

Punjab-Haryana High Court

Sanjay Sarin vs Payal Sarin on 16 February, 2012

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

F.A.O. No. M-40 of 2012 (O&M)
DATE OF DECISION : 16.02.2012

Sanjay Sarin

.... APPELLANT

Versus

Payal Sarin

..... RESPONDENT

CORAM :- HON'BLE MR. JUSTICE SATISH KUMAR MITTAL
HON'BLE MR. JUSTICE T.P.S. MANN

Present: Mr. Rajiv Kataria, Advocate,
for the appellant.

Caveator/respondent in person.

SATISH KUMAR MITTAL , J.

1. The husband has filed the instant appeal against the order dated 13.2.2012, passed by the court of Additional District Judge, Chandigarh, whereby the counter-claim filed by him under Section 23-A of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') seeking divorce on the ground of adultery, in the divorce petition filed by the wife (respondent herein) under Section 13 of the Act on the ground of cruelty, has been dismissed. As a consequence of the said order, the trial court has also dismissed the application filed by the appellant-husband under Order 1 Rule FAO No. M-40 of 2012 (O&M) -2-

10 of the Code of Civil Procedure (hereinafter referred to as 'the Code') for impleading one Gaurav Saini son of M.K. Saini, the alleged adulterer, as respondent in the divorce petition.

2. The brief facts of the case are that the marriage of the appellant and the respondent was solemnized as per the Hindu rites and ceremonies at Chandigarh on 21.2.2001. Out of this wed-lock, two children, one son and one daughter, were born on 3.12.2001 and 28.10.2003, who are now aged about ten years and eight years, respectively. On 16.3.2007, the appellant- husband filed a petition under Section 9 of the Act in the District Court, Tis Hazari, Delhi, for restitution of conjugal rights, alleging therein that the respondent-wife had withdrawn from his society without reasonable

excuse. It was alleged that after receipt of notice of the said petition, on 1.6.2007, the respondent-wife filed a petition under Section 13 of the Act at Chandigarh for dissolution of marriage on the ground of cruelty. It is admitted position that in the said divorce petition, the appellant-husband filed written statement on 3.3.2008. It is also an admitted fact that while filing the said written statement, the appellant-husband did not file any counter-claim for any relief, which could have been granted against the respondent-wife under the Act.

3. Thereafter, on the transfer petitions filed by the respondent- wife, the Hon'ble Supreme Court vide order dated 15.11.2010 (Annexure A-

5), transferred the petition filed by the husband under Section 9 of the Act and the contempt petition filed by the appellant against the respondent, from FAO No. M-40 of 2012 (O&M) -3-

the court of Additional District Judge, Tis Hazari Courts, Delhi, to the District Court at Chandigarh, where the wife's petition under Section 13 of the Act was pending. At that time, the divorce petition filed by the respondent-wife was at the stage of arguments. While transferring the aforesaid petitions, the Hon'ble Supreme Court directed the District Court, Chandigarh to take up and dispose of the transferred cases along with the divorce petition and requested the trial court to expedite the disposal of both the cases.

4. When both the cases were not decided as per the directions of the Hon'ble Supreme Court, the respondent-wife filed Civil Revision No. 4421 of 2011 in this Court, seeking direction to the trial court to decide both the cases in a time frame manner. Vide order dated 18.8.2011, this Court, while keeping in view the ages of the parties, nature of litigation, future of their children, and totality of other facts and circumstances, directed the trial court to complete the trial of both the matrimonial cases within a period of four months positively, from the date of receipt of a certified copy of the order.

5. The period of four months expired on 18.12.2011. Thereafter, on request of the trial court, the time to decide both the cases was extended by this Court upto 22.2.2012. In view of the time frame fixed by this Court, the trial court took the case for hearing on day to day basis, so that the trial of the cases could be concluded within the time prescribed by this Court. The divorce petition filed by the respondent-wife was at the stage of rebuttal FAO No. M-40 of 2012 (O&M) -4-

and arguments, whereas the petition under Section 9 of the Act filed by the appellant-husband was at the stage of evidence of the respondent-wife. The appellant-husband had availed 25 effective opportunities to conclude his evidence in the petition under Section 13 of the Act, but when he failed to conclude the same, his evidence was closed by order of the court on 23.1.2012.

6. On 31.1.2012, when the matter was fixed for arguments, the appellant-husband filed an application under Order 6 Rule 17 of the Code for amendment of his written statement in the divorce petition to take the plea that the respondent-wife was living an adulterous life with one Gaurav Saini, with whom she had also solemnized marriage. It was also sought to be pleaded that the respondent-wife had committed an offence of bigamy, therefore, she was guilty of matrimonial

wrong and not entitled to a decree of divorce, as prayed by her. The learned trial court, vide its order dated 6.2.2012, dismissed the said application, while observing as under :

"Law relating to amendment of pleadings is fairly liberal but the court can permit the parties to amend their pleadings only within the parameters of Order 6 Rule 17 CPC. It has been claimed that the husband came to know of the adulterous relationship of his wife during the course of proceedings under the Domestic Violence Act in Delhi when one Sukhwinder Kaur appeared in the court and disclosed about the affair. It has, however, not been spelled out in the application as to when, for the first time, the husband came to know of the alleged affair and adulterous relationship of the wife and when the petition FAO No. M-40 of 2012 (O&M) -5-

under the Domestic Violence Act was fixed in the court at Delhi. The husband had failed to convince that despite the exercise of due diligence, he could not have raised the matter before the commencement of trial. The application does not appear to be bonafide and is a mere device to delay the proceedings of the case. Order dated 01.09.2011 of Hon'ble High Court shows that when cross examination of the wife was being recorded in the petition under Section 9 of the Act, at that time also, the husband was aware of her alleged relationship and cross examined her on that aspect. It does not therefore, appear that in spite of due diligence the husband could not have raised the matter earlier. Allowing the application for amendment of the written statement would result in denovo trial of the case which has to be determined by 22.02.2012 as per orders of Hon'ble High Court. The application is without merit and is, therefore, dismissed."

7. Immediately after dismissal of his aforesaid application, on the next day, the appellant-husband filed an application under Section 23-A of the Act, claiming it as a counter-claim for grant of decree of divorce on the ground of cruelty, adultery and bigamy on the part of the respondent-wife. It is undisputed position that when the said application was filed, the case was listed for arguments. Along with the application, the appellant-husband also filed an application under Order 1 Rule 10 of the Code for impleading Gaurav Saini, the alleged adulterer, as a respondent.

8. Vide the impugned order, the learned trial court dismissed the said applications being filed with malafide object to delay the decision in the divorce petition filed by the respondent-wife and the petition under FAO No. M-40 of 2012 (O&M) -6-

Section 9 of the Act filed by the appellant-husband. It has been observed that taking on record the counter claim of the appellant-husband seeking divorce on the ground of wife's adultery would amount to obliterating the order dated 6.2.2012, whereby his application to amend his pleadings to incorporate the factum of adulterous relationship of the wife has been dismissed. It has been further observed that learned counsel for the appellant-husband has failed to satisfy why the counter-claim has been filed at the fag end of the trial, when the alleged adulterous relationship has come to the appellant-husband's knowledge, during the cross-examination of the respondent-wife. It has also

been observed that on the one hand, the appellant-husband is seeking restitution of conjugal rights and on the other hand, by filing counter-claim, he seeks decree of divorce, a contradictory relief.

9. The aforesaid order has been challenged by the husband in the instant appeal.

10. We have our doubts as to whether the impugned order passed by the trial court is appealable under Section 28 of the Act, which reads as under :

28. Appeals from decrees and orders - (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise FAO No. M-40 of 2012 (O&M)

-7-

of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of ninety days from the date of the decree or order.

11. Learned counsel for the appellant-husband argued that since dismissal of the the counter-claim filed by the appellant-husband under Section 23-A of the Act amounts to passing of the final order on the counter-claim, therefore, such an order is appealable. In our opinion, the application filed by the appellant-husband under Section 23-A of the Act, alleged to be counter-claim, was not decided on merits, but was dismissed on the ground that it was filed at a very belated stage with intention to delay the proceedings. Thus, in our opinion, such an order cannot be taken as a final order. It is an interim order against which no appeal lies under Section 28 of the Act. But without going into this controversy, even if we take that the impugned order is a revisable order, under the power of superintendence under Article 227 of the Constitution of India, we have heard learned counsel for the appellant-husband and the caveator/respondent-wife in person, on merits, so that the matter may not be further delayed.

FAO No. M-40 of 2012 (O&M) -8-

12. Learned counsel for the appellant-husband argued that the provision of Order 8 Rule 6-A of the Code, which provides for filing of counter-claim by defendant, is not applicable to the proceedings under the Act. It is pertinent to mention here that as per Order 8 Rule 6-A (1) of the Code, a defendant is required to file a counter-claim in respect of a cause of action accruing to him against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. In order to wriggle out of this provision, the appellant-husband is taking the plea that the provision of Order 8 Rule 6-A of the Code is not applicable to the proceedings under the Act. According to the learned counsel, as far as any proceeding under the Act is concerned, the counter-claim can only be filed under Section 23-A of the Act, which reads as under :

23A. Relief for respondent in divorce and other proceedings - In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

According to learned counsel for the appellant-husband, in any proceeding for divorce or judicial separation or restitution of conjugal rights, the FAO No. M-40 of 2012 (O&M) -9-

respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but may also make a counter-claim for any relief under the Act on that ground, which relief the court is competent to grant under the Act. While referring to Section 21 of the Act, which makes the Code applicable to the proceedings under the Act, learned counsel argued that the Code shall regulate all the proceedings under the Act, subject to any contrary provision contained under the Act. Learned counsel further argued that since Section 23-A of the Act deals with filing of the counter-claim, therefore, the provision of Order 8 Rule 6-A of the Code with regard to filing of counter-claim is not applicable to the proceedings under the Act. In support of his contention, learned counsel relied upon a decision of the Bombay High Court in S. Rashmi Pradip Kumar Jain Vs. Pradeep Kumar, II (1994) Divorce & Matrimonial Cases 25, and a decision of Madhya Pradesh High Court in Sameeran Roy Vs. Leena Roy, AIR 2001 M.P. 192.

13. Learned counsel further argued that under Section 23-A of the Act, counter-claim can be filed by the respondent at any time of the proceeding, even at the stage of arguments of the case, as in the said provision, nothing has been provided that counter-claim can be taken either before or after the filing of the written statement but before the respondent has delivered his defence or before the time limited for delivering his defence has expired. He argued that the trial court, under this provision, can FAO No. M-40 of 2012 (O&M) -10-

only decline to entertain the counter-claim, if the court is not satisfied about unnecessary and improper delay in instituting the proceeding, as required under clause (d) of Section 23 (1) of the Act.

14. During the course of arguments, learned counsel for the appellant-husband admitted that the appellant-husband came to know about the adulterous relationship of the respondent-wife in the year 2009 during her cross-examination. However, he submits that it was not obligatory on the appellant-husband to file the counter-claim at that time. According to the learned counsel, it is the prerogative of the respondent to take such decision and then to file the counter-claim in the proceedings at any stage. According to the learned counsel, in the present case, there was no inordinate delay on the part of the appellant-husband in filing the counter-claim and the learned trial court has committed grave illegality while rejecting the same on the said ground.

15. We have considered the submissions made by learned counsel for the appellant.

16. Under the Code, three modes of setting up counter-claim in a civil suit have been provided. Firstly, the counter-claim can be set up in the written statement. Such counter-claim would be a counter-claim in the light of Order 8 Rule 1 read with Rule 6-A of the Code. Secondly, a counter-claim may be preferred by way of amendment in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9 of the Code. In the latter two cases, the counter-claim, though FAO No. M-40 of 2012 (O&M) -11-

referable to Order 8 Rule 6-A of the Code, cannot be brought on record as of right but shall be governed by the discretion vesting in the court, either under Order 6 Rule 17 or Order 8 Rule 9 of the Code, as the case may be.

17. Admittedly, in the present case, when the written statement was filed by the appellant-husband, he did not set up any counter-claim. His subsequent application for amendment of the written statement for taking the plea of adultery as defence to defeat the divorce petition filed by the respondent-wife was also dismissed. Immediately thereafter, within two days, the appellant-husband filed an application under Section 23-A of the Act, claiming it as a counter-claim for grant of decree of divorce on the ground of cruelty, adultery and bigamy on the part of the respondent-wife. The counter-claim filed by the appellant-husband falls under the third category. In this category, the counter-claim cannot be brought on record as of right, but shall be governed by the discretion vesting in the court. It is well settled that generally, a counter-claim, which was not set up in the original written statement, should not be allowed to be taken on record at a belated stage of the trial, particularly when the issues have already been framed and the case has been set down for trial. In *Ramesh Chand Ardawatiya Versus Anil Panjwani* (2003) 7 Supreme Court Cases 350, it was held that if the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of the proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already FAO No. M-40 of 2012 (O&M) -12-

taken by the court, the court would be justified in not exercising its discretion in favour of permitting a belated counter-claim. The framers of the law never intended pleading by way of counter-claim to be utilized as an instrument for forcing the reopening of the trial or pushing back the progress of the proceedings.

18. Learned counsel for the appellant argued that the appellant has filed the counter-claim under Section 23-A of the Act, which does not provide any stage or the time limit for filing the counter-claim. According to the learned counsel, the provisions of counter-claim, particularly Order 8 Rule 6-A of the Code, which provides that the counter-claim in respect of a cause of action accruing to the defendant against the plaintiff can be filed either before the defendant has delivered his defence or before the time limited for delivering his defence has expired, are not applicable. Learned counsel further argued that these provisions are contrary to Section 23-A of the Act, hence need not to be followed in view of Section 21 of the Act. In our opinion, these contentions raised by learned counsel for the appellant are without any substance.

19. Section 23-A was inserted in the Act by virtue of the Marriage Laws (Amendment) Act No. 68 of 1976, with intention to provide relief to the respondent in divorce and other proceedings pending under the Act. According to the statement of objects and reasons, this new section was inserted in the Act to avoid multiplicity of the proceedings. Where the proceeding for divorce is initiated by a party on the ground of adultery, FAO No. M-40 of 2012 (O&M) -13-

cruelty or desertion then the respondent has been permitted not only to oppose the relief sought, but also to make counter claim for any relief under the Act on any ground. By this provision, a substantive right has been conferred on the respondent, facing the divorce petition, to make a counter- claim for any relief under the Act on the grounds of adultery, cruelty or desertion and if he/she is able to prove those grounds, the court may give him/her any relief under the Act to which he/she would have been entitled by presenting a petition seeking such relief on that ground. The provision of Section 23-A of the Act does not prescribe any procedure or the stage at which such counter-claim can be filed. For that procedure, we have to follow the general rules for filing counter-claim, as prescribed under the Code. Section 21 of the Act clearly provides that "Subject to the other provisions contained in the Act and to such rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908." If any contrary provision has been provided under the Act or the Rules framed by the High Court in this behalf, then those provisions/Rules are to be followed, but in absence of any such provision or Rule, the general procedure provided under the Code is to be applied in the proceedings under the Act. The judgment of the Madhya Pradesh High Court in Sameeran Roy's case (supra), relied upon by learned counsel for the appellant, is not applicable in the facts and circumstances of the present case. In that case, in a petition for divorce filed by the wife on the ground of impotency and cruelty on the part of the FAO No. M-40 of 2012 (O&M) -14-

husband, a counter-claim for grant of damages was set up by the husband in his written statement, alleging that he was defamed and mentally harassed due to false allegations of his impotency. The said plea of counter-claim was resisted by the wife on the ground that the claim put forth by the husband was not covered within the ambit and sweep of Order 8 Rule 6-A of the Code, but was covered under Section 23-A of the Act. The husband refuted the objection on the ground that sub-rule (1) of Order 8 Rule 6-A of the Code was of wide magnitude and would cover the counter-claim of this nature in its spectrum. However, the learned trial court accepted the objection of the wife, while observing that Section 23-A of the Act was a special provision in respect of a counter-claim, therefore, the counter-claim would not be governed by the principles enshrined

under Order 8 Rule 6-A of the Code. The issue in the present case is entirely different. The trial court has rejected the application filed by the appellant-husband for setting up counter-claim under Section 23-A of the Act on the ground that it cannot be entertained at a belated stage, particularly when the appellant has filed the same with a malafide intention to delay the divorce proceedings. Even if it is taken that the appellant is entitled to set up counter-claim under Section 23-A of the Act, the court in its discretion can decline to entertain the same in view of clause (d) of Section 23 (1) of the Act. Under the said clause, in any proceeding under the Act, the relief of divorce can be declined to the petitioner, if the court is satisfied that there has been unnecessary or improper delay in instituting the proceeding. In the present case, the court is FAO No. M-40 of 2012 (O&M) -15-

well within its discretion to decline the relief claimed in the counter-claim on the ground that the same has been instituted at a very belated stage. If such counter-claim under Section 23-A of the Act is allowed, it will defeat the very purpose of this provision, which is to ensure speedy justice. Generally, a counter-claim is set up at the initial stage of the trial. Normally, it should not be permitted to be set up at the belated stage of the trial, particularly after framing of issues and recording of the evidence. At this stage, it will amount to re-opening of the trial and delay the disposal of the case. It is fundamental principle that the court should not help those persons who are guilty of laches. On the other hand, declining to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.

20. In the present case, from the facts and circumstances of the case, it is apparent that the appellant is adamant to delay the proceedings, which have been directed by the superior court to be completed within a stipulated time. He has not only taken several dates to complete his evidence, but is filing applications, one after the other, to delay the proceedings. In these circumstances, in our view, the trial court, in exercise of its discretion, has rightly rejected the counter-claim filed by the appellant- husband at the belated stage.

21. The contention of learned counsel for the appellant that it was not obligatory on the part of the appellant to file the counter-claim at the FAO No. M-40 of 2012 (O&M) -16-

time, when he came to know about the adulterous relations of the respondent-wife, but he is at liberty to file the counter-claim at any stage of the proceeding, cannot be accepted. By his own conduct, the appellant- husband cannot be permitted to defeat the very purpose of the counter-claim to adjudicate the dispute between the parties without any delay.

22. In view of the above, we are not inclined to interfere in the impugned order, passed by the learned trial court.

23. Dismissed.

(SATISH KUMAR MITTAL)
JUDGE

February 16, 2012
ndj

(T.P.S. MANN)
JUDGE

Refer to Reporter