

Rita Mago Vs. V.P. Mago

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Court : Delhi

Decided On : Apr-23-1981

Reported in : 20(1981)DLT103

Judge : T.P.S. Hawla, J.

Acts : Hindu Marriage Act, 1967 - Sections 24

Appeal No. : Civil Revision No. 401 of 1980

Appellant : Rita Mago

Respondent : V.P. Mago

Advocate for Pet/Ap. : Ashwani Kumar, Adv

Judgement :

T.P.S. Chawla, J.

(1) This is, indeed, an odd petition. The wife commenced proceedings for divorce and obtained an ex-parte decree. She now wants to have that judgment revised, though it is in her favor. Nat that she seeks reversal of the decree. Her complaint is that the judgment impliedly rejects her application for incurring maintenance, and it is in that respect that she is aggrieved. The argument will become mare comprehensible after I state the facts.

(2) On 18th January 1979, the wife filed a petition for divorce on the grounds of cruelty and desertion by her husband. Along with the petition, she filed an application under section 24 of the Hindu Marriage Act for maintenance pendente lite for herself and her infant daughter, and expenses of the proceedings. On 22nd January 1979, the Additional District Judge made an order that the petition be registered and 'Notice be issued to the respondent' for 1st March 1979. Nothing was said about the application for interim maintenance. A process fee of Rs. 1.50 had already been filed with the petition. This is the fee prescribed for issuing notice of a petition or application in the District Courts. Although on the process fee form it was stated that the purpose of filing the process fee was 'Service of summons of position on respondent along with Section 24 application', notice could be issued either of the position or the application and not both because only a single process fee had been filed. No further process fee was filed after the order that notice should issue. In these circumstances, as was to be expected, only notice of the main proceeding, i.e. the petition, was issued to the husband. The application lay unattended.

(3) On 1st March 1979 it was reported that the husband had not been served as he had gone out of India. The judge ordered notice to issue again for 9th April 1979, and directed the wife to furnish the address of the husband. The process fee, if any, filed pursuant to this order does not appear to be on record.

(4) On 9th April 1979, the case was transferred to another Additional District Judge. He made an order on the same date directing notice to issue to the husband for 17th May 1979. The wife was again required to furnish the complete address of the husband and file the process fee. Again, she filed a process fee of only Rs. 1.50. On the process fee form the purpose was stated to be: 'Service on respondent by registered AD. as he is a resident of New York'. Since, as before, the process fee paid was sufficient only for a single process, notice was sent only of the petition and not the application.

(5) By 17th May 1979, the return as to service was not received. Notice was ordered to issue again for 5th July 1979. The wife again filed a single process fee Rs. 1.50. On the process fee form it was merely said : For notice to the

respondent'. So, again, notice went only of the petition.

(6) On 5th July 1979, the return as to service was again not received, and, hence, further orders were deferred till 24th July 1979. On this latter date, the case was transferred to yet another Additional District Judge. He ordered notice to issue again for 13th September 1979, both in the ordinary way and by registered post, and directed the wife to file 'two copies of petition'. He made no reference to the application. The wife again filed a single process fee of Rs. 1.50 'for service of the respondent'.

(7) On 13th September 1979, the presiding officer was on leave and the matter was deferred to 22nd September 1979. On this deferred date, notice was ordered to be issued again 16th November 1979 and the direction to the wife to file 'two copies of petition' was repeated. As before, nothing was said about the application. Again, the wife filed a single process fee of Rs. 1.50. This time there was a Note on the process fee form : '2 copies of plaint and two copies of application u/s 24 attached'. But) since only one process fee was paid, notice was sent only of the petition.

(8) The husband was again not served. So, on 16th November 1979 notice was ordered to issue for 24th January 1980. The process fee paid was again Rs. 1.50. The purpose stated was 'notice to the defendant'. Because a single process fee had been paid, notice was again sent only of the petition.

(9) At last, the husband was served and he filed his written statement on 24th January 1980. The wife was then ordered to file her replication on 29th January 1980. The parties were also ordered to be present in person on that date so that an endeavor could be made to bring about a reconciliation.

(10) On 29th January 1980, the wife did not appear in court as she was said to be out of station. So, the case was adjourned to 2nd February 1980, and the parties were again directed to be present in person.

(11) On 2nd February 1980, no one appeared on behalf of the husband. Consequently, an order was made that the case would proceed exparte against

him. Immediately thereafter the statement of the wife was recorded on oath and she closed her evidence. Judgment was delivered forthwith dissolving the marriage between the parties. The judgment made no reference to the application for interim maintenance and expenses of the proceedings. On behalf of the wife that is being treated as a dismissal of the application without a hearing or an order. Hence this petition for revision of the judgment.

(12) It will be seen that at no time, throughout the proceedings, was notice of the application ordered to issue to the husband. - Nor was process fee for the issuance of such notice ever filed. No doubt, on two occasions there was a reference to the application on the process fee form, but, since only a single process fee of Rs. 1.50 was filed, notice could issue only of the petition and not the application. On other occasions, there was no reference to the application at all.

(13) These facts show that the wife and her advisers were labouring under some misconception. What exactly it was, is difficult to say. But, these facts also clearly indicate that the wife and her advisers were not all serious about proceeding with the application for interim maintenance. Supposing they were under the impression that the judge had, whether expressly or impliedly, ordered notice of the application to issue, they never filed process fee for that purpose. Whether this was done deliberately or was the result of inadvertence makes no difference. The fact remains that notice of this application was never sent nor served on the husband, or, at least, not under the authority of an order by the court. therefore, throughout the proceedings there was no stage at which an order on this application could have been made. It was never made ready for hearing. The blame for this must rest entirely on the wife and her advisers. It seems to me that the only appropriate inference that can, in law, be drawn from the course of the proceedings, is that the wife abandoned the application, and it was not pressed.

(14) Counsel for the wife, however, alleged that on a number of occasions a specific request was made on behalf of the wife that notice of the application be issued to the husband, but the judge declined to make an order. There is nothing on record to support this allegation, and I find it impossible to believe that if the

attention of the judge had been drawn to the application he would have refused to issue notice. An order issuing notice of such an application is a matter of routine, and there is no conceivable reason that I can find why the judge would have refused the order had a request been made. And, supposing what counsel for the wife now says to be true, there was nothing to prevent the wife from moving a further application demanding that an order be made on the application for interim maintenance. Admittedly, moving of that kind was never done.

(15) Moreover, if the judge had expressly refused to issue notice of the application, then why, on the process fee form filed pursuant to the order of 22nd September 1979, was reference made to the 'application u/s 24'? Was this an attempt to circumvent the alleged oral order? I think, it is patent that not much attention was ever paid by the wife and her advisers to the application for interim maintenance. They seem to have remembered it only now and then. The importance they attached to it can be gauged from the fact that not once did they file two process fees as they ought to have done.

(16) In an affidavit, now filed by the wife, she has said that on the date on which the husband filed the written statement, the attention of the judge was drawn to the fact that no reply had been filed to the application. Nevertheless, the judge made no order. Again, there is nothing on record to substantiate this assertion, and, as I have said before, I see no reason why the judge would have refused to make an order respecting the application if a request had been made. At this stage in the proceedings it was further open to the wife to insist that an order for interim maintenance and expenses of the proceeding be first made before proceeding with the case. She could have held up the proceedings by insisting on an order. But no such prayer appears to have been made by her.

(17) She further says in her affidavit that on 2nd February 1980, when the husband did not appear and an order to proceed ex parte against him was made, her counsel again requested that an order for interim maintenance and expenses of the proceedings be made on the application. The judge, it is alleged, expressed the opinion that 'as the proceedings are being culminated the order under Section 24 will not be passed'. Assuming that to be true, the 'opinion' of the judge was not

unreasonable. He could not at that time have made an order on the application) because notice had not been issued to the husband. The only alternative would have been to postpone the passing of the ex-parte decree, and issue notice of the application to the husband. This would have delayed the passing of the decree indefinitely. The wife and her advisers would obviously not have desired such a result. They must tacitly have acquiesced in the 'opinion' of the judge in order not to delay the decree.

(18) In effect, by the present petition for revision, the wife seeks to obtain an order for maintenance pendent lite in respect of a proceeding which is already concluded. In my opinion, that is not possible. In order under section 24 of the Hindu Marriage Act 1955 can direct payment of interim maintenance only 'during the proceedings'. There is no jurisdiction to make an order under that section after a decree. At that later stage, an order can be made only under section 25, and I was told that an application made by the wife under that section is pending.

(19) The position would have been altogether different if some order had been made after notice to the husband. A petition for revising such an order or an appeal would have remained entertainable, though meanwhile the main proceeding had terminated in a decree. That is all that can be derived from *N. Subramanyam v. Mrs. M.G. Sarnswathi*, Air 1964 Kar 38, on which counsel for the wife relied. But, here, the application for interim maintenance was never brought to a hearing, and the question of making an order did not arise. As I have said, the application must be deemed to have been abandoned by the conduct of the wife and her advisers. The position is, thus, the same as if no application had ever been made. To make an order for interim maintenance, now, in revision, would be as if to make the order at first instance after the main proceeding for divorce had terminated. That would be directly contrary to section 24 of the Hindu Marriage Act.

(20) It is to overcome this difficulty that counsel for the wife contended that the final judgment implied an order rejecting the application for interim maintenance. The argument is untenable. Notice of the application was never issued to the husband as the wife failed to obtain an order and deposit process fee, and, hence,

no adjudication on the application can be attributed to the judge.

(21) After the hearing of this petition, I have discovered on my own that there are two authorities which take the same view as I had formed. They are *Nirmala Davi v Ram Dass*, , and *Smt. Chitra Lekha v. Ranjit Rai*, : AIR1977 Delhi176 . These were not cited in argument as they ought to have been since the matter was being heard ex parte against the husband. In the latter case, a single judge of this court distinguished *N. Subramanyam v. Mrs. M.G. Saraswathi*, Air 1964 Mysore 38, on the same ground that I have done.

(22) For these reasons, this petition is dismissed. However, since the husband did not appear at the hearing, and the matter has been heard ex parte, there will be no order as to costs.

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