

Smt. Manju Vs. Krishan Gopal

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Court : Rajasthan

Decided On : Mar-23-1998

Reported in : 1998(3)WLC29; 1998(1)WLN358

Judge : V.S. Kokje, J.

Appeal No. : S.B. Civil Misc. Appeal No. 364 of 1995

Appellant : Smt. Manju

Respondent : Krishan Gopal

Advocate for Def. : Shri. Pradeep Shah

Advocate for Pet/Ap. : Shri. I.R. Choudhary

Disposition : Appeal allowed

Judgement :

V.S. Kokje, J.

1. Heard Shri I.R. Choudhary, learned Counsel for the appellant and Shri Pradeep Shah, learned Counsel for the respondent.

2. This is an appeal against an ex-parte decree for restitution of conjugal rights passed on an application under Section 9 of the Hindu Marriage Act 1955. The husband filed a case before the District Judge Churu on (illegible). The notice was

served and the appellant wife appeared before the learned District Judge through her father on 24.7.1993. On 18.9.1993 she was represented by Shri Rakesh Verma, Advocate. The case was then fixed for conciliation and then was adjourned to 6.11.1993, 29.1.1994 and 26.2.1994. Out of these, on 26.2.1994 the Presiding Officer was on leave. On 2.4.1994 i.e., on the next day before the Presiding Officer after appearance of the learned Counsel for the appellant the Court closed the right of the appellant to file reply. On the next date of hearing i.e., 7.5.1994 the counsel for the wife moved an application under Section 151 CPC with an unattested affidavit and the case then was adjourned to 16.7.1994 for reply and arguments on that application. On 16.7.1994 time was sought by the learned Counsel for the husband to file reply and the case was fixed on 20.8.1994, on that date the Presiding Officer was on leave. On the next date i.e., 3.9.1994 again the husband's counsel sought time for filing a reply to the application under Section 151 CPC and the case was adjourned to 17.9.1994. On that date Presiding Officer was on leave. The case was fixed on 15.10.1994 and again the Presiding Officer was on leave and even on that date the learned Counsel for the husband sought time to file reply. On 11.11.1994 the learned Counsel for the wife Shri Rakesh Verma pleaded no instructions orally and by writing in the margin of the proceedings the words 'No instructions' and signing under them. The Court then gave call for the non-applicant wife and on her not responding to the calls because of her absence ordered ex-parte proceedings to be taken against her. On the next date i.e., 17.12.1994 ex-parte evidence was recorded and ultimately on 11.1.1995 ex-parte decree was passed. It is in this setting that this case has come before this Court.

3. The learned Counsel for the appellant wife submits that having engaged a counsel the appellant was complacent that her interest would be looked after by her counsel. She was, therefore, not present when the counsel pleaded no instructions before the Court. She also claims that the counsel did not intimate her of his having pleaded no instructions or his intention to do so. The learned Counsel for the appellant further submits that in the matrimonial cases an opportunity to contest has to be given and ex-parte decrees have to be discouraged. He relies on a Division Bench decision of this Court in *Banshi Dhar v. Chandra*, 1987 RLW 628. The learned Counsel also relies on a decision of the

Madhya Pradesh High Court in Smt. Benibai v. Smt. Champabai : AIR 1996 MP243 , wherein the learned Single Judge of that Court has observed that it is always the duty of the counsel before pleading no instructions to inform the party that for a particular reason he shall not be appearing in the case and shall be pleading no instructions. A person who is not present in the Court presupposes that because of engagement of a counsel his interest would be properly looked after. It is the duty of a counsel to inform him before he proceeds to plead no instructions. It was further observed that it was the duty of the Court also to inquire as to why and under what circumstances the counsel was pleading no instructions. The Court cannot be a silent spectator to the scene which is staged in the Court. If a counsel declined to act up to his duty then the Judge has to Act as it is his duty to administer justice. The judicial conscience of the Judge should always be satisfied before he permits a lawyer either to withdraw or to retire from the case.

4. The learned Counsel further relied on a decision of the Supreme Court in Tahil Ram Issardas Sadarangani and Ors. v. Ramchand Issardas Sadarangani and Anr. 1993 Supreme Court 1182, wherein it has been observed that when a Advocate withdraws his power in absence of the client and when the client is not aware of the date of hearing, dismissal of petition in default would be for no fault of the client and should be set aside. Another decision of the Supreme Court relied upon was the case of Malkiat Singh v. Joginder Singh AIR 1998 Supreme Court 258 wherein it was observed that when the litigant was not negligent or careless and moved the Court as soon as knowing of the ex-parte decree and when the litigant had engaged a counsel and was following the proceedings the litigant cannot be punished for his counsel pleading no instructions.

5. The learned Counsel for the respondent however submits that right from the beginning the appellant had avoided coming to the Court and it was clear that she was trying to protract the trial of case for one reason or the other. It was submitted that after having waited for the appellant to appear in the Court for a long time, her counsel in utter exasperation pleaded no instructions and in such a situation it is not a case where an innocent litigant was suffering because of sudden pleading of no instructions by her counsel.

6. I have heard the learned Counsel and perused the record. As already stated, on the date on which the learned Counsel for the appellant wife pleaded no instructions the case was only fixed for reply and arguments on the application under Section 151 CPC filed on behalf of the wife. The wife was not expected to remain present on that date nor she was directed by the Court to remain present. There was no occasion for her counsel to have pleaded no instructions on that date and at least he was expected to show to the Court the reasons for which he was doing so. Sub-rule (2) of Rule 4 of Order 3 of the CPC very clearly lays down that the appointment of a pleader shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. The counsel for the respondent before the Trial Court who pleaded no instructions did not comply with the requirement of asking for leave of the Court to withdraw from the case in writing and the Court also ignored the provision. The purpose of the provision is clearly to avoid the possibility of a litigant suffering because of a sudden pleading of no instructions by his counsel without his knowledge. It is clearly the duty of the Court to ensure strict compliance with the Rule and require a counsel pleading no instructions to make such prayer in writing and before granting leave to withdraw from the case to ensure that the litigant on whose behalf the counsel was appearing has knowledge of such withdrawal of his counsel from the case. If a counsel wants to plead no instructions before the Court it is the duty of the Court to require him to first give a notice to his client. In any case leave to withdraw from the suit by pleading no instructions should not be granted to a counsel without notice to the client for whom he appears. In cases in which the Court suspects that the provision is being abused for getting the case adjourned some how, the best course is to refuse permission to withdraw from the proceedings straightway. Unfortunately, the provisions was neither followed in letter nor in spirit by the learned District Judge who proceeded ex-parte merely on pleading no instructions by the counsel for the wife. The learned District Judge has not even taken care to mention whether he had granted leave for withdrawal to the counsel or had not done so.

7. It would be useful to survey the case law on the point in order to settle the position once for all so far as this Court is concerned.

8. In *All India Reporter v. CD. Moghe and Ors* AIR 1950 Nagpur 110, Sh. V.R. Sen, J. though in some what different context observed that it is not open to a counsel to withdraw or to a party to terminate the services of its counsel without leave of the Court. The Court is the best Judge to decide if the determination should be made without prejudice to the trial.

9. In *Thakur Singh v. Bhaironlal* a Single Bench of this Court disagreed with the view expressed by Madras High Court in *Manickam Pillai v. Mahudum Bathummam* AIR 1925 Madras 21 and observed that it has not been decided in that case that even though no leave is given by the Court simply an endorsement saying that the pleader has withdrawn the vakalat would be sufficient for his withdrawal under order 3 Rule 4 of CPC. It was further observed that the question whether a particular document is to be taken to be a document in writing signed by the party or the pleader for the determination of the pleader's appointment depends altogether upon the interpretation of that document.

10. In *Pannalal v. Firm Ballaram Basia* an another Single Bench of this Court held that the mere fact that the counsel for the defendant made a note on the notice that his power to represent the defendant had come to an end by the order of dismissal of suit, even if it is deemed to be a prayer for withdrawal from suit, does not terminate his authority. He can withdraw from suit only with the leave of the Court.

11. In *Kodanda Ramaswami Van Devastanam v. D.Seshayya* AIR 1957 Andhra Pradesh 950 it was observed that Order 3 Rule 4 CPC so far as it governs the continuance of the Vakalat is primarily concerned not so much with the right of an Advocate as with the right of the Court to consider that the client who appears by a pleader in any proceedings continues to be represented by him until the appointment which is filed in Court is determined in the manner specified in the rule.

12. In Govardhanbhai Somabhai Patel v. Parshottam Umedbhai AIR 1976 Gujarat 1998, a Division Bench of the Gujarat High Court observed that an Advocate's reporting no instructions' does not discharge him. An order or discharge from the Court is necessary under Order 3 Rule 4 CPC.

13. In Thomas Rajan v. Philip John AIR 1982 Kerala, 118 a learned Single Judge of the Kerala High Court observed that a mere notice given by the Advocate to his client giving up the engagement as a lawyer could not be sufficient for withdrawal of his power in the case. The appointment of the counsel in a suit or appeal would hold good till determined according to the procedure prescribed in the Civil Procedure Code.

14. In Bijli Cotton Mills (Pvt.) Ltd. v. M/s. Chhaganmal Bastimal : AIR1982 All183 a Division Bench of the Allahabad High Court held that the appointment of a pleader shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader as the case may be and filed in the Court. Once an Advocate is engaged as a pleader by his client the authority of the advocate to represent his client continues to remain in force until it is determined with the leave of the Court in writing signed by the client or the pleader. In the absence of a written termination of the relationship of the client and the pleader, the pleader is not absolved of his duty to appear on behalf of his client. Any statement made by him that he had no instructions do not terminate his authority. Once he has accepted the brief, he continues to represent the client and be responsible for the conduct of the case. He is, no doubt, entitled to terminate his status as a pleader of the client but that cannot be done orally. It must be done in writing with the permission of the Court in the manner laid down by Order 3 Rule 4(2) CPC.

15. A Division Bench of the Karnataka High Court in Noor Abdul Jaleel v. Achuthan : AIR1982 Kant237 made certain observations which are opposite in the case before me. It was contended before the Division Bench that the Court below after permitting both the advocates of the defendant to retire from the case ought to have issued a notice to the party and ought not to have proceeded to consider the case on merits without such a notice. The prayer was opposed by the other

side by submitting that it would be putting a premium on the lethargic attitude of the defendant to protract the litigation. The Division Bench answered the question in the following words in paragraph 10 of the Judgment.

10. We gave our anxious consideration to these contentions. Considering the facts and circumstances of the case, in the light of the authorities to which we have called attention, it is, in our judgment, not possible to hold that the defendant was entitled to a notice as contended for. There is no such obligatory duty imposed on the Court to invite a party whose Advocate out of disgust has retired from the case. It is a sound principle, no doubt, that the Court before granting permission for an Advocate to retire, must enquire whether the advocate has intimated his intention to his client not to proceed with the case. But we cannot accept the submission that the Court after permitting an Advocate to retire from the case, is bound to adjourn the case and direct a notice to the party-in-default. Such a contention, so far as we find, has neither the sanction under law nor the support of any canon of judicial ethics or rules of prudence.

In our system of administration of justice, it is generally for litigants to choose their Advocates and the Advocates are primarily accountable to their parties. If a responsible Advocate seeks leave of the Court to retire from the case and the Court in its judicial discretion permits him to retire, we fail to understand why then the Court should again notify the party-in-default in the absence of any statutory requirement. A word of caution however, is required to be uttered. We in the world of law should not move mechanically. We must have a little more regard to facts of life and problems of people. We must insist on the proof from the Advocate when he seeks leave to retire. The proof pertains to the intimation of his intention to the party not to proceed with the case. This is more by way of a rule of prudence. Next is the rule of discretion to be observed. The discretion to grant or not to grant leave to retire from the case should be guided by well settled judicial norms. If the leave sought for is granted and if the party remains unrepresented and its decision on any matter in issue is likely to affect any suit or proceeding, then the Court would be well advised to request any Advocate to address it on that issue before finally disposing of the matter. Such a discretion has been conferred upon Courts under O.I.R. 10-A of the Civil P.C. That is all that we intend to state in this context.

16. I agree with the aforesaid view, it is true that the law does not require a Court to issue notice to litigant whose counsel pleads no instructions. But that does not mean that in no case the Court can issue such a notice. The Court has discretion in the matter and if it finds that the ends of justice require that such a litigant is sounded about his counsel abandoning his cause, it can very well issue notice to the litigant. It should all depend on the facts and circumstances of each case. When it appears to the Court that the litigant is not be blame for his counsel pleading no instruction. The Court may issue notice to the litigant to enable him to make other arrangements. In case it appears to the Court that pleading of no instructions is only a subterfuge and the real intention is to get the case adjourned some how, the Court may straightway refuse leave to withdraw from the case to the counsel and then proceed ex-parte if he does not take part in the proceedings.

17. In the present case when there was no order passed on the request for withdrawal from the case I find that the learned District Judge has erred in proceeding ex-parte against the appellant on 11.11.1994 and thereafter proceeding to pass an ex-parte decree after taking ex-parte evidence in the case. This appeal, therefore, deserves to be allowed. It is hereby allowed. The ex-parte decree passed by the learned District Judge, Churu in Misc. Civil Case No. 12 of 1993 passed on 11.1.1995 is set aside and the proceedings under Section 9 of the Hindu Marriage Act are revived. The application under Section 151 CPC moved by the learned Counsel for the wife for setting aside the order closing right to file a reply dated 2.4.1994 is also set aside. The parties shall appear before the District Judge, Churu on 27th April, 1998. The appellant shall file her reply to the application under Section 9 CPC on 27.4.1998 before the learned District Judge. If she fails to file such reply on that date, the District Judge shall be free to proceed in accordance with law against her. As this case has already taken a long time it is directed that the case shall be disposed of within four months from 27.4.1998 by the District Judge, Churu and the parties shall cooperate in the disposal of case by him within that period. There shall be no order as to costs. The record be sent back immediately.