Mrs. Payal Ashok Kumar Jindal

Vs

Captain Ashok Kumar Jindal

Civil Appeal No. 2446 of 1991

(CJI M. H. Kania, Kuldip Singh JJ)

06.05.1992

JUDGMENT

KULDIP SINGH, J.

1. His parents advertised for "homely non-medico" bride. Her parents responded. Marriage took place on January 24, 1988 at Noida near Delhi. They hardly lived as husband and wife at Pune for about seven months when on August 16, 1988 the husband filed a petition under Section 13 of the Hindu Marriage Act for dissolution of marriage on the ground of cruelty. He alleged "she had a habit of smoking" and "it was found that she was in the habit of drinking and even once came drunk to the applicant's house and abused everybody", He further alleged "it was found by the applicant that she was working as a model prior to marriage and he found few pictures of the respondent in bikini and semi-nude clothes in magazines". She vehemently denied the allegations and claimed that she was a homely, vegetarian, non-smoking, teetotaler and faithful housewife. The Family Court at Pune proceeded ex parte and granted divorce-decree by the order dated November 30, 1989. Wife's application for setting aside the ex parte decree was dismissed by the Family Court on June 24, 1990. The High Court by its judgment dated October 10/11, 1990 upheld the findings of the Family Court with the modification that in place of decree for dissolution of marriage it granted a decree for judicial separation. This appeal by way of special leave is by the wife against the judgments of the courts below.

2. During the pendency of the divorce-proceedings before Family Court, Pune, the wife filed a petition, on May 1, 1989, before this Court seeking transfer of the case from the Family Court, Pune to Delhi. This Court granted as interim stay of the proceedings before the Family Court, Pune. The stay remained operative till September 11, 1989 when this Court dismissed the transfer petition and vacated the stay. Thereafter the husband appeared before the Family Court on September 15, 1989 whereas the appellant-wife remained absent. Notices were sent by registered post to the wife on her address at Noida and also at her Delhi address given by her in the proceedings before this Court. The notices came back with the remarks "not found". The Family Court ordered substituted service and a notice was published in the "Times of India" New Delhi of dated October 24, 1989 asking the wife to appear before the Family Court on November 16, 1989 or the proceedings would be taken ex parte. On November 16, 1989 the Family Court ordered ex parte proceedings. The issues were framed on November 21, 1989, the evidence of the husband was recorded on November 25, 1989, and the judgment was pronounced on November 30, 1989.

3. The appellant filed an application dated December 18, 1989 for setting aside the ex parte divorce-decree wherein she stated that after she was forced to leave her matrimonial-home at Pune, she was residing with her parents at Noida. She further stated that in October/November, 1989 she had gone

to reside with her brother at Delhi. According to her she applied to the Army Authorities claiming maintenance out of her husband's salary. Respondent-husband is an Army officer. The Army authorities sent a letter dated December 14, 1989 to her father wherein it was mentioned that his daughter's application for maintenance allowance could not be entertained because the husband had already obtained a divorce-decree from the court. A copy of the Family Court judgment granting divorce-decree to the husband was also annexed to the letter. The appellant claims that for the first time, on or about December 14, 1989, she came to know through her father that the respondent had already been granted an ex parte divorce-decree by the Family Court. The appellant in her application inter alia stated as under :

> "The applicant submits that the applicant did not receive any notice/letter/summons or communication from this Hon'ble Court's office. Even there was no intimation given by postal authorities and the applicant honestly states that till the receipt of the letter from the Army H.Q. New Delhi, she was not aware of the date of proceeding. The applicant submits, the applicant was under bona fide belief that she will receive a notice from this Hon'ble Court. As such and being far from Pune, either in Noida (U.P.) or at New Delhi, it was not possible for her to approach this Hon'ble Court for an enquiry since she was also not permitted to appear through the lawyer ... At any rate and in any event, the applicant also did not come across the public notice published in the Times of India, New Delhi on October 24, 1989 as stated in the decree. The applicant submits, the applicant had every intention to resist the marriage petition filed by the opponent since the same was absolutely false, frivolous and out and out false, and has been resisted by the applicant by filing written statement, preliminary objection including to approach the Supreme Court of India. The intention of the applicant was clear. The applicant submits, the applicant was also advised by her Advocate that she will receive a fresh notice in due course of time after the stay was vacated by the Hon'ble Supreme Court of India from this Hon'ble Court. The applicant states she resides at a far long distance from Pune. She was also refused any assistance of lawyer. The applicant has no relation or any representative who can look after her in the present proceeding in Pune. It was in these circumstances, the applicant was prevented by sufficient cause from appearing in the marriage petition proceeding No. 561 of 1989 and as such the said decree is required to be set aside ... The applicant states, the applicant is unable to maintain herself, she has no source of income ... The applicant submits, because of the passing of ex parte decree, she has been refused maintenance allowance. The applicant also prays for granting of maintenance allowance pending final disposal of this application"

4. The Family Court dismissed the application for setting aside ex parte divorce-decree on the following reasoning :

> "But where the party itself knows that stay obtained by it has been vacated there appears no warrant for the proposition that again a notice is required to be given to the said party. I do not think that such advice was really given to the applicant. The applicant has not produced any evidence to the effect that she received such advice from a lawyer. It is her own statement. Its a self-serving statement and can hardly be believed. I think that if the applicant was really keen and desirous to contest matrimonial petition, she would have at once made enquiries to find out as to when the next date for hearing in this court was fixed after her application for transfer of the case was dismissed by the Supreme Court and the stay obtained by her was

> vacated. The order of vacating the stay was passed on September 11, 1989 by the Hon'ble Supreme Court and the applicant knew fully well about it. The opponent who had also appeared in the Supreme Court in connection with that matter did appear in this Court on September 15, 1989. The record of P.A. No. 561 of 1989 shows that opponent applied for issuing of notice to the present applicant. The notice was issued by registered post on two separate addresses. One of the address was the one shown by applicant herself in the Supreme Court petition and the other address was the one which was admitted to be her address in the matrimonial petition (which was address of her father at Delhi). Both these notices were sent by the registered post in due course. The court waited till return of this notice. On both these envelopes postal authorities have endorsed that the present applicant was not found on these addresses. The opponent had, therefore, made application that the applicant was avoiding to take notice and hence substituted service by publishing in the Times of India be made. Accordingly, a notice was published as per order of the Court on opponent's application ... Thus the contention of the respondent that she had no notice of the further proceeding in marriage petition does not appear convincing. As stated already in the first instance, there was no necessity for her to wait for receipt of the notice in the circumstances of the present case. The notices sent to her were obviously evaded, otherwise there was no reason why the applicant was found on either of the addresses which she admits to be the correct addresses. Even if she was not present, there was no reason why other major members of the family did not accept these notices. And lastly the publication of the notice in one of the most widely circulated newspaper at Delhi was sufficient notice to the applicant."

5. The High Court upheld the reasoning and the conclusions reached by the Family Court and dismissed the appeals filed by the wife.

6. The respondent appeared before us in person and himself argued his case. The learned counsel for the appellant raised the following points for our consideration :

> (a) That the Family Court and the High Court grossly erred in dismissing the application filed by the appellant for setting said the ex parte proceedings;
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> (b) that the divorce-petition was filed hardly seven months after the marriage. Section 14 of the Hindu Marriage Act provides "it shall not be competent for any court to entertain any petition for dissolution of a marriage by decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage". The divorce petition should have been dismissed as not competent in terms of Section 14 of the Hindu Marriage Act;
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> (c) that even on merits the divorce-decree is based on no evidence. The allegation in the divorce-petition are wholly vague. In any case the evidence of Major Ved Prakash being wholly interested and contrary to the record the courts below fell in to grave error in the accepting serious allegations the appellant on the basis of his evidence;
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> (d) that the High Court acted illegally in substituting the decree of divorce to that of a decree of divorce to that of a decree for judicial separation. The High Court should have dismissed the divorce-petition.

7. We may take-up the First Point.

8. The appellant filed written statement before the Family Court, Pune vehemently denying the allegations make against her by the respondent. She also raised preliminary objections regarding the maintainability of the divorce petition. She filed a transfer petition before this Court which was dismissed in September, 1989. She filed another transfer petition which was dismissed by this Court on April 12, 1990 with the following observations :

> "It is open to the petitioner to move the High Court under Section 24 Code of Civil Procedure fir consideration of her prayer that the case be transferred to another Judge. On the merits of this prayer, we decline to make any observation.

It would appear that the case is now listed before the Family Judge at Pune on April 13, 1990. It will be appropriate that having regard to the apprehension expressed by the petitioner the Court should not proceed with the matter until her prayer for transfer is considered by the High Court. We accordingly direct the Family Court, Pune to stay further proceedings in the case a period of 60 days from today to enable the petitioner to approach the High Court."

9. It is no doubt correct that the appellant did not approach the High Court for the transfer of the case but the fact remains that she has been seriously contesting the divorce proceedings and it would not be fair to assume that she deliberately chose to abstain from the Family Court was intentionally avoiding the summons.

10. The Family Court and the High Court have held that after the dismissal of the transfer petition and vacation of stay by this Court the appellant-wife should have, on her own, joined the proceeding before the Family Court. Accordingly to the courts below no notice for appearance was required to be sent to the parties after the stay was vacated.

11. It is not necessary for us to go on into the question as to whether a fresh notice to the parties is necessary where the superior Court vacates the stay order and as a consequence the proceedings recommence before the court below. We are of the view that in the fact in this facts and circumstances admitted facts in this case are as under :

> (i) While dismissing the transfer petition and vacating the stay order this Court did not fix any date for the appearance of the parties before the Family Court, Pune.
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> (ii) The Family Court had permitted the assistance of a lawyer to the appellant-wife in the followings terms : "As applicant is from Delhi and it would cause hardship, permission is granted for engaging and Advocate for pleading her case only for the purpose of presenting applications or serving notices and noting the orders of the Court".
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> (iii) The appellant did not engage a lawyer to represent her before the Family Court, Pune.
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> (iv) The appellant-wife was residing withe her parents at Noida (Delhi).

12. Even the distance between Noida and Pune was a big hassle for the appellant especially when she had no counsel to look after the proceedings before the Family Court Pune. We are of the View that in facts and circumstances of this case she was justified in her assumption that the proceedings

before the Family Court would be resumed after fresh notice to the parties. The applicability of the rules of natural justice depends upon the facts and circumstance of each case. We are of the view that in this case fair play and the interested of justice required the issuance of a fresh notice to the parties after the stay order was vacated by this Court. We do not, therefore, agree with the findings of the courts below to the contrary.

13. In any case - realising the requirements of natural justice - the Family Court, sent two registered notices to the appellant at her Noida address and also at the address given by her in the proceedings before this Court. Unfortunately, both the notices came back with the endorsements that the appellant could not be found on the given addresses. This is not material on the record to reach a conclusion that the appellant refused to receive the notices. There is also nothing on the record to show as to whether the postal authorities made any effort to deliver the registered letters to any of the appellant's relations at the given addresses. The courts below are wholly unjustified in holding that the appellant refused to receive the notices and further that the said notices could have been received by any of the her relations on the given addresses.

14. After the notices sent by registered post were received back, the Family Court did not make any attempt to serve the appellant through the process of the Court. The appellant was no stranger to the respondent. She was his wife. It could not have been difficult for him to find out the substitute service by way of publication in the newspaper was not justified.

15. We are, therefore of the view that there was sufficient cause for the non-appearance of the appellant in the matrimonial petition before the Family Court.

16. The view we have taken on the first point, it is not necessary to deal with the other points raised by the learned counsel for the appellant.

17. We, therefore set aside the order of the Family Court dated June 24, 1990 and allow the appellant's application dated December 18, 1989 and set aside the ex parte decree passed against the appellant in marriage petition No. A-561 of 1989. As a consequence the judgment of the Family Court, Pune dated November 30, 1989 and the judgment of the High court in First Appeal No. 649 of 1990 and First Appeal No. 696 of 1990 dated October 10/ 11, 1990 are also set aside.

18. The appellant had asked for transfer of her case from the Principal Judge Family Court Pune to some other court and this Court gave liberty to the appellant to move the High Court for the said purpose. We are satisfied that the reasons given by the appellant for such transfer and the apprehensions entertained by her are wholly unjustified. We are, however of the view that the Principal Judge Family Court Pune, has taken the grievances made by the appellant before this Court rather seriously and has commented adversely about the same. With a view to do complete justice between the parties we direct that this case be transferred from the file of Principal Judge, Family Court, Pune to the Principal Judge, Family Court, Bombay. The parties are directed to appear before the Principal Judge, Family Court, Bombay on June 22, 19992.

19. Before concluding we wish to place we wish to place on record that we tried that to persuade the parties to live together and in the alternative to settle their dispute amicably but with no result.

20. We allow the appeal in the above terms with no order as to costs.

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