

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 6833 OF 2016

Sanjay Khanderao Bodake	]	Petitioner
Vs.		
Ashwini Sanjay Bodake	]	Respondent

.....

Mr. Rakesh S. Patil, for Petitioner.
Mr. Rahul Kamerkar, for Respondent.

....

CORAM : R.G. KETKAR, J.

DATE : 16TH OCTOBER, 2018.

P.C:

Heard Mr.Patil, learned Counsel for the petitioner and Mr. Kamerkar, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 26th October, 2015 passed by the learned Joint Civil Judge, Senior Division, Kolhapur below Exhibit 33 in H.M.P No. 329 of 2013. By that order, the learned trial Judge rejected the application made by the petitioner under Order-I, Rule-10 (2) of the Code of Civil Procedure, 1908 (for short 'C.P.C') for impleadment of adulterer as a necessary party.

3. Rule. Mr. Kamerkar, waives service on behalf of the respondent. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. In support of this Petition, Mr. Patil submitted that the learned trial Judge rejected the application principally on the ground that at the time of filing H.M.P, the petitioner did not seek permission as required under Rule-5 of Bombay High Court Hindu Marriage and Divorce Rules 1955 (for short 'Rules'). If the petitioner was not aware of the name of such person at the time of filing of the Petition etc, he should have sought permission to dispense with joinder of such person. The learned trial judge observed that in the present case, neither that person is made party nor such permission was sought. The learned trial Judge relied on a decision of **Ayyapan Vs. Vasanta, A.I.R 1988 Kerala 314** wherein it is held that as the adulterer was not made co-respondent in the Petition and as no attempt was made to dispense with on any of the grounds envisaged in Rule 11(d) of Kerala High Court Rules 1963, it has to be held that the Petition is defective and it cannot be cured at a later stage. He submitted that the learned trial Judge observed that under Order-I, Rule-10, the petitioner cannot seek order for impleading the adulterer as a necessary party. He submitted that as the learned trial Judge has passed perverse order, it deserves to be set aside.

5. On the other hand, Mr. Karmekar supported the impugned order. He submitted that while rejecting the application, the learned trial Judge noted that from the cross-examination of the petitioner, it appeared that before institution of the Petition, he had filed missing complaint of the respondent with Shroli MIDC Police Station. At that time, statement of alleged adulterer Neetin Chain Londhe was recorded and the same fact was admitted by the petitioner. Thus, the petitioner was aware of the name of the alleged adulterer and despite that, he did not implead him as party at the time of filing of the Petition. No permission was also sought for dispensing with the joinder of adulterer. He, therefore, submitted that no case is made out for interfering with the impugned order.

6. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. In paragraph 5 of the impugned order, the learned trial Judge has reproduced Rule-5 of the Rules. A perusal of this rule does not indicate that the same is mandatory and at no point of time during pendency of the Petition, the defect can be cured. In my opinion, the learned trial Judge was not justified in adopting hyper technical approach and observing that the petitioner cannot take recourse or Order-I, Rule-10 of C.P.C. That apart, before deciding the application, the learned trial Judge ought to have issued notice to the proposed respondent and after hearing the parties, ought to have decided the application. Without issuing notice to the proposed respondent, the learned trial Judge was not justified in deciding the application.

7. In view thereof, the impugned order deserves to be set aside thereby, restoring application to the file of the trial Court. The trial Court will issue notice to the proposed respondent and thereafter will proceed to decide the application after ensuring service on the proposed respondent. The learned trial Judge will not reject the application on the grounds on which application Exhibit 33 was rejected. Subject to above, the Petition succeeds. Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]