

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 11164 OF 2016

Shri Tarun Singh Sehra

...Petitioner

Versus

Smt. Barinder Kaur Sehra

...Respondent

....

Mr. Baldev Raj a/w. Ms. Shikha Tyagi, i/b. Amit Kumar Tiwari, Advocate for the Petitioner.

Mr. E.A. Limaye i/b. Ms. Mukta Rajesh Singh Gobse, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 03rd MAY, 2018

P.C.

1. Heard Mr.Baldev Raj, learned counsel for the petitioner and Mr.E.A. Limaye, learned counsel for the respondent, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 8.6.2016 passed by the learned Judge, Family Court No.7, Mumbai below Exhibit-6 in Petition No.A-389/2014. By that order, the learned trial Judge partly allowed the application made by the respondent for interim maintenance and directed the petitioner-husband to pay interim maintenance @ Rs.40,000/- per month from the date of application i.e. from 24.1.2014 till the decision of the main Petition.

3. In support of this Petition, Mr. Baldev Raj advanced two fold submissions. In the first place, he submitted that the respondent instituted a Petition on 24.1.2014 under Section 9 of the Hindu Marriage Act, 1955 (for short, 'Act') for restitution of conjugal rights. Along with that Petition, she also filed interim application Exhibit-6. On 9.3.2015, the petitioner filed written statement resisting the Petition. Along with the written statement, he enclosed the certified copy of the decree of divorce passed by the Federal Circuit Court of Australia. By that order, the Australian Court terminated the marriage w.e.f. 16.2.2015. He, therefore, submitted that the main proceedings instituted by the respondent under Section 9 of the Act itself is rendered infructuous as the marriage between the parties is dissolved. In any case, he submitted that the petitioner is ready and willing to deposit amount of maintenance as ordered by the impugned order from 24.1.2014 till 16.2.2015. Mr. Baldev Raj submitted that the respondent has not challenged the decree passed by the Australian Court and that she is able-bodied and capable of maintaining herself and, therefore, the learned Judge was not justified in passing the impugned order.

4. Secondly, Mr. Baldev Raj submitted that while passing the impugned order, the learned trial Judge did not consider the aspect of cost of leaving. He submitted that it may be true as found by the

learned trial Judge that the petitioner earns \$ 4299.33 (dollars) per month in Australia. At the same time, one cannot ignore the cost of leaving in the foreign country. In support of this proposition, he relied upon the decision of Delhi High Court in **Rajat Taneja v. Harmeeta Singh, 2007(7) AD (Delhi) 545**. As this aspect is not considered by the learned trial Judge, the impugned order may be set aside and Exhibit-6 may be restored for deciding it afresh.

5. On the other hand, Mr. Limaye supported the impugned order. He has invited my attention to paragraph-22 of the petition filed under Section 9 of the Act. In paragraph-22, the respondent asserted that the petitioner is at present working at Sydney, Australia in Favelle Fanco Cranes Private Limited as a Design Draftman. He earns annual income \$ 60,001-80,000/- i.e. Rs.44,00,000/- approximately. He also invited my attention to paragraph-8 of the written statement of the petitioner dated 9.3.2015 and submitted that there is evasive denial by the petitioner. He submitted that the learned trial Judge after considering the income of the petitioner herein has awarded maintenance @ Rs.40,000/- per month and, therefore, no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Australian Court had passed a decree of divorce on 15.1.2015 terminating the marriage w.e.f. 16.2.2015. A perusal of that order shows that the Australian Court recorded following findings :

“THE COURT FINDS:

1. The marriage is proved.
2. The husband was at all material times domiciled in Australia.
3. The ground for the application for a divorce order – namely that the marriage has broken down irretrievably – is proved.

THE COURT, BY ORDER, DECLARES THAT IT IS SATISFIED:

4. There is/are no child/ren of the marriage to whom Section 55A(3) of the Act applies.”

7. A perusal of finding No.3 shows that the Australian Court passed the decree of divorce on the ground that the marriage has broken down irretrievably. Section 13 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') reads thus :

“13. When foreign judgment not conclusive.-- A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except --

(a) where it has not been pronounced by a Court of

- competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India] in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud ;
- (f) where it sustains a claim founded on a breach of any law in force in India.”

8. It is not in dispute that the petitioner and the respondent are both Sikhs and were married to each other as per Sikh rites and rituals. They are governed by the provisions of the Hindu Marriage Act, 1955 (for short, 'Act'). Section 13 thereof deals with the grounds for obtaining divorce and it reads thus :

- “13. Divorce.-- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
- (i) has, after the solemnization of the marriage, had voluntary sexual inter-course with any person other than his or her spouse; or
 - (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or
 - (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]
 - (ii) has ceased to be a Hindu by conversion to another religion; or
 - (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the

petitioner cannot reasonably be expected to live with the respondent.

Explanation.-In this clause,-

- (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
- (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]
- (iv) has been suffering from a virulent and incurable form of leprosy; or
- (v) has been suffering from venereal disease in a communicable form; or
- (vi) has renounced the world by entering any religious order; or
- (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation.--In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

- (1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-
 - (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

- (ii) that there has been no restitution or conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]
- (2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,-
 - (i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:
 Provided that in either case the other wife is alive at the time of the presentation of the petition; or
 - (ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or⁹[bestiality; or]
 - (iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;
 - (iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.-This clause applies whether the marriage was solemnized before or after the commencement¹¹of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).”

9. As noted earlier, the Australian Court has passed decree of divorce on the ground that the marriage has broken down irretrievably. Said ground is not available under the provisions of the Act. A decree of divorce passed by the Australian Court on a ground not available under the Act, parties being Hindus, marriage was solemnized according to Hindu rites, is neither recognizable nor enforceable in India. A judgment delivered by a Foreign country contrary to Indian legislation would not be conclusive.

10. Mr. Baldev Raj heavily relied upon the decision of **Rajat Taneja** (supra) to contend that as the marriage between the parties was dissolved by a decree of divorce dated 15.1.2015 passed by the Australian Court, the learned trial Judge was not justified in awarding maintenance. That apart, the learned trial Judge did not consider the cost of living in Australia. Insofar as the submission that the learned trial Judge has not considered the cost of living in Australia is concerned, a perusal of reply to the interim application at Exhibit-24 as also written arguments at Exhibit-29 does not even remotely indicate that the petitioner has raised that contention before the trial Court. If that be so, the petitioner cannot be permitted to agitate this contention for the first time which raises highly disputed questions of law. I have already held that the decree passed by the Australian Court is not

conclusive. In view thereof, the reliance placed on the decision of **Rajat Taneja** (supra) does not advance the case of the petitioner.

11. Mr. Baldev Raj submitted that the petitioner was not given fair and reasonable opportunity to present his case. I do not find any merit in this submission. The petitioner has filed reply Exhibit-24 opposing the application Exhibit-6. The petitioner also filed written arguments at Exhibit-29. The impugned order was passed after hearing the parties and after considering the material on record.

12. That apart, the impugned order is passed on 8.6.2016. That order was never stayed by this Court at any point of time. Despite that the petitioner has neither deposited nor paid single penny.

13. In the light of the above discussion and in view of the conduct of the petitioner, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)