9 of the Hindu Marriage Act, 1955 a party to the

marriage could seek restitution of conjugal rights only when the other has withdrawn from the society of the other without reasonable cause. A reference to counselling towards bringing about reconciliation between parties cannot be routine and should be made only when the same is likely to be constructive and productive. Referring to a typedset which allegedly contained messages shared by respondents, learned counsel submitted that the same was replete with explicit sexual overtures and had caused grave mental agony to petitioner. The first respondent having undergone a change of religion rendered futile any attempts at reconciliation. Court below was bound to look into the nature and circumstances of the case and petitioner ought to have been afforded an opportunity to explain why the case was not one fit for reference to counselling/mediation.

5. Learned Senior counsel appearing on behalf of the first respondent submitted that the Family Courts Act u/s.9, mandatorily required a Family Court to make efforts at settlement in respect of the subject matter of the suit or proceeding and to assist and persuade the parties in arriving there at. Sec.10, besides making applicable the Code of Civil Procedure, also empowered the Family Court to lay down its own procedure with a view to arrive at

settlement in respect of the subject matter of the suit or proceedings. Sec.20 contained a non-obstante clause to give the Family Courts Act an over riding effect.

6. Learned Senior counsel referred to a few decisions which we shall put to use towards disposal of this petition.

In *Jagraj Singh vs. Birpal Kaur*, AIR 2007 SC 2083, the Hon'ble Supreme Court has held:

“12. The Act (Hindu Marriage Act, 1955) is a special Act dealing with the provisions relating to marriages, restitution of conjugal rights and judicial separation as also nullity of marriage and divorce. Chapter V (Sections 19 to 28A) deals with jurisdiction and procedure of Court in petitions for restitution of conjugal rights, judicial separation or divorce. Sub-section (1) of Section 23 expressly states that where a petition for divorce is filed under Section 13 of the Act on certain grounds, before proceeding to grant any relief, the Court, 'in the first instance', should make an endeavour to bring about reconciliation between the parties.

....

15. The above decisions of this Court make it more than clear that the approach of a Court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by courts with human angle and sensitivity. Delicate issues affecting conjugal relations have to be handled carefully and legal

provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses. Probably, this aspect has been kept in view by the Legislature in enacting sub- section (2) of Section 23 of the Act by requiring a court to make all efforts to bring about reconciliation between the parties.

.....

23..... If in the light of the above intention and paramount consideration of the Legislature in enacting such provision, an order is passed by a Matrimonial Court asking a party to the proceeding (husband or wife) to remain personally present, it cannot successfully be contended that the Court has no such power and in case a party to a proceeding does not remain present, at the most, the Court can proceed to decide the case ex parte against him/her. Upholding of such argument would virtually make the benevolent provision nugatory, ineffective and unworkable, defeating the laudable object of reconciliation in matrimonial disputes. The contention of the learned counsel for the appellant, therefore, cannot be upheld.”

In decision reported in **AIR 1963 Mysore 3 (V 50 C 2)**, it has been held as follows:

“5.....While we agree that the trial court has a duty to perform by making every endeavour to bring about a reconciliation between the parties we do not see how the matter, goes to the question of jurisdiction. It will be noticed that the endeavour is to be made, where it is possible to do so consistently with the nature and circumstances of the case. It cannot be said that the full nature and circumstances of the case can always be gathered exclusively from the pleadings. It is no doubt true

that the provision says that such endeavour is to be made 'in the first instance'; but to say from this that the court cannot make use of its good offices at any later stage would be to defeat the very object of the provision. The intention of the provision undoubtedly is to render all possible assistance in the maintenance of the marital bond and if at any stage of the case the circumstances are propitious for reconciliation it will be the court's duty to make use of such circumstances irrespective of the stage. The use of the words "in the first instance" can in this context only mean that the court's efforts in the direction of reconciliation should commence right from the start of the case and not that such effort should not be made at any later stage. It would therefore follow that the matter is not one of jurisdiction. If no endeavour had been made by the court, it will undoubtedly be a serious omission which has to be taken into account. But it cannot affect the jurisdiction of the court to try the case. It also follows that, as it is the constant duty of the court to bring about a reconciliation, such efforts are not only open to the appellate court or courts but that it is appropriate that those courts also should make the endeavour."

In decision reported in **AIR 2008 Kerala 84**, a Division Bench of the Kerala High Court has referred to Jagraj Singh's case and observed thus:

"4. Section 10 of the Family Courts Act has made applicable the provisions of the Code of Civil Procedure to the suits and proceedings before the Family court. Under Section 10(3) the Family Court also is free to evolve its own procedure with a view to arrive at a settlement of the cases. Section 10 reads as follows:

10. Procedure generally.-- (1) Subject to the

other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter DC of the code of Criminal Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in Sub-section (1) or Sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

Order XXXII-A was inserted by the C.P.C. Amendment Act 104 of 1976. "The provisions of this Order shall apply to suits or proceedings relating to matters concerning the family", as per Rule 1. Under Sub-rule (3) to Rule 1 it is also provided that in case there is any special provision or procedure under any special law, to that extent the order will not apply. Order XXXII-A Rule 1(3) reads as follows:

1(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

Under Order XXXII-A Rule 3 it is the duty of a court to make efforts for a settlement. Rule 3 reads as follows:

3. Duty of Court to make efforts for

settlement.- (1) In every suit or proceeding to which this Order applied, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by Sub-rule (2) shall be in addition to and not in derogation of, any other power of the Court to adjourn the proceedings.

Recently the Supreme Court had occasion to consider the issue regarding the duty of courts under Order XXXII-A Rule 3 in Jagraj Singh v. Birpal Kaur. It has been held that "Order 32-A Rule 3 CPC requires the court to make efforts for settlement of family disputes. The Hindu Marriage Act, 1955 is a Special Act dealing with the provisions relating to marriages, restitution of conjugal rights and judicial separation as also nullity of marriage and divorce. The approach of a court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by courts with human angle and sensitivity. Delicate issues affecting conjugal relations have to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses." In Manju Singh v. Ajay Bir Singh the Court went to the extent of even holding that if an endeavour for reconciliation is not made, the order

would be illegal. To quote on the principle:

Section 23(2) of the Act gives a direction to the Court that before proceeding to grant any relief under the Act it shall be the duty to endeavour to bring about reconciliation between the parties except in the cases mentioned in the proviso to the sub-section. The intention of the legislature is that an attempt should be made by the Court for reconciliation before proceeding with hearing of the petition. The provision is mandatory and an effort for reconciliation is to be made by the Court right from the start of the case by directing and giving reasonable opportunity to the parties to appear in person before the Court, even the filing of the written statement by the opposite party should not be insisted, and reconciliation should be attempted by the Court. If reconciliation attempt fails, written statement be filed. The Court however is to watch the proceedings during trial and make further attempt for reconciliation at any stage deemed appropriate by the Court. But in any case duty is cast upon the Court to try reconciliation between the parties before Finally deciding the proceedings under the Act. The words "before proceeding to grant any relief, mean during the course of trial i.e. right from the date when the opposite party is served till the date of giving final decision.

5. However, it has to be seen that conciliation is (sic not) mandatory only in respect of three grounds under the Hindu Marriage Act, namely adultery, cruelty and desertion, which are enumerated under Section 13(1)(i), (i-a) and (i-b). The Delhi Court has taken the view that on grounds of conversion to another religion, renunciation of the word, mental disorder, venereal diseases and leprosy, no conciliation is required since they are expressly excluded under proviso to Section 23(2) of

the Act. It has to be noted that there is no discussion as to the impact of the Family Courts Act nor is the issue discussed regarding the impact of the exempted clauses as per proviso" to Section 23(2) by the Apex Court in Jagraj Singh's case (supra). Therefore, the crucial question again is, after the introduction of the Family Courts, Act 1984 is conciliation mandatory in a matrimonial dispute, whatever, be the ground taken for dissolution, divorce or nullity.

6. The Family Courts Act, 1984 has an overriding effect over all other laws, notwithstanding anything inconsistent contained in such laws. The relevant provision, Section 20, reads as follows:

20. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

It has also to be seen that under Section 9 of the Family Courts Act, there is no such exclusion of endeavours for reconciliation on any ground.

7. The provisions of the Family Courts Act, the Rules framed by the High Court and the State, the amended Code of Civil Procedure would clearly show the role of conciliation for reconciliation/settlement of disputes in family affairs. The primary object is to promote and preserve the sacred union of parties to a marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement on disagreement shall be made by way of settlement. Resolution of the disputes between the parties to a marriage on grounds available under law should be gone into only after the procedure under the Rules is followed through the counsellors to find out the

possibility of reconciliation of the parties to the marriage or settlements of their disputes, however grave be the ground for separation. When a man and a woman are called upon to be one, though ideally one would expect them to be one for all purposes, differences of opinion are bound to be there on various grounds. After all, it is a fusion of two personalities. In the event of such bickerings, even if a party to a marriage is entitled to succeed on any of the available grounds under law, the Family Courts shall first make an attempt for reconciliation and if that fails, a further attempt for settlement and thereafter only proceed to the trial. It is one thing to say that a party is entitled to get relief on any of the available grounds under law but it is yet another thing to say that de hors the legal entitlement, reconciliation/settlement ignoring such legal grounds is possible. A settlement in a matrimonial dispute need not necessarily be based on strict legal grounds but more on what the parties perceive on a just and reasonable settlement bases on mutual concessions. Such a compromise acceptable to the parties need not also coincide with the terms of a legally correct decision. If the law expects that refinement, reconciliation and settlement is to be first attempted, without following such a procedure, the Family Court shall not dispose of the suit or proceedings before it either granting the relief or declining the relief on the entitlement or disentanglement on legal grounds. It is not necessary that by mere conversion the marital tie should be broken. In a secular country like India and a literate State like Kerala where mixed marriage itself is a well accepted course, on the mere ground of conversion to another religion of one of the Hindu parties to a marriage during the subsistence of the marriage, the marital tie need not be broken. The

parties can disagree on matters of faith and still lead a happy marital life if they could be convinced that matters of faith should not stand in the way of union of hearts. Thus though under the Hindu Marriage Act, 1955 no endeavour for reconciliation need be made in a petition for divorce on the ground of conversion to another religion, or other grounds excepted under Section 13(1) of the Hindu Marriage Act or on similar or other grounds available under any other law also, after the introduction of the Family Courts Act, 1984, the Family Court is bound to make endeavours for reconciliation and settlement. The requirement is mandatory. That is the conceptual change brought out by the Family Courts Act, which is a special statute.

8. In the instant case the Family Court has not made any efforts for conciliation. On the mere admission of conversion, a decree has been granted, without making any endeavour for reconciliation and settlement. That is against the spirit and mandate of the provisions under the Family Courts Act, 1984. We set aside the impugned order and remit the matter to the Family court to proceed afresh in the matter in accordance with law.

The Registry shall immediately forward a copy of this judgment to all the Family Courts.”

Following the rationale of the above judgments and expressing the view that the possibility of reconciliation in seemingly irreconcilable situations can never be ruled out, this civil revision petition shall stand dismissed. No costs.

23.12.2016

To

The II Additional Judge, Family Court,
Chennai,

C.T.SELVAM, J

Pre-delivery order
in
Civil Revision Petition (PD) No.2454 of 2016

23.12.2016

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