

Suman Vs. Jaikumar

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Court : Mumbai

Decided On : Jul-30-1989

Reported in : I(1990)DMC446

Judge : A.A. Desai, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 9 and 13(1)

Appeal No. : F.A. No. 27 of 1987

Appellant : Suman

Respondent : Jaikumar

Advocate for Def. : S.P. Dharmadhikari, Adv.

Advocate for Pet/Ap. : S.R. Ahmad, Adv.

Disposition : Appeal dismissed

Judgement :

A.A. Desai, J.

1. By this appeal, appellant wife has questioned the decree of divorce granted by the trial Court in favour of respondent.

2. Appellant Suman in 1962 married with respondent-Jaikumar. After the marriage, she started living with respondent at Kalamb, district Yavatmal where he was serving as a teacher. In 1964, she was blessed with son Chandrakant. In 1966, she was blessed with daughter. However, she did not survive. In 1967, respondent-Jaikumar shifted his residence from Kalamb to his parental house at Venikota which is about 7 miles away from Kalamb. Appellant Suman stayed with him at Venikota for 3 to 4 days. She left Venikota on 15-1-1967 and started residing with her mother at Nagpur. Respondent husband wrote letters but she did not come back. He, therefore, on 3-5-1967 issued notice. However, the appellant Suman did not respond.

3. Respondent-Jaikumar, therefore, filed an application under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. His claim was decreed on 24-12-1968. Appellant even then did not join respondent and she questioned the validity of the order before the District Judge. The District Judge set aside the decree of restitution of conjugal rights and remanded the matter to the trial Court. Respondent husband questioned the order of remand by filing second appeal before this Court. However, he subsequently withdrawn his petition for restitution of conjugal rights on 20-6-1979. The respondent-husband thereafter on 11-7-1979 presented a petition under Section 13(1)(b) of the Act claiming dissolution of marriage by decree of divorce. According to him, the appellant-wife deserted him without sufficient cause or reason since 15-1-1967. The appellant wife resisted the claim. According to her, the respondent had an illicit relation with one Shakun who has been residing at Venikota. She alleged that the respondent assaulted her and driven her on 15-1-1967 and, therefore, she was residing at Nagpur. She also made a counter claim for judicial separation on the ground that the respondent-husband is living in adultery.

4. The learned trial Judge framed the necessary issues and held that the wife failed to prove that the respondent-husband is living in adultery with Shakun. He has further held that the appellant wife has deserted the respondent for a continuous period of more than two years. He, therefore, passed a decree dissolving marriage by decree of divorce.

5. In this appeal, Mr. Ahemad, the learned Counsel appearing for the appellant wife, mainly contended that the petition as presented was not maintainable. According to Mr. Ahemad, the cause of action arose for claiming a decree of divorce on the ground of desertion only on 20-6-1979. As such, the petition presented on 11-7-1979 is not after completion of the statutory period of two years. In the submission of Mr. Ahemad, period from 15-1-1967 till 20-6-1979 cannot be counted and be termed as a period of desertion. According to him, during this period the parties were litigating in a Court on a claim of restitution of conjugal rights. As such, this period needs to be excluded, and the learned trial Judge has not applied his mind on this aspect. In the submission of Mr. Ahemad the appellant wife was justified during the said period from 15-1-1967 till withdrawal of proceedings on 20-6-1979 in not joining the company of her husband respondent. Mr. Ahemad, therefore, made a submission that from 20-6-1979 till the presentation of petition for divorce on 11-7-1979, the period of two years as prescribed under Section 13(1)(b) is not complete. The petition was premature, and, as such liable to be dismissed.

6. I am unable to agree with this submission. It is true that the parties were litigating in the Court. The respondent-husband was struggling for restitution of conjugal rights. However, it did not prevent respondent wife to join for cohabitation. Refusing to join the company of the husband without any reasonable cause is certainly a desertion on the part of a spouse. Mr. Ahemad in support of his contention placed reliance on a decision reported in a case of *Lachman Kirpalani v. Meena* : [1964]4SCR331 and made a submission that mere physical separation does not amount to desertion. In the submission of Mr. Ahemad at the most it can be said that the appellant wife was at Nagpur. However, it cannot be said thereby that it was the mental attitude of wife to bring an end to marital relation and cohabitation. From the circumstances of the case, it is evident that not only appellant wife was away from the husband without any reasonable cause but she also bore the mental attitude not to join. In these proceedings, she also claimed for a judicial separation and asserted that she is unwilling to live with husband. The physical separation without reasonable cause with a mental attitude not to join the husband do certainly constitute desertion and since it is for a period of more than two years, the respondent-husband was entitled to a divorce.

7. The appellant made allegation about the adulterous relation of respondent-husband with Shakun. However, it is not substantiated. It is pertinent to note that appellant-wife was hardly for 3 to 4 days stayed at Venikota after they shifted from Kalamb. Moreover, Shakun as per the evidence was hardly a girl of 10 to 12 years. It is not conceivable that the respondent-husband maintained adulterous relation with the girl of 10-12 years. The wife appellant alleged that the husband had a illicit relation and Shakun as a result delivered a baby on 26-6-1968. She produced a certificate, Exh. 41. However, she has not examined any authority from the Women Hospital. The learned trial Judge discussed this aspect in para 17 of his judgment and rejected this evidence and according to me rightly. The appeal is without any substance. The same is liable to be rejected. The appeal is dismissed. No order as to costs.

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