

Smt. Roopa Vs. Santosh Kumar

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Court : Allahabad

Decided On : Nov-05-2004

Reported in : AIR2005All172; 2005(2)AWC1663

Judge : A.K. Yog and ;M.P. Singh, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 9 and 13B; Dowry Prohibition Act - Sections 3 and 4; Indian Penal Code (IPC) - Sections 323, 498A, 504 and 506; Family Courts Act - Sections 10; Family Courts Rules; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125

Appeal No. : First Appeal No. 1114 of 2004

Appellant : Smt. Roopa

Respondent : Santosh Kumar

Advocate for Pet/Ap. : Ram Chandra Srivastava and ;Vidya Bhushan Srivastava, Adv.

Judgement :

A.K. Yog and M.P. Singh, JJ.

1. Heard Sri Vidya Bhushan Srivastava, learned counsel for the appellant, Smt. Roopa, daughter of Chunnu Lal Kaviraj, wife of Santosh Kumar.

2. While this petition came up for admission this Court passed following order :

'Learned counsel for the appellant states that divorce petition was filed with consent under Section 13B, Hindu Marriage Act and further according to his instructions both appellant and respondent in this appeal are still willing to press their consent petition before Family Court. He has further stated that both appellant and respondent are ready to appear before the Court as per 'his instructions.

Let both the parties be present in person.

Put up as fresh on 5.11.2004.'

3. Today, Smt. Roopa, the appellant (who had sworn the affidavit filed in support of the stay application in the present appeal-hereinafter called the affidavit) has appeared before this Court and identified by Sri V. B. Srivastava, advocate. Smt. Roopa, who is present in the Court, has stated before us that she still supports the divorce petition by consent, under Section 13B, Hindu Marriage Act.

4. Since present F.A.F.O. arises out of the impugned judgment and decree dated 27.9.2004, passed under Section 13B, [Hindu Marriage Act, 1955](#) (as amended upto date) rejecting the divorce petition, with the consent of the concerned parties and the matter relates to the matrimony of these parties, we are of the opinion, that this appeal be decided finally without waiting for issuing notice to Santosh Kumar, respondent for the reason indicated in our order given hereinafter.

5. Santosh Kumar son of late Roop Singh and Smt. Roopa daughter of Chunnu Lal Kaviraj, wife of Santosh Kumar, who have married according to the Hindu rites on 2.12.2001, filed a joint divorce petition under Section 13B, Hindu Marriage Act, photostat copy (purported to have been obtained from the certified copy) has been filed as Annexure-1 to the affidavit. Perusal of the consent divorce petition shows that both Santosh Kumar and Smt. Roopa have signed it. According to the said petition a baby girl (namely Km. Ritika) was bom out of the wed-lock of the aforesaid Santosh Kumar and Smt. Roopa ; Case No, 92 of 2003, Santosh Kumar v. Smt. Roopa, for restitution of conjugal rights was pending under Section 9,

Hindu Marriage Act ; Case No. 14/11 of 2003, Smt Roopa v. Santosh Kumar, for maintenance under Section 125, Cr.P.C. was pending before the Court ; Case No. 92 of 2003, Santosh Kumar v. Chunnu Lal Kaviraj, was also pending before the Court of Chief Judicial Magistrate, Moradabad, a case under Section 498A, I.P.C. read with Section 3/4, Dowry Prohibition Act was also presented before the Court of Chief Judicial Magistrate, Moradabad, which had given rise to Criminal Revision No. 68 of 2003, Roopa v. Santosh Kumar, in the Court of District Judge, Moradabad, has been dismissed by the Fast Track Court No. 1, Moradabad, which has been challenged by means of Criminal Misc. Writ Petition No. 7356 of 2003 before the High Court and some directions have been issued for investigation of the case ; as a consequence of which a case under Section 498A/323/504/506, I.P.C. read with Section 3/4, Dowry Prohibition Act has been registered ; in the said petition it is further mentioned that some settlement took place on 17.1.2004, due to intervention of the relatives and some respected persons and parties have exchanged goods and articles between them ; para 13 of the said petition contains the conditions of the settlement which had taken place. According to para 14 of the consent divorce petition nothing is due to any party to the aforesaid marriage and no claim survives vis-a-vis each other, The parties, under aforesaid circumstances, filed a joint petition, signed and verified by both of them, to seek divorce by mutual consent, under Section 13B, Hindu Marriage Act (as amended upto date). It has also been mentioned that aforesaid husband and wife are living separately for more than one year and have mutually agreed to get the marriage dissolved.

6. The Court had fixed 27.9.2004 in the case. Smt. Roopa failed to appear on the said date. Court order dated 27.9.2004 (Annexure-3 to the affidavit) shows that when case was called out, petitioner Santosh Kumar was present but Smt. Roopa was not present to endorse the contents of joint petition and for settlement talks. In the said order Court merely expressed that arguments of Santosh Kumar have been heard and case was directed to be taken up on the same date for orders.

7. Before orders could be passed, Smt. Roopa filed an application (6 Ga) through her pairokar before the Family Court disclosing her illness as the ground for her absence and to exempt her presence on that date (i.e. 27.9.2004). Copy of the

said application is part of order sheet of the Family Court ; copy of which is Annexure-2 to the affidavit. The order sheet of 27.9.2004, further shows that the said adjournment application (6 Ga) was taken up by the Court before Court could pass the final order. The Court, however, rejected the said application on the ground that there was no provision for moving an application for exemption of appearance.

8. The Court finally passed order which, on being translated in English, reads :

'Judgment delivered.--Joint petition under Section 13B, Hindu Marriage Act is hereby rejected.'

9. Learned counsel for the appellant pointed out that Court had completely misdirected itself in rejecting adjournment application (6 Ga) on the ground that there was no provision under law for moving such an application under Family Courts Act.

10. Learned counsel referred to Section 10 of Family Courts Act which is relevant for our purpose reads :

' (1) Subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) (2 of 1974), before a Family Court and for the purpose of the said provisions of the Code, Family Court shall be deemed to be a civil court and shall have all the powers of such Court.

(2).....

(3) Nothing to the other provisions of this Act and the Rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings or at the truth of the facts alleged by the one party and denied by the other.'

11. We have no doubt that Family Court ought to have considered the application on merit. Family Courts Act does not allow advocates to appear before Family

Court. Technicalities cannot be allowed to prevail upon substantial interest of justice. Procedures are made to achieve ultimate object to dispense justice.

12. Moreover we find that neither in the order sheet (Annexure-3 to the affidavit) nor in the impugned judgment and order dated 27.9.2004, there is anything to show that Santosh Kumar was, in any manner, not agreeable to the consent divorce petition or that he wished to resile from what he has stated in the consent petition jointly signed by him and his wife. To this extent Santosh Kumar was also petitioner ; it is not possible, as the record stands at present to comprehend why his petition for AWC 105 seeking decree of divorce by consent has been rejected.

13. Considering the averments contained in the divorce petition under Section 13B, Hindu Marriage Act/Annexure-1 to the affidavit, Family Court was under an obligation to afford opportunity to the concerned parties to prosecute consent divorce petition.

14. Family Court has necessary powers, including those under Order IX, Rule 13, C.P.C. by virtue of Section 10, Family Court Act,

15. Judgment and decree dated 27.9.2004, passed by the Principal Judge Family Court/Additional District Judge, Moradabad in Case No. 54 of 2004, Santosh Kumar v. Smt. Roopa, cannot be sustained.

16. The impugned Judgment and decree dated 27.9.2004, is hereby set aside. Application for divorce under Section 13B, Hindu Marriage Act (registered as Case No. 54 of 2004) is hereby restored and concerned Family Court, Moradabad, is directed to decide the aforesaid case on merit in accordance with law.

17. Since notice has not been issued to Sri Santosh Kumar we specifically direct that in case Santosh Kumar finds himself aggrieved with this order it shall be open for him to apply for recall/review of this order. Appeal allowed. No costs.