

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE**

**HON'BLE SHRI JUSTICE SHEEL NAGU**

**&**

**HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL**

**ON THE 28<sup>th</sup> OF APRIL, 2023**

**FIRST APPEAL NO.850 of 2021**

**BETWEEN:-**

**SMT. SHILPA HARDAHA W/O PRAVEEN KACHHAWAHA,  
AGED ABOUT 27 YEARS, OCCUPATION-STAFF NURSE  
GOVT. PRIMARY HEALTH CENTRE MOHGAON, TAHSIL  
AND DISTRICT MANDLA (M.P.)**

**.....APPELLANT**

**(SHRI MANHAR DIXIT, ADVOCATE)**

**AND**

**PRAVEEN KACHHWAHA S/O SHRI NAGESH  
KACHHWAHA AGED ABOUT 31 YEARS,  
OCCUPATION-PRIVATE GARDNER, R/O EDEN  
GARDEN WARD, MANDLA DISTT. MANDLA MP.**

**.....RESPONDENT**

**(SHRI SHAKTI PRAKASH PANDEY, ADVOCATE)**

.....  
*This appeal coming on for hearing this day, Court passed the  
following:*

**JUDGMENT**

This first appeal was admitted on 05.01.2022 but with the consent of parties, is heard finally, whereby the appellant/defendant/wife has challenged the judgment and decree dated 11/08/2001 passed by Principal Judge, Family Court, Mandla in Civil Suit No.23-A/2018 (RCSHM No.130/2018) allowing the petition under Section 13(1)(i) of the Hindu Marriage Act, 1955 filed by the respondent/plaintiff/husband, resulting into decree of divorce on the ground of adultery.

2. In short the facts are that the plaintiff and defendant were married on 05/05/2018 as per Hindu rituals. It is alleged that within 4-5 days of marriage the defendant left the matrimonial home and started residing alone in a rented house at Mehgaon (Distt-Bhind). It is alleged that lastly on 10/06/2018 the plaintiff and defendant resumed cohabitation but thereafter the defendant avoided to come back and upon having suspicion the plaintiff informed the incident to his parents, thereupon father of the plaintiff along with his friend Sunil Benjamin reached the defendant's residence at Mehgaon at 7:30 p.m., but the defendant did not open the door for about 15 minutes and thereafter one person named Adil came out from the defendant's room and despite asking defendant did not disclose the identity and relationship with Adil. Accordingly, the plaintiff/husband making allegations of adultery against the defendant/wife, filed the petition for divorce.

3. The defendant appeared and filed reply denying the allegations of adultery and contended that since prior to marriage she was working as a staff nurse in Primary Health Center Mehgaon, Distt. Bhind which was not liked by the plaintiff and he was pressurizing the defendant to leave the job but upon denial, he has made false allegations against the defendant. It is further contended that she has no relation with Adil,

who was working as a computer operator in the Primary Health Center, Mehgaon who left the job in the year 2017 and she has always tried her best to continue with matrimonial relations but the plaintiff always pressurized the defendant to leave the job. It is also contended that from the wedlock, a daughter Sanvi was born on 30.01.2019 and there being no coordination in between the plaintiff and defendant, they are residing separately. It is also contended that during reconciliation proceedings the defendant went her matrimonial house and they resumed cohabitation but later on the plaintiff evicted the defendant from his house. Then the defendant was constrained to file complaint against the plaintiff, however she still wants to live with the plaintiff. On inter alia contentions, the defendant prayed for dismissal of the petition.

4. On the basis of pleadings of the parties, learned family Court framed an issue in respect of allegation of adultery and recorded evidence of the parties. The plaintiff-Praveen Kachhwaha examined himself as PW1, his father Nagesh Kachhwaha as PW2 and father's friend Sunil Benjamin was examined as PW3. The defendant-Shilpa Kachhwaha examined herself as DW1. However, no documentary evidence was produced by the plaintiff to prove the allegation of adultery. However, after taking into consideration the oral evidence of the parties, learned family Court delivered judgment on 11.08.2021 and passed decree of divorce on the ground of adultery.

5. Learned counsel for the appellant/defendant/wife submits that only on the basis of false and cryptic allegations made by the plaintiff, learned family court has passed decree of divorce on the ground of adultery, whereas the plaintiff has not even made Adil as party to the petition of divorce and did not try to examine Adil as a witness and in

absence of statement of Adil, no decree of divorce could be passed on the ground of adultery. He also submits that there is no sufficient pleadings or cogent and reliable evidence on record to hold that the defendant was residing in adultery but learned Court below has on the basis of presumptions and its own wrong assumptions, passed the impugned judgment and decree of divorce, which is not sustainable. In support of his case, learned Counsel placed reliance on the rule 2(7)(e) (ii) and 5 of The Hindu Marriage (Madhya Pradesh) Rules, 1975 as well as on a decision in the case of Jaideep Shah Vs. Rashmi Shah @ Miss Rashmi Vyas **AIR 2011 MP 216**.

6. Learned counsel appearing for the respondent/husband supports the impugned judgment and decree of divorce. He submits that entire burden was on the defendant/wife to prove that she was not having illicit relations with Adil and there is no rebuttal to the statement made by plaintiff's father and his friend Sunil Benjamin, who both went Mehgaon personally and seen the reality including defendant's attitude. In response to the argument of non-impleadment of adulterer as party to the petition, learned counsel has relied on a decision in the case of Neelam Tiwari Vs. Sunil Tiwari **AIR 2009 MP 225**.

7. The following points for determination are arising in the first appeal:

1. Whether in absence of impleadment of Adil as party to the divorce petition, learned Family Court has erred in passing decree of divorce on the ground of adultery ?
2. Whether in absence of statement of Adil and without recording any finding regarding sexual intercourse in between the appellant/wife and Adil, learned Court below has erred in passing decree of divorce on the ground of adultery merely on the basis of suspicion?

8. Upon perusal of petition of divorce, it is clear that for the reasons best known to the respondent, sufficient averments required as per rule 2(7)(e)(ii) of The Hindu Marriage (Madhya Pradesh) Rules, 1975, have not been made regarding adulterer Adil, whose whereabouts are known to the respondent.

9. The High Court in exercise of power under sections 14 and 21 of the Hindu Marriage Act, 1955 has framed Rules known as The Hindu Marriage (Madhya Pradesh) Rules, 1975, relevant rules 2(7)(e)(ii) and 5 are reproduced as under:-

"2. **Contents of petitions.**- Every petition shall state –

(7)(e) if the petition is for divorce on the ground of-

(i) conversion, unsoundness of mind, leprosy, venereal disease, renunciation of the world or another marriage, the date and place of the act or disease,

(ii) adultery, rape or sodomy, the date and the place of the act or acts and the name and address of the person or persons with whom these acts were committed by the respondent,

(iii) presumption of death, the last place of cohabitation of the parties, the circumstances in which the parties ceased to cohabit, the date when and the place where the respondent was last seen or heard of and the steps which have been taken to trace the respondent;

3. xxxxxxx

4. xxxxxxx

5. **Notice.**- The Court shall issue notice to the respondent and co-respondent, if any. The notice shall be accompanied by a copy of the petition. The notice shall require, unless the Court otherwise directs, the respondent or co-respondent to file his or her statement in Court within a period specified by the Court along with a copy for the use of the petitioner.”

10. Considering the aforesaid rules and distinguishing an earlier single Bench decision of this Court in the case of Neelam Tiwari (supra), later

single Bench of this Court in the case of Jaideep Shah Vs. Rashmi Shah @ Miss Rashmi Vyas **AIR 2011 MP 216**, has held as under:-

"9. In a petition under section 13(1)(i) of the Hindu Marriage Act, 1955, an allegation of voluntary sexual intercourse by the spouse with a third party is required to be adjudicated. The High Court in exercise of power under sections 14 and 21 of the Hindu Marriage Act, 1955 has framed Rules. Under Rule 2(7)(e)(2) of the Rules, in a petition seeking dissolution of marriage on the ground of adultery, the date and place of the adultery and the name and address of the person with whom the adultery was committed by the respondent is required to be stated. Rule 5 enjoins a duty on the Court to issue notice to the respondent and co-respondent, if any. The aforesaid Rule is in consonance with the principles of natural justice as the finding recorded in the suit would adversely affect the reputation of the concerned person and, therefore, such a person should have an opportunity to defend his reputation before such a finding is recorded. My aforesaid conclusion finds support from a Division Bench decision of Karnataka High Court reported in Arun Kumar Agrawal, supra. So far as the reliance placed by the learned counsel for the respondent No. 2 on the decision of this Court in Neelam Tiwari, supra is concerned, in the said case, the adulterer was not impleaded as a party in the petition for divorce before the trial Court. In appeal, an objection was raised that since the adulterer was not impleaded as co-respondent, therefore, the petition filed under section 13 of the Hindu Marriage Act, 1955 was bad on account of non-joinder of necessary party. In the aforesaid context, the learned Single Judge of this Court held that Rules framed by this Court does not mandatorily require the impleadment of the adulterer. The ratio laid down in the aforesaid case is of no assistance to learned counsel for the respondent No. 2, in the facts and circumstances of the case."

**11.** As such in view of the aforesaid Rule 2(7)(e)(ii) and 5 of The Hindu Marriage (Madhya Pradesh) Rules, 1975 and in view of the later decision of a single Bench of this Court in the case of Jaideep Shah (supra), in our considered opinion, the adulterer Adil was necessary and proper party, in whose absence decree of divorce, on the ground of

adultery could not be passed. It is also pertinent to mention here that although the Marriage Rules of the year 1975 do not contain clear provision about impleadment of adulterer as a party to the petition of divorce but conjoint reading of rule no. 2(7)(e)(ii) and 5 suggests necessary impleadment of adulterer as a party to the petition of divorce.

**12.** In the present case learned family Court has taken into consideration the testimony of plaintiff's father Nagesh Kachhwaha (PW2) and his friend Sunil Benjamin (PW3) to hold the allegation of adultery proved for passing the decree of divorce on that ground, but in absence of adulterer being party to the divorce petition and without affording opportunity to the defendant/wife to defend, nothing could be said against the defendant.

**13.** So far as the question of non-raising of objection of non-impleadment of adulterer as a party to the petition, is concerned, in our opinion the adulterer is necessary and proper party, therefore, mere non-raising of objection in the written statement, does not absolve the plaintiff or learned family Court of its duty and if a person is necessary party, it can be impleaded by the Court on its own motion.

**14.** For proper consideration, the provision of Order 1 Rule 10 CPC is quoted as under:

**“10. Suit in name of wrong plaintiff.**

“(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties.—The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly

joined, whether as plaintiff or defendant, be struck out, and *that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.*

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended.—Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.”

**15.** From perusal of the impugned judgment, it is clear that learned family Court has upon consideration of oral testimony of plaintiff's father and his friend Sunil Benjamin, passed decree of divorce on the ground of adultery and failed to notice the aforesaid provision before passing decree of divorce, without compliance of which the decree of divorce on the ground of adultery, is not sustainable.

**16.** Even otherwise, as per settled law, if a spouse after the solemnization of the marriage indulges in voluntary sexual intercourse with a person other than his or her spouse, he or she, as the case may be would be entitled to get divorce, therefore, even one act of extra marital sex would be enough to grant divorce to other spouse. But while passing the impugned judgment, learned Court below has not recorded any finding in respect of sexual intercourse in between the appellant/wife and Adil and passed decree of divorce on the ground of adultery, as such the learned Court below has failed to exercise its jurisdiction vested in it under the law.

**17.** As we are of the considered opinion that the adulterer is



necessary party and there is no finding of sexual intercourse, therefore, the matter deserves to be remanded to learned family Court with the further direction to the plaintiff/respondent to implead the adulterer Adil as a party to the divorce petition and to afford due opportunity to the defendant/wife to defend herself.

**18.** Resultantly, the first appeal succeeds and is **allowed** and by setting aside the decree of divorce, the matter is remanded to learned family Court for passing judgment afresh without being influenced by any of the observations made by this Court. However, no order as to costs.

**19.** Interim application(s), if any, shall stand disposed off.

**(SHEEL NAGU)**  
**JUDGE**

**(DWARKA DHISH BANSAL)**  
**JUDGE**

Pallavi