

RAJASTHAN HIGH COURT

Radhey Shyam

Vs.

Pappi

Civil Misc. Appeal No. 123 of 2004

(Prakash Tatia, J.)

15.09.2006

ORDER

Prakash Tatia, J.

1. Heard learned counsel for the parties.

2. This appeal is against the divorce decree dated 13-2-2002 passed by the learned Addl. District Judge No. 2, Chittorgarh in Divorce Case No. 14/98. The trial Court dismissed the divorce petition on the ground that the appellant- applicant sought divorce on the ground of, respondents living adulterous life but the appellant-applicant did not implead the person against whom, according to the applicant, the respondent had illicit relations.

3. It will be worthwhile to mention here that in the trial Court, the applicant-appellant prayed for DNA test of the appellant and his wife- respondent and respondent's son Chiku which was allowed by the trial Court vide order dated 2-8-2000 because the respondent also gave her consent for the DNA test of herself and her son. A letter was issued by the Court to the Centre for DNA Finger-printing and Diagnostics, which is an autonomous Centre of the Department of Biotechnology, Ministry of Science and Technology, Govt. of India. In pursuance of the directions of the Court the appellant-applicant deposited the requisite amount for the said DNA test and paid the expenses for respondent and respondent's son so that their blood may be examined by the said DNA Diagnostic Centre. The said Centre gave report along with forwarding letter dated 4-12-2000 that the appellant is not biological father of child Chiku. When the appellant-applicant tried to tender in evidence the said DNA report, an objection was raised by the respondent for tendering the document in evidence. The trial Court

observed that the report is not prepared or signed by the appellant and, therefore, cannot be tendered in evidence and consequently the document was not admitted in evidence.

4. According to the learned counsel for the appellant, the marriage of the appellant and respondent took place when they were of the age of 4 or 5 years. The respondent-wife came to the house of the applicant-appellant after about 17-18 years and no physical relationship established between the applicant and the non-applicant at any point of time. It is stated that the non-applicant remained in the house of the applicant for two days only and at that time the applicant was sick and otherwise also he had no physical relation with the respondent. In the year 1998, the appellant came to know that the respondent gave birth to one child. Since the appellant was sure that the child was not his, therefore, he filed the divorce petition on the ground of respondent's living adulterous life and giving birth to a child of other person. However, in the application there is no mention of name of any person with whom the respondent, according to the appellant, had physical relations and about the person who, according to the appellant, is the father of the child Chiku.

5. The respondent submitted reply to the divorce petition and denied the appellant's contention that the marriage of the appellant and respondent took place when they were minor. She stated that the child is of the appellant and the allegation of bad character upon the respondent is absolutely false. However, no objection was raised by the respondent in reply to the divorce petition that the divorce petition is not maintainable due to non-impleading the necessary party, the person with whom the appellant is alleging the relation with the respondent.

6. In the trial Court, oral evidence was produced by both the parties but as stated above, the relevant documentary evidence was not permitted to be even tendered in evidence. According to the learned counsel for the appellant, the DNA report is a public document and, therefore, mere its tendering in evidence, would have been sufficient and if the appellant would have been permitted to tender in evidence the DNA report, the appellant could have proved the fact that the respondent gave birth to a child which is not of his and that would have been the final proof in favor of the appellant's case, apart from the fact that the appellant produced oral evidence also in relation to the respondents living adulterous life.

7. According to the learned counsel for the appellant, Section 21 of the Hindu Marriage Act, 1955 empowers the High Court to make rules for regulating the proceedings which may be taken the Act of 1955. As per the rule 5 of the Rules under the Hindu Marriage Act, 1955 framed by the Rajasthan High Court, the petitioner was required to furnish the grounds upon which the relief is sought in the divorce petition and sub-rule (g) of Rule 5 clearly provides that the applicant may furnish full particulars which are known to the applicant. It is clear from the divorce petition that the petitioner neither could have any knowledge about the person with whom the respondent had illicit relations nor the applicant-appellant could have known it because the appellant-applicant was even not knowing his in-laws' house and his marriage took place when he was of the age of 4 or 5 years only.

8. It is also submitted that the Court below dismissed the divorce petition on the ground of non-impleading necessary party, the person with whom the respondent had illicit relations. According to the learned counsel for the appellant, the applicant has submitted application in this appeal under Rule 7 of the Rules of 1955 framed by the High Court for dispensing with from impleading that (unknown) person as party in the decree petition. The learned counsel for the appellant also relied upon the judgment of this Court delivered in the case of *Imarta Devi (Smt.) v. Deep Chand* ¹ wherein this Court observed that it is not necessary for the aggrieved husband to prove with whom his erring wife had illicit relations. It is also submitted that in view of the above decision of this Court as well as in view of the fact that the rules are procedural in nature and, therefore, they are directory in nature and, therefore, the Court below could not have dismissed the divorce petition of the applicant on this ground. It is also submitted that there was no objection of the respondent about non-joinder of necessary party and, therefore, the objection should have been deemed to have been waived under Rule 13 of Order 1, Civil Procedure Code.

9. The learned counsel for the respondent vehemently submitted that it is settled law that in a case where divorce decree is sought on the ground of spouse's living adulterous life, the applicant is required to implead the person against whom there is allegation of having illicit relations. For this the learned counsel for the respondent relied upon the judgment of the Andhra Pradesh High Court delivered in the case of *Mirapala Venkata Ramana v. Mirapala Peddiraju*, ² and also relied upon the judgment of the Kerala High Court delivered in the case of *M. K. Kunhiraman v. Santha alias Devaki* ³

10. According to the learned counsel for the respondent, the Court below rightly dismissed the divorce petition because of the reason that there is no evidence available on record with respect to the adulterous life of the respondent. It is submitted that the appellant did not call the doctor to prove the DNA report. It is also submitted that the appellant was not the author of the document nor he signed the document. Therefore, the Court below rightly refused to admit the DNA report in evidence, it is also submitted that the appellant failed to implead necessary party and the rules framed by the High Court in this respect are very clear and by rules, it has been made mandatory that in a case of allegation of adulterous life of the non- applicant, the person with whom the relation is alleged, should be impleaded as party. It is also submitted that the allegations are of serious nature and involves third person and cannot be decided in absence of the said person as party in the divorce petition. Therefore, even if the ground was not taken by the respondent specifically in the petition but it is clear that the appellant-applicant neither impleaded necessary party nor sought exemption from impleading the necessary party in the divorce petition.

11. I considered the submissions of the learned counsel for the parties and perused the record.

12. So far as procedure governing the matrimonial cases are concerned, there is no dispute and there is no dispute that the High Court framed the rules under Section 21 of the Hindu Marriage Act read with Section 14 of the Act of 1955.

13. The Rule 5 provides what should be the contents of the petition. Sub- clause (ii) of sub-rule (f) of Rule 5 is as under:-

"5. Contents of Petition -

(f).....

(ff) in the case of cruelty or sexual intercourse with any person other than his or her spouse, the specific act of cruelty or sexual intercourse and the occasion when and the places where such acts were committed together with the name and address of the person or persons with whom the respondent had sexual intercourse, if known to petitioner."

14. Relevant sub-rule (g) under Rule 5 provides as under:-

"(g) if the petition is for divorce, the matrimonial offence alleged or other grounds upon which the relief is sought together with the full particulars thereof so far as such particulars are known to the petitioner;

(i) in the case of allegation that the other party, after the solemnization of the marriage, held voluntary sexual intercourse with any person other than his or her spouse, that specific act and the occasion when and the place where such act or acts was or were committed together with the name and address of the person with whom sexual intercourse was committed."

15. A conjoint reading of sub-clause (ii) of sub-rule (f) of Rule 5 and sub-rule (g) of Rule 5 make it clear that the applicant is required to give full particulars and the grounds "which are known to him" upon which the applicant is seeking relief in any petition filed for obtaining divorce decree. Despite this sub-clause (ii) under sub-rule (f) of Rule 5 requires that in case of allegation of adulterous life of the non-applicant and having illicit relations of the non-applicant with other person then the applicant is required to furnish the name and address of the person or persons with whom the non-applicant had illicit relations. It will be worthwhile to mention here that even in sub-clause (ii) of sub-rule (f) of Rule 5 itself, said requirement has been qualified by using the words "if known to the petitioner". In view of the above, it is clear that the requirement of furnishing particulars of person or persons against whom there is allegation of having illicit relation with the non-applicant then the particulars are required to be furnished by the applicant if the particulars are known to him. Otherwise also no one can be asked to furnish the particulars which are not in his knowledge. Therefore, the rules are required to be read in a manner so that it may not be termed as unreasonable or contrary to basic law.

16. The Rule 7 of Rules under the Hindu Marriage Act provides that the petitioner shall implead the person against whom there is allegation of having illicit relations with non-applicant-respondent, but this rule itself also provides that the applicant-petitioner may apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as co-respondent on the grounds mentioned in sub-clauses under Rule 7(a) and the Court may exempt the application from impleading the said person as party in the divorce petition.

17. These rules are required to be applied in a manner so that cause of justice may be advanced and not in a manner to defeat the cause of justice. The person who has no knowledge about the other person who had or has illicit relations with the non-applicant, cannot be asked to implead that unknown person as party in the divorce petition. But if the Court finds that the applicant could have known the particulars or has knowledge of the person against whom there is allegation of having illicit relations with the non-applicant then the relief can be denied to the applicant because of not impleading the necessary party in the divorce petition seeking divorce on said grounds.

18. In this case, it is clear from the divorce petition itself that the marriage of the appellant and respondent took place when they were not only minor but they were virtually kids. Accordingly to the applicant-appellant, when his marriage took place, he was of the age of only 4 to 5 years. The non-applicant in her cross-examination admitted that her marriage took place when she was of the age of 5 to 6 years only. The applicant's case is that the non-applicant came to his house only for few days; first she lived for only a few days and thereafter she came when applicant's grand-mother died. In these facts and circumstances, the Court should not have allowed the objection of non-impleading the party in the divorce petition at such belated stage of arguments, as the respondent never took objection about non-joinder of necessary party in the divorce petition in his reply nor any issue was framed by the Court. But even then if the Court is of the view that the necessary party should have been impleaded in the divorce petition then before dismissing the divorce petition, an opportunity should have been granted to the applicant for taking steps for impleading a party or seeking exemption under Rule 7.

19. In view of the above and in the facts of the case, this Court is of the view that the applicant could not have impleaded any person as party in the divorce petition because his case is that he has no knowledge nor he has knowledge now about the person who is father of the son of the respondent named Chiku. Therefore, the finding of the Court below that the divorce petition filed by the appellant is not maintainable for want of necessary party is set aside.

20. The Court below further committed error of law in denying the applicant from tendering in evidence DNA report. At this juncture, it appears that the Court below failed to draw distinction between tendering of document in evidence and providing a

document. The applicant though was not author of the document nor he signed the document DNA report, still he is the person who, with the order of the Court, obtained the DNA report to prove his case, therefore, he had right to tender the document in evidence. The Court should have permitted the applicant to tender the document in evidence and thereafter should have considered whether the document has been duly proved or not and whether any further proof is required in case the contention of the appellant is accepted that the document is a public document and mere tender in evidence of it would have been sufficient for making it a lawful evidence for consideration of the Court. The issues referred to above have not been decided by the Court below nor are required to be decided by this Court in this appeal because of the reason that the DNA report has not been allowed to tender in evidence by the Court below.

21. The Court below, therefore, committed error of law. In view of the above, the order of the trial Court (recorded in the statement of the applicant) denying the applicant to tender in evidence the document DNA report is set aside. The applicant is permitted to produce the DNA report in evidence. Since the material evidence has been denied by the Court below, therefore, the judgment and decree passed by the trial Court deserves to be set aside and hence the judgment and decree of the trial Court dated 13-2-1992 is set aside. The matter is remanded back to the trial Court. The trial Court shall permit the applicant to tender in evidence the DNA report and thereafter, if necessary, may permit further evidence to the applicant and the non-applicant for proving and disproving the DNA report. The trial Court shall thereafter decide the divorce petition afresh in accordance with law uninfluenced from the earlier order.

22. Both the parties shall appear before the trial Court on 27-10-2006.

23. The appeal is, therefore, disposed of as indicated above.

Order accordingly.

Cases Referred.

1. 1999 DNJ (Raj) 413
2. (AIR 2000 AP 328)
3. (AIR 1998 Kerala 189)