

Kakali Mukherjee Vs. Gautam Mukherjee

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Court : Kolkata

Decided On : Jul-28-1998

Reported in : (1999)1CALLT124(HC),II(1999)DMC115

Judge : Bhaskar Bhattacharya, J.

Acts : Code of Civil Procedure (CPC), 1980 - Sections 13(1), 21 and 115 - Order 32, Rule 15;; Hindu Marriage Act, 1955 - Section 13

Appeal No. : Civil Revisional Jurisdiction, C.O. No. 1718 of 1998

Appellant : Kakali Mukherjee

Respondent : Gautam Mukherjee

Advocate for Def. : Mr. K.S. Roy and ;Ms. Tapasi Sengupta, Advs.

Advocate for Pet/Ap. : Mr. Abhijit Banerjee and ;Mr. Pritwish Bhattacharya, Advs.

Judgement :

B. Bhattacharya, J

1. This revisional application under section 115 of the Code of Civil Procedure ('Code') is at the instance of a wife/respondent in a suit for divorce under the provision of section 13(1)(iii) of the Hindu Marriage Act, 1955 ('Act') and is directed against Order No. 42 dated June 4, 1998 passed by the learned trial Judge in Matrimonial Suit No. 38 of 1997 thereby allowing an application under Order 32

Rule 15 of the Code filed by the husband/opposite party and fixing June 25, 1998 for holding enquiry under the aforesaid provision of the Code.

2. As indicated earlier the aforesaid matrimonial suit was filed by the husband/opposite party on the ground inter alia under section 13(1)(iii) of the Act. After the interim alimony proceeding was over, the husband/ opposite party filed an application under Order 32 Rule 15 of the Code for holding an enquiry as to whether the petitioner herein was capable of protecting her interest in the suit.

3. The aforesaid application was contested by the present petitioner by filing written objection thereby denying the allegation made by the opposite party.

4. By the order impugned, the learned trial Judge has allowed the prayer of the husband/opposite party.

5. Mr. Banerjee, the learned senior advocate appearing in support of the instant revisional application has made two fold submissions.

6. The first submission of Mr. Banerjee is that the provision contained in Order 32 Rule 15 of the Code has no application to a proceeding for divorce under section 13(1) of the Act.

7. The second contention of Mr. Banerjee is that in this case the wife having competently preceded with the proceeding for alimony and in the absence of any prima facie material showing sign of insanity on the part of his client, the learned trial Judge acted illegally and with material irregularity in allowing an application under Order 32 Rule 15 of the Code.

8. Mr. Roy, the learned senior advocate appearing on behalf of the husband/opposite party has on the other hand controverted the aforesaid submissions made by Mr. Banerjee and has relied upon the following decisions in opposing the prayer of Mr. Banerjee:

(1) Asha Rani v. Amratlal, ,

(2) Duvvuri Papt Rcdy and Ors. v. Duvvuri Rani Reddy, : AIR 1969 AP362 .

9. As regards the first contention of Mr. Banerjee, in view of the provision contained in section 21 of the Act, the proceeding under the Act shall be regulated as far as may be by the Code subject however to the other provisions contained in the Act and to such Rule as the High Court may make in this behalf. Mr. Banerjee could not draw my attention to any provision contained in the act or in any rule prescribing application of Order 32 Rule 15 of the Code to a proceeding for divorce under section 13 of the Act. The law is now well settled that it is the duty of the court to see that the defendant is capable of protecting his interest in defending that suit and for that purpose the court may seek assistance of medical experts and can compel a party to appear before a Medical Board for deciding the question. The law is also settled, that Order 32 Rule 15 applies not only to a person of unsound mind but also to a person of weak mind. In this case the allegation of mental unsoundness has been put forward in the application of divorce. In the application under Order 32 Rule 15 of the Code the petitioner has annexed certain medical prescriptions in support of his allegation. Under the aforesaid circumstances the court has been prima facie satisfied about the allegation of the petitioner and has directed an enquiry to be held to ascertain the capability of the petitioner for the purpose of defending the said suit.

10. In the case of *Asha Rani v. Amratlal* reported in relied upon by Mr. Roy it was held that without holding any enquiry of a preliminary nature as regards the unsoundness of mind of the defendant as required under Order 32 rule 15 of the Code if any decree is passed on the ground of mental infirmity, the said decree will be a nullity.

11. Thus, in my opinion, the provision contained in Order 32 Rule 15 of the Code applies squarely to a proceeding for divorce under section 13 of the Hindu Marriage Act. As regards the second contention raised by Mr. Banerjee I find that on the basis of allegations made in the pleading as well as in the application under Order 32 Rule 15 of the Code the trial court has merely passed a direction for preliminary enquiry under the provision contained in Order 32 Rule 15 of the Code. The final decision on such enquiry is yet to come. The order impugned. In my opinion, cannot be said to be a case decided within the meaning of section 115 of the Code nor can it be said that the petitioner has suffered any irreparable loss

and injury nor has the said order occasioned a failure of justice.

Under the aforesaid circumstances I find no force in the aforesaid contentions of Mr. Banerjee. Both the points raised by Mr. Banerjee having failed, the revisional application is dismissed. In the facts and circumstances of the case there will be however no order as to costs.

12. Application dismissed

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