

# RAJASTHAN HIGH COURT

Dr. Rajneesh

Vs.

Savita

S.B. Civil Writ Petition No. 1607 of 2003  
(Prakash Tatia, J.)

18.04.2003

## ORDER

**Prakash Tatia, J.**

1. Heard learned counsel for the petitioner.
2. The petitioner is aggrieved against the order dated 10th April, 2003 by which the petitioner's application dated 20th March, 2003 was dismissed by the Trial Court.
3. Brief facts of the case are that the non-petitioner who is wife of the petitioner filed one divorce petition against the petitioner in the Trial Court. The grounds for seeking relief of divorce are cruelty and desertion. The petitioner submitted reply to the divorce petition and also filed counter-claim and sought relief of divorce on the ground of cruelty and desertion, therefore, there are allegations and counter-claim of cruelty and desertion by each party against other. The petitioner submitted an application under Section 151 Civil Procedure Code and requested that in case, non-petitioner-applicant withdraws the allegations of cruelty and desertion, then the decree may be passed for which the petitioner will have no objection. It is also stated that the petitioner is prepared to submit joint divorce petition under Section 138. The said application was resisted by the non-petitioner-applicant and the application of the petitioner was dismissed by the Trial Court by order dated 16th Jan., 2003 after considering the judgments of the Hon'ble Supreme Court as well as judgment of the Division Bench of this Court, which are again relied upon by learned counsel for the petitioner in support of this petition also.
4. The trial court while rejecting application of the petitioner held that in this matter the reconciliation proceeding has not taken place and the judgments relied upon by

learned counsel for the petitioner are not applicable to the facts of the present case and thereafter, observed that passing of a decree under the provisions of Order 8 Rule 6-E Civil Procedure Code depends upon the discretion of the Court and that discretion is required to be a judicial discretion. Ultimately, the Court held that by exercising judicial discretion, the Court is of the opinion that till reconciliation proceeding do not take place, there is no reason for passing the decree and, therefore, rejected the application of the petitioner and fixed the date for finding out possibility of reconciliation between the parties.

5. It appears from the facts of the case that when the non-petitioner did not appear before the Trial Court for reconciliation on 27th Feb., 2003 and 20th March, 2003, the petitioner submitted an application again for grant of divorce decree in the counter-claim of the petitioner, the trial court adjourned the matter for reconciliation proceedings, which ultimately failed on 2th April, 2003. The Trial Court fixed the matter for arguments on the application of the petitioner-non-applicant. The respondent-applicant before the Trial Court submitted that she does not want to file the reply to the application filed by the petitioner-non-applicant under Order 8 Rule 6-E Civil Procedure Code. The arguments on the application were heard and ultimately, by order dated 10th April, 2003 the application of the petitioner for grant of divorce in counter-claim of the petitioner was again dismissed.

6. According to learned counsel for the petitioner, it is clear from the facts of the case that there are allegations of cruelty and desertion against the respondent-non-applicant which have not been denied by the respondent by filing reply to the counter-claim and, therefore, the Court should have passed the divorce decree in favor of the petitioner under the provisions of Order 8 Rule 6-E Civil Procedure Code, which provides that if the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit. Learned counsel for the petitioner further submitted that when there are prayers of both the parties for grant of decree of divorce, who leveled allegations of cruelty and desertion loses its significance and the Court, in these circumstances, may pass the decree for divorce, which will give relief to both the parties and there is no requirement of deciding any issue particularly in the facts of this case because no reply to the counter-claim has been filed by the respondent-applicant herself consciously. Learned counsel for the petitioner relied upon the Division Bench judgment of this Court delivered in the case of *Shimla Devi v. Kuldeep Sharma*,<sup>1</sup>

7. Learned counsel for the petitioner also submitted that as per Clause (a) of Sub-Section (1) of the Section 23 of the Hindu Marriage Act, 1955 (for short 'the Act of 1955'), for grant of divorce decree, what is required is existence of the ground for grant of relief of divorce irrespective of the fact that who levelled the allegation. If the Court is satisfied that there exist grounds for relief, which are given in Section 13 of the Act of 1955, then there is no reason for not granting the relief of divorce. Learned counsel for the petitioner also submitted that the Trial Court on an earlier occasion vide order dated 16th Jan., 2003 dismissed the application for grant of divorce on petitioner's application only on the ground that efforts have not been made by the Court to settle the dispute between the parties as required under the procedure to be adopted in the matter of matrimonial disputes and thereafter, very specifically held that till the reconciliation proceedings are not taken, relief of divorce cannot be granted to the petitioner-non-applicant in his counter-claim. According to the learned counsel for the petitioner, after failure of reconciliation between the parties now there is no hurdle in granting decree for divorce.

8. I considered the submission of learned counsel for the petitioner. The facts mentioned above clearly show that first non-petitioner filed the divorce petition on the ground of allegation of cruelty and desertion in which reply has been filed by the petitioner, therefore, issues involved in the divorce petition of the petitioner, are whether the petitioner has committed any cruelty and deserted the non-petitioner? In the counter-claim, there are counter-allegations levelled by the petitioner against the non-petitioner of cruelty as well as desertion. In the trial Court, the petitioner moved an application for grant of decree for divorce on the plea that since, the non-petitioner has not filed the reply to the counter-claim, therefore, the decree of divorce may be passed by exercising discretion under Order 8 Rule 6-E Civil Procedure Code. The trial Court by order dated 16th Jan., 2003 after taking note of the fact that efforts for reconciliation have not been made by the court as required under the law, therefore, till the efforts for reconciliation between the parties are not taken up, the decree for divorce cannot be granted. In addition to the above, the trial Court also observed that whether to grant a decree by exercising power under Order 8 Rule 6-E Civil Procedure Code. It is discretionary and for that purpose judicial discretion is required to be exercised. In view of the above reasons, it is clear that the trial Court in its order dated 16th Jan., 2003 did not grant the decree for divorce on two counts : one is that the efforts are yet to be made for reconciliation between the parties and the second is that in not haste without making any effort for reconciliation, it will not be proper to grant the decree for divorce in counter-claim of the petitioner. A bare perusal of the

reasoning given by the trial court in its order dated 16th Jan., 2003 itself makes it clear that the case was even not matured for exercising of judicial discretion of the Court for exercising power under Order 8 Rule 6-E Civil Procedure Code. Therefore, I do not find any force in the submission of learned counsel for the petitioner that after the order dated 16th Jan., 2003 upon failure of the reconciliation efforts between the petitioner and non-petitioner, the Court had no option but to grant the decree for divorce in counter-claim of the petitioner.

9. The another submission of learned counsel for the petitioner that since the facts of the case reveal that there are allegations of cruelty and desertion in the counter-claim filed by the petitioner in the divorce petition of the non-petitioner, which have not been denied by the non-petitioner and specifically she refused to deny the allegations, therefore, the Court should have granted the decree for divorce in favor of the petitioner despite the fact of pendency of the divorce petition of the non-petitioner on the same grounds of cruelty and desertion, which are against the petitioner himself. Such a plea cannot be accepted for the reason that the non-petitioner submitted divorce petition and leveled allegation of cruelty and desertion against the petitioner, which is required to be decided by the trial Court and the allegation leveled by the petitioner has direct or indirect relation with the allegation leveled by the non-petitioner upon the petitioner, therefore, even if, a specific reply to the counter-claim filed by the petitioner has not been filed by the non-petitioner, still the facts submitted and grounds raised by the non-petitioner in her divorce petition cannot be altogether ignored and those facts can also be considered for the purpose of exercise of judicial discretion under the provisions of Order 8 Rule 6-E Civil Procedure Code. In view of the rival claim of cruelty and desertion against the each other, if the decree of divorce has not been granted on the ground of merely not filing of the reply to the counter-claim by the non-petitioner, the trial Court has not committed any illegality rather has exercised a power with sound judicial discretion.

10. Learned counsel for the petitioner next contended that when there is a ground available for grant of the decree, then it is not necessary to find out who is guilty of committing the cruelty and desertion and the Court can grant the decree for divorce without finding who is the person actually guilty. Learned counsel for the petitioner relied upon the Division Bench judgment of this Court, delivered in the case of *Shimla Devi v. Kuldeep Sharma* (supra). This submission of learned counsel for the petitioner is also devoid of any force. First of all, if the submission of learned counsel for the petitioner is accepted, then it will result into holding that a person committing cruelty

and deserting spouse may also take benefit of his or her own wrong to get rid of his or her spouse and may also take benefit in the divorce petition, which has been filed due to fact that the non-applicant himself, to get rid of his or her spouse compelled other to file divorce petition and thereby that wrong doer will get what he should not have got, this will be absolutely against the public policy. The public policy provides that the Courts are not meant for giving relief to the wrong doers. Secondly, the legislature specifically took care of this situation particularly in the divorce petition by framing sub- clause (a) of Sub-Section (1) of Section 23 of the Act of 1955, which specifically provides that before passing the decree for divorce, the Court shall record its satisfaction regarding existence of the ground of divorce and further shall see that the wrong doer is not taking benefit by getting the decree of divorce, therefore, in any count such submission cannot be accepted.

11. The judgment which was relied upon by learned counsel for the petitioner has rightly been distinguished by the Trial Court. The facts of Shimla Devi's case (supra), I need not to narrate in detail because of the reason that the Division Bench of this Court in appeal filed by the wife against the grant of divorce decree observed that the judgment of the Trial Court does not contain the reasons to hold any party guilty of committing cruelty, but the appellate court, after taking into account the conduct of the appellant's wife, very specifically held that even if there exists no reason for holding any one guilty of committing cruelty, still there exists conduct of the appellant. In that case, situation arose that the wife did not want to live with husband nor she wanted to give the divorce and she wanted to maintain the position as was going on of not living with husband and not permitting divorce to the husband, therefore. Division Bench of this Court after recording these facts held as under :-

"So even though the finding recorded by the Family Court against the appellant on the question of desertion and cruelty may be suffering from strict legal proof, yet we do not find any scope of interference with the impugned judgment and decree."

12. Therefore, the above judgment of the Division Bench has no application to the facts of this case because there are serious allegations, which are yet to be determined by the Trial Court.

13. Assuming for the sake of argument that the Trial Court in its order dated 10th April, 2003 not very specifically call upon the petitioner to prove his case, still the entire reasons given in the impugned order dated 10th April, 2003 very clearly reveals

that the trial Court considered the facts of the case and found that this is not a fit case for grant of divorce in counter- claim. It impliedly means that the Court will proceed to take up the divorce petition and the counter-claim of desertion and Trial Court will proceed which automatically requires calling upon the parties to prove their cases.

14. Therefore, I do not find any force in the writ petition filed by the petitioner is and the same is dismissed

Petition dismissed.

Cases Referred.

1. 1999 DNJ (Raj.) 249