Court No. - 39

Case :- FIRST APPEAL No. - 239 of 2015

Appellant :- Smt. Alka Saxena
Respondent :- Sri Pankaj Saxena
Counsel for Appellant :- Goapl Misra,Gopal Misra
Counsel for Respondent :- Ajit Kumar,Syed Irfan Ali

Hon'ble Saumitra Dayal Singh,J.
Hon'ble Donadi Ramesh,J.

1. Heard Sri Gopal Misra, learned counsel for the appellant and Sri Syed Irfan Ali along with Sri Ajit Kumar, learned counsel for the respondent.

2. Present appeal has been filed under Section 19 of the Family Court Act, 1984, arising from judgment and order dated 19.3.2015 passed by Principal Judge, Family Court, Firozabad in Case No. 186 of 2013 (Sri Pankaj Saxena Vs. Smt. Alka Saxena), in divorce case proceeding treated to have been filed under Section 13 (1-A) (ii) of the Hindu Marriage Act, 1955 (hereinafter referred to as the H.M.A.).

3. Admitted facts between the parties are that they were married on 15.01.1999. No children are born to them. Within a period of one year and barely upon expiry of 11 months, the aforesaid divorce petition was first presented by the respondent on 16.12.1999. That date we have verified from the original record. Initially, the divorce petition thus filed, was registered as a Misc. Case No. 228 of 1999. Later, it was registered as Matrimonial Case No. 239 of 2000 and was instituted before the Civil Judge, Senior Division, Aligarh. Thereafter, the proceedings was transferred to Kanpur Nagar. From there it was re-transferred to Firozabad on transfer

application moved by the respondent. Thus, it came to be numbered as Case No. 186 of 2013. During pendency of these proceedings, the appellant instituted a proceeding under Section 9 of the H.M.A. being Case No. 266 of 2000 (Smt. Alka Saxena Vs. Sri Pankaj Kumar Saxena) before the Family Court, Kanpur Nagar. That petition was decreed on 14.11.2000. No appeal was filed thereagainst. It has attained finality.

4. In the meanwhile, after the decree of restitution of conjugal rights had been passed, the respondent filed an amendment application in Case No. 186 of 2013. It was allowed vide order dated 21.02.2003. Accordingly, the respondent first introduced additional ground for divorce in terms of Section 13 (1-A) (ii) of the H.M.A. Thereafter, issues were framed in the divorce case proceeding on 12.07.2011. No issue was framed with respect to the additional ground for divorce pleaded by the respondent under Section 13 (1-A) (ii) of the H.M.A. The only issues framed, are as below:

"१- क्या याची याचिका में वर्णित अभिकथनो के आधार पर विपक्षीया से तलाक पाने का अधिकारी है?

२-क्या याची को याचिका प्रस्तुत करने का कोई वाद कारण उत्पन्न हुआ ?

३- क्या विपक्षीया द्वारा याची के साथ क्रूरतापूर्ण व्यवहार किया गया ?

४-क्या विपक्षीया हमेशा याची के साथ वतौर आदर्श पत्नी के रूप में सामाजिक रीति रिवाजो को दृष्टिगत रखते हुए रहने के लिए तैयार रही है तथा आज भी रहने को तैयार है?

५-अनुतोष ?"

5. Thereafter, evidence has been led and the matter heard. At the stage of oral hearing, amongst others, specific objection was raised by the appellant that the divorce case was instituted by the respondent only to extract a higher dowry, even before the expiry of statutory period of one year from marriage. In that regard, the learned Court below has recorded the objection raised in the following terms:

"याची ने उक्त याचिका अधिक धन के लालच में विधि की मंशा के प्रतिकूल निर्धारित समय न्याय अवधि से पूर्व न्यायालय में प्रस्तुत कर दी थी।"

6. The learned Court below has not dealt with the objection thus raised by the appellant on the strength of statutory provision of Section 14 (1) of the H.M.A. It has also not discussed any additional ground raised under Section 13 (1-A) (ii) of the H.M.A. At the same time, it has returned a finding on issue nos. 1 and 3, not on the strength of evidence led by the parties as to any cruel behaviour offered by the appellant but on the strength of conduct of the appellant in the course of legal proceedings. In that, it has been observed as below:

"मेरे समक्ष वर्तमान मामले में भी जैसा कि उपरोक्त समस्त विवेचना की मची है जहां तक पक्षकारों के मध्य विभिन्न वाद विचाराधीन होने का प्रश्न है? विपक्षी द्वारा याची के विरूद्ध लगभग ३-४ मुकों न्यायालय में प्रस्तुत किये गये और उन मामलो में भी बार-२ पारित किये गये आदेश व निर्णयों की निगरानिया की गयी बार-२ पत्रावली के स्थानान्तरण के सम्बन्ध में उच्च न्यायालय में स्थानान्तरण प्रार्थनापत्र दिये गये और जैसा कि उपरोक्त विवेचना की गयी है कि वाद प्रस्तुत की दिनांक से अब तक मामले के निस्तारित करने में जानबूझकर विपक्षी द्वारा देरी की गयी । अन्य मामलो में निर्धारित की गयी भरण पोषण धनराशि विपक्षी बराबर प्राप्त करती रही। स्वीकृत रूप से शादी के उपरान्त से विपक्षी मात्र ८-९ महीने याची के साथ रही और उनके कोई सन्तान उत्पन्न नहीं हुई और वर्ष २००० से दोनो पक्षो के मध्य मुकझेंवाजी चल रही है और लगभग १५ साल का समय अब तक व्यतीत हो चुका है। समझौता वार्ता केन्द्र व न्यायालय द्वारा प्रयास करने के बावजूद भी दोनो पक्षो के मध्य कोई सकारात्मक निष्कर्ष नहीं निकला। इन समस्त उपरोक्त परिस्थितियो में जबकि विपक्षी का व्यवहार मामले को अधिक समय तक खीचने का रहा है और मात्र याची से भरण पोषण आदि धनराशि प्राप्त करने का रहा है। दोनो पक्षो के मध्य अब कोई विवाह की पुनर्स्थापन होने की संभावना नहीं रही है और दोनो पक्षो के मध्य सम्पन्न हुआ विवाह लगभग समाप्त हो चुका है। क्योंकि वर्ष २००२ से न्यायालय की डिक्री के पश्चात भी दाम्पत्य अधिकारो का पुनर्स्थापन दोनो पक्षो के मध्य नही हो पाया है।"

7. Submission of learned counsel for the appellant is, the divorce case proceeding was wholly incompetent and rather, not maintainable in view of the clear bar contained in Section 13 (1-A) (ii) of the H.M.A. No application was filed and no allowance was made by the learned Court below in terms of the proviso to Section 14 (1) of the H.M.A. Since, the divorce petition had been 'presented' by the respondent well within one year from the date of marriage between the parties, the same may never have been entertained by the learned Court below. The fact that such a petition filed was initially registered as a miscellaneous case and that it may have registered as a divorce petition after the expiry of one year, would make no difference. That registration of the divorce case (after one year of marriage), may never have been made since the petition was presented before the Court at Aligarh,

on 16.12.1999 i.e. about one month before the completion of one year of marriage between the parties. That presentation itself was barred. The bar arising therefrom prevented entertainment of such petition, at any later time. Passage of time after presentation of such a defective non-maintainable petition, could cause no legal effect.

8. Second, alternatively, it has been submitted that the findings of the learned Court below are completely perverse and based on extraneous facts and circumstances. The only issue framed being with respect to cruelty, the learned Court below may have confined itself to the evidence led by the parties to establish if any cruel behaviour had been offered by the appellant towards the respondent and etc. during the period of 11 months of marriage between the parties. It was the own case of the respondent that the parties remained separated since 3.12.1999. Therefore, no conduct offered by the appellant in the course of legal proceedings was not relevant and in any case, the fact that the appellant contested the divorce case proceeding tooth and nail, may never be read as an act of cruelty towards the respondent. In that regard, it has been further stressed, even today, the appellant is ready and willing to revive her matrimonial relationship with the respondent. As to the additional ground for divorce under Section 13 (1-A) (ii) of the H.M.A, it has been submitted, neither any issue was framed in that regard nor such ground was available on the date of presentation of the divorce petition, 16.12.1999. That being the date to which the amendment made to the plaint may relate, the learned Court below never had jurisdiction to rule on that ground since the petition came to be filed before that ground could ever become available.

9. On the other hand, learned counsel for the respondent would contend that the divorce petition was registered after one year of

marriage between the parties. Therefore, the bar of Section 14 (1) of the H.M.A. does not apply. As to cruelty, he has further relied on the allegations contained in paragraphs 7 and 9 of the plaint. Similar statements were made at the stage of evidence. However, no clear finding has been recorded on such pleading.

10. Last, it has been submitted that the parties have remained separated for almost 24 years. There are no children born to them. There is no hope of revival of their matrimonial relationship. Their marriage has irretrievably broken down. Therefore, the decree of divorce granted by the learned Court below may be confirmed.

11. Having heard learned counsel for the parties and having perused the record, in the first place, Section 14 of the H.M.A. reads as below:

"14. No petition for divorce to be presented within one year of marriage.-

(1)Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2)In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year."

12. First that provision opens with a non-obstantate clause. It overrides all other provisions of the Act. Therefore, if the provision

were found to apply to the facts of the given case, no divorce petition may ever be filed contrary that provision. Second, the provision contains a bar to 'entertain' any petition for dissolution of marriage by any competent Court. Third, the bar thus created arises with reference to the 'date of presentation of the petition'. Fourth, that bar arises wherever the petition may have been 'presented', 'within one year' from the date of marriage.

13. Clearly, the bar thus created is not on the entertainment of a petition within one year of the Hindu marriage. Rather, the bar arises on the presentation of a petition within one year of a marriage. Therefore, the statute prevents a party to a Hindu marriage to 'present' any petition to dissolve their marriage before any competent Court, within one year from the solemnization of their marriage. The upshot of the above discussion is that the bar operates against the cause of action arising to a party to a Hindu marriage within one year from solemnization of their marriage.

14. The exception to the above bar is contained in the proviso to Section 14 of the H.M.A. First that exception may be invoked only upon specific application being filed by a party seeking to dissolve a Hindu Marriage within one year of its solemnization. Second, the bar may be lifted by passing an appropriate order, keeping in mind the statutory safeguards. Thus, it may 'allow' a petition to be presented within one year from the solemnization of a Hindu marriage. That may be done if the case involves 'exceptional hardship' to the petitioner or it involves 'exceptional depravity on the part of the respondent'. That power once exercised has not been made absolute. The competent Court would retain its jurisdiction to provide that the decree of divorce, if passed, in such a case, may not be given effect until after expiry of one year from the date of the marriage or it may dismiss the petition (after allowing the

presentation of such petition in exercise of power under the proviso of Section 14 (1) of the H.M.A), if it later reaches a conclusion that the permission was obtained by the petitioner on misrepresentation or concealment of the nature of the case. Further consideration is to be made by the competent Court while granting permission under the proviso to Section 14 (1) of the H.M.A. in terms of Section 14 (2) of the H.M.A. Thus, the competent Court would also have regard to the interest of children of marriage and reasonable probability of reconciliation.

15. Thus, the presentation of the petition within one year is not permitted under the Act by way of general law. In fact on a wholesome reading of the provision it reveals that cause of action to dissolve a Hindu marriage may not arise to a party thereto, within the first year of marriage, except in cases involving 'extreme hardship' or 'extreme depravity' suffered by the petitioner. Barring those two contingencies, no other exists. Even then, that cause of action is not available on its own. Its existence has to be claimed by the petitioner, by filing a specific application to the Competent Court and it has to be first established before that Court. Only upon that plea being accepted, such a petition may be entertained. Here, no application was filed or considered or allowed by the learned Court below, before entertaining the divorce petition filed by the respondent. For that reason, the ratio of the Madras High Court in **Indumati Vs. Krishnamurthy 1998 SCC Online Mad 477** is distinguishable as in that case an application made under the proviso to Section 14 (1) was allowed. In our opinion a divorce petition filed under H.M.A. within one year of marriage cannot be entertained unless the petitioner/s first file an application in terms of the proviso to Section 14 (1) and unless that application is first allowed.

16. Though, learned counsel for the respondent has supported the impugned order on the strength of reasoning that the divorce case petition was not decided within one year or soon thereafter and that it was decided after expiry of much time, the bar contained under Section 14 (1) of the H.M.A. remained relevant and applicable to the facts, as the Act does not allow for a divorce petition to arise within one year of a Hindu marriage. If that petition could not be filed, because no cause of action arose, the petition may not become competent by passage of time as cause of action may only be seen to arise with reference to the date of presentation of a petition, and not later.

17. Coming to the next issue, we find that the above issue was raised at the stage of oral hearing. It is a pure legal issue, requiring no evidence to be led by the parties as it arose on admitted facts. The bar arises under the statutory law and it had been pressed at the stage of oral hearing. On admitted facts, the same ought to have been dealt with by the learned Court below. Though that objection has been noted by the learned Court below, no finding has been returned thereon. Also, it is not in doubt that the respondent did not apply under the proviso to Section 14 (1) of H.M.A. Therefore, no order was passed in that regard. Hence, no cause of action ever arose to the respondent to file (and therefore press) the divorce petition.

18. Coming to the next issue of cruelty, we find that no finding has been recorded by the learned Court below on cruelty pleaded by the respondent. The learned Court below has only observed as to the conduct offered by the appellant in resisting the divorce case. It has not found any cruelty committed by the appellant in the matrimonial relationship formed by the parties. It has only referred to and relied on the conduct of the appellant in the course of legal

proceedings, inasmuch as it has noted that the appellant instituted 3-4 cases against the respondent and filed revision petition against the order passed in the legal proceedings between the parties. That was not the cruelty alleged by the respondent. It was extraneous to the dispute.

19. Therefore, we have no hesitation to observe that the learned Court below has completely erred in failing to record any cogent finding on the issue of cruelty based on the pleadings and evidence on record. That conclusion recorded is based on extraneous considerations, that were wholly irrelevant to the issue before it. How, the appellant conducted herself in the course of legal proceedings and how hard she fought to resist dissolution of her marriage, may never be construed as cruel behaviour against the appellant. The fact that the appellant resisted the proceedings for dissolution of marriage only to re-establish her matrimonial relationship re-confirmed her intent to revive her matrimonial relationship with the respondent.

20. The pleadings in paragraphs 7 and 9 and the evidence led in support thereof, though relied by learned counsel for the respondent, do not impress us. How parties to a marriage may conduct themselves in the privacy of their relationship that must be maintained within the boundaries of the intensely personal relationship between two individuals, is not for the Courts to rule upon. What personal likes, preferences and habits, acts a party to a marriage may feel inclined to practice and indulge in and desire their partner to participate in, within the confines of that relationship that too involving intimate moments is not for the Court to explore or examine unless they involve acts of *ex facie* extreme cruelty and/ or depravity. We find no such pleading exists. We leave it to the better judgment of the parties to a marriage to

find appropriate ways to adjust and conduct themselves in such situations. Suffice to note, merely because the respondent may have different behavioral preferences to act in intimate moments than those desired by the appellant, may remain an issue that may be best resolved by the parties to the marriage without any intervention being ever offered by the Court of law.

21. Insofar as the learned Court below has referred to the fact that the parties cohabited for barely 8-9 months and that there are no children born to them and that much time has passed since they were married, proves that no cause of action arose. Second, if at all, it may be indicative of a perceived opinion of the learned Court below that the marriage between the parties had irretrievably broken down. We are not called upon to test the correctness of that fact finding. Suffice to note- irretrievable break down of marriage is not a statutory ground for dissolution of a Hindu marriage under the H.M.A. It is also equally clear to us that the present is a statutory appeal, which may remained confined to the statutory scheme. In that, we find irretrievable break down of marriage is not a statutory ground available to dissolve a Hindu marriage. To that extent the finding recorded by the learned Court below is extraneous.

22. Accordingly, we find no ground is made out to grant divorce. At the same time, we also find that the appellant has been dragged into needless litigation that too wholly prematurely i.e. before the respondent earned a cause of action. Even today the respondent is not willing to revive his matrimonial relationship with the appellant.

23. Accordingly, the appeal is **allowed**. The judgment and order dated 19.3.2015 passed by Principal Judge, Family Court,

Firozabad in Case No. 186 of 2013 (Sri Pankaj Saxena Vs. Smt. Alka Saxena) is set aside, with costs Rs.50,000/-

24. We are informed that the respondent had deposited Rs. 2,50,000/- before the learned Court below in compliance to the impugned judgment and order. Let costs awarded be paid therefrom. The balance amount together with accrued interest be refunded to the respondent, after ensuring that all recoveries outstanding against the respondent towards maintenance amount awarded to the appellant are satisfied.

Order Date :- 24.10.2024
Noman

(Donadi Ramesh, J.) (S.D. Singh, J.)