

D.P. Gopala Vs. Pushpaveni

D.P. Gopala Vs. Pushpaveni

SooperKanoon Citation : sooperkanoon.com/375762

Court : Karnataka

Decided On : Jan-21-1982

Reported in : AIR1982Kant329; 1982(1)KarLJ441

Judge : Sabhahit and ;P.A. Kulkarni, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1), 23 and 24

Appeal No. : Misc. First Appeal No. 124 of 1981

Appellant : D.P. Gopala

Respondent : Pushpaveni

Advocate for Def. : K.G. Poonaiiah, Adv.

Advocate for Pet/Ap. : S.C. Bbagawan, Adv.

Judgement :

Sarhabit, J.

1. This appeal by the petitioner-husband is directed against the judgment and order dated 5th Dec., 1980 passed by the Civil Judge, Kodagu at Madikeri in H. M. C. No. 4 of 1977 on his file, dismissing the petition of the, husband for, divorce from his wife.

2. The husband instituted the petition under S. 13(1)(i)(b) of the Hindu Marriage Act (hereinafter referred to as the Act) for divorce from his wife on the ground that she deserted him without reasonable cause for more than two years prior to the institution of the petition. The petition was instituted in Feb., 1977.

3. The husband averred in the petition that he was married with the respondent in the year 1969, immediately after the marriage, the respondent stayed with him in his house. They lived as husband and wife for about 55 days. He took the respondent to her mother's house for 'Ashada' and thereafter she did not return to his house in spite, of his invitation to her to come back. She further instituted, on the other hand, a petition under S. 488 of Criminal P. C. for maintenance in Criminal Miscellaneous Case No. 22 of 1980 which came to be decreed for Rs. 125/- per month. The husband did not pay the maintenance and an arrest warrant was issued to him. At this stage, the husband instituted a petition under Section 9 of the Act against the respondent in H. M. C. No. 7/71 for restitution of conjugal rights. That case ended in a compromise. Accordingly the respondent was taken back by the husband on 16-1-1971 and the wife stayed with him till Oct. 1972. In the meanwhile, she became pregnant and the petitioner took her and left her in her parent's house for delivery. There after, it is the case of the husband that his wife was delivered of a child in the Madikeri Hospital and he attended the naming ceremony of the child and invited his wife to come back to his house with the child. But she did not return to his house. On the other band, she instituted again an application for maintenance under S. 125, Criminal P. C., 1974 in CrI. M. C. No. 32/74 which was dismissed. The respondent took up the matter in revision to the Session Court, that was also dismissed and since she did not return to the house of the petitioner, the petitioner instituted the present petition for divorce on the ground of desertion.

3. The petition was resisted by the respondent-wife. She contended that her husband did not come even when she delivered the child in the hospital. that he did not give her money for maintenance; that be did not invite her back. to his house and that he did not attend even the naming ceremony, She further contended that when she stayed in the husband's house, she was always troubled by her mother-in-law who was the stepmother of her husband. She did not allow

her to touch anything and to do house-hold work and she made her to cook her food and eat separately. She used to go out locking the house, whenever she went out of the house. Thus, she complained that she was treated with cruelty and torture by her mother-in-law and her husband encouraged her to so ill-treat her and neglected even to maintain her and the child. In that way, she submitted that she did not desert the society of her husband but she was compelled to stay away from him by his conduct. She was ever ready and willing to go and stay with her husband if he treated her properly.

4. the trial Court raised the following issues as arising for its consideration :

(1) Whether the petitioner proves that the respondent deserted him from Oct., 1972?

(2) Whether the respondent establishes that the petitioner and his step-mother treated her with cruelty?

(3) Is the petitioner entitled to a decree of divorce?

(4) To what relief's are the parties entitled ?

5. During hearing, the petitioner examined himself as P. W, I in support of his case and got marked Exts. P-1 and P-2 and the respondent examined herself in support of her case.

6. The learned Civil Judge, appreciating the evidence on record, held that the petitioner-husband failed to establish desertion on the part of the respondent-wife and in that view he dismissed the petition of the husband by the aforesaid order. Aggrieved by the said judgment and order, the husband petitioner has come up with the above appeal before this Court.

7. The learned Advocate appearing for the appellant strenuously urged before us that the evidence on record was sufficient to hold that the wife deserted her husband from Oct., 1972. He further submitted that the Court below should have held that the wife was not treated cruelly either by the husband or by the step-mother of the husband. In that view, he submitted that the trial Court ought to have

decreed the petition.

8. He further submitted that the learned Civil Judge labored under the wrong notion of law that the standard of proof required in a proceeding under Hindu Law for purpose of divorce was similar to the one required under criminal law it being 'beyond a shadow of doubt'. He submitted that the standard of proof necessary in a proceeding under Hindu Marriage Act was as in a civil case namely proof by preponderance of Probabilities. Hence, he submitted that the very approach of the learned Civil Judge on the facts of the case was erroneous, illegal and his order could not be sustained. He further submitted, alternatively, that the amount of alimony granted by the learned Civil Judge at Rs.150- per month to the respondent-wife under S. 24 of the Act was very much on the higher side.

9. As against that, the learned counsel appearing for the respondent-wife in this appeal argued supporting the judgment and order of the learned Civil Judge.

10. The points, therefore, that arise for, our consideration in this appeal are:

(1) Whether the learned Civil Judge was justified in holding that the husband has failed to establish the alleged desertion on the part of his wife?

(2) Whether the alimony granted by the learned Civil Judge is just and proper ?

11. It is no doubt true that under , the amended Hindu Law, desertion for more than two years is made a ground for divorce under S. 13(1)(i-b) of the Act. It states:

' 13 (1). Any marriage solemnized, whether before or after the commencement of this Act, may on a Petition Presented by either the husband or the wife, be dissolved by a divorce on the ground

party.

(ia)

(ib) has deserted the petitioner for a continuous Period of not less than two years immediately preceding the presentation of the petition that the other

Explanation : In this sub-section, the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.'

Thus, it is obvious that the husband must prove in the instant case that his wife kept away from his society without reasonable cause and without his consent or against his wish. On the facts of this case, he must further prove *prima facie* that there was no willful neglect on his part of his wife. He must also show that the desertion is for more than two years preceding the presentation of the petition.

12. It may be mentioned in this context that the learned Civil Judge was not justify in holding that the standard of proof in a case of this nature under the Hindu Marriage Act is akin to the standard required in a criminal trial. It is no doubt true that. the learned Civil Judge relied upon a decision of the Supreme Court in the case of *Lachman Utamchand v. Meena* : [1964]4SCR331 . That was based on a decision of the House of Lords in the case, *Preston Jones v. Preston Jones* (1951 (1) All ER 124) laying down that in a matrimonial offence, the standard of proof necessarily is similar to one required in a criminal trial. But, subsequently the House of Lords changed its view in 1966 in the case, *Blyth v. Blyth* (1966-1 All ER 524 at p. 536). Accordingly in 1975 in the case of *Dr. N. G. Dastane v. Mrs. S. Dastane* : [1975]3SCR967 the Supreme Court changed its view by laying down that the standard of proof necessary in a proceeding under the Hindu Marriage Act is as in a civil case being preponderance of probability and not of 'beyond reasonable doubt' as in a criminal trial. The Supreme Court of India in *Dastane's* case : [1975]3SCR967 the judgment has observed thus:

'But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with common sense

as it is so much easier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of S. 10(1)(b) of the Act. But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt? In other words, though the burden on the petitioner to establish the charge of cruelty, what is the standard of proof to be, applied in order to judge whether the burden has been discharged?

The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favor of the existence of the particular fact. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the Court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny, than those like the loan on a promissory note : 'the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue'. Per Dixon, J. in *Wright v. Wright*, (1948) 77 CLR 191 at v. 210; or as said by Lord Denning, 'the degree of probability depends on the subject matter. In proportion as the offence is grave, so ought the proof to be clear'. (*Blyth v. Blyth*, 1966-1 All ER 524 at p. 536). But whether the issue is one of cruelty or of a loan on a pro-note, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases, this, normality, is the standard of proof to apply for finding whether the burden of proof is discharged.'

13. That being so, it is obvious that the, learned Civil Judge was not justified in relying upon the earlier decision of the Supreme Court and in holding that the standard of proof necessary to prove matrimonial cruelty is such as is required in a criminal case.

13-A. The learned counsel for the appellant no doubt submitted that without more the appeal was entitled to succeed as the very approach of the learned Civil Judge was not legal on the facts of the case, in appreciating the evidence.

14. On going through the judgment however, we find that though the learned Civil Judge has stated about the standard of Proof from the earlier decision of the Supreme Court he has not applied the said standard in appreciating the evidence. For, this is what he has observed in the course of his judgment:

'The evidence of the respondent coupled with the preponderance of probabilities in the light of the evidence on record outweigh the petitioner's submission that the desertion is by the respondent.'

Thus. it is clear that while actually appreciating the evidence on record, the learned Civil Judge has used the standard as required in a civil case, namely, by preponderance of probabilities. Hence, we are satisfied that the judgment does not suffer from legal infirmity of applying the wrong standard of proof as in a criminal trial.

14-A. The husband alleged that his wife deserted his society without any reasonable cause from Oct., 1970 or 1972 as she did not return to his house after delivery (5-3 -173) in spite of his inviting her to his house. The wife has asserted that she was willing to stay with her husband and to discharge her matrimonial obligations by him. However, she complained that she could not stay in the Matrimonial house because of the cruel treatment meted out to her by the step mother of her husband. She has made out a specific case that the step-mother of her, husband was not allowing her to work in the usual course in the house. She (respondent) was cooking her food separately and the step-mother of her husband was locking the house when she was going out, thus creating an atmosphere of intolerance for her and causing her mental agony. She has further averred that her

husband, in spite of her protest, did not set right the matter and was encouraging his step-mother by his connivance. It is no doubt true that the husband in a general way has denied these averments but the significant fact remains that the stepmother has discreetly desisted from entering the box and denying the averments, made by the respondent in the case. Adverse inference, therefore, has to be drawn against the version of the petitioner-husband. Moreover, mere physical separation would not amount to desertion. The animus deserendi or the intention to bring cohabitation permanently to an end should be present on the facts of the case. As explained by the Supreme Court in Lachman's case : [1964]4SCR331 there must be factum of separation in addition to the intention to bring cohabitation permanently to an end animus deserendi (sic) and the allegation of permanence, which is, a prime condition required. Both these essential ingredients should continue during the entire statutory period of more than 2 years. In the instant case it is no doubt true that the wife did not return after Oct., 1972. At any rate, after delivery in March, 1973 and the petition was presented in 1977. Therefore, there is no difficulty to hold that the physical separation is for more than two years. But, law requires something more, animus deserendi and further the wife has made out a specific case that the husband neglected her and the step-mother of her husband gave her sufficient cause to stay away treating her (the respondent) in a cruel way. It is therefore necessary for the husband to establish prima facie that the separation of wife did constitute desertion by establishing that he did not neglect his wife and the allegations made against the step-mother are not prima facie true.

15. It is in this context that the non examination of the step-mother assumes importance. The wife has stepped into the box and has sworn to the averments made in the statement of objections. The stepmother has not stepped into the box to deny the assertion made in the deposition of the wife. That probabalises the version of the wife 'justifying' her stay separately from the husband.

16. It is the case of the wife that when she was taken to her mother's house and was left there for 'Ashada', her husband did not come to call her back. Things at matrimonial house did not improve and she continued to stay in her mother's house. Since, there was no response from the husband, she was compelled to file

a petition for maintenance. The claim was decreed. In spite of it her husband did not pay even maintenance. An arrest warrant was issued. It was at this stage that the husband instituted an application for restitution of conjugal rights at H. M. C. 7/71 as stated above. In spite of all that, the wife was ready and willing to go and stay with her husband. The application filed by the husband in H. M. C. 7/71 ended in a compromise and the wife went and stayed with him in Jan., 1972. They cohabited up to Oct, 1972. The wife became pregnant and as stated above, she went to her mother's house for delivery. The husband did not attend at the time of delivery of his wife in the hospital. He did not attend the naming ceremony of the child. Thus, it is so obvious, that the wife must have been touched to the quick by the utter negligence of her husband towards her. This conduct on the part of the husband constitutes prima facie neglect by him of his wife which amounts to desertion prima facie by the husband of the wife and not vice versa.

17. During the pendency of the case before the learned Civil Judge, the learned Civil Judge made efforts to bring about reconciliation. The wife when questioned, was willing to go and stay with her husband; she did go and stay with her husband for some days; again the same conditions prevailed, as before. She was treated cruelly by the step-mother of the husband, the husband encouraging it. The wife was again constrained to leave the husband's house and she went and stayed in her parent's house.

18. It may also be mentioned in this context that the wife has made out a specific case that her husband made false accusations against her that she was suffering from gonorrhea. The husband when he was in the box did not have the guts to deny that he wrote such a letter making false allegations. On the other hand, in a cowardly way he stated 'I do not remember if I have written such outrageous letter'. As against this-, the wife in her examination-in-chief swore that her husband did write such outrageous letter. There is no cross-examination on that aspect. That is yet another circumstance to justify separate stay of the wife from her husband. Making a false accusation against the wife that she was suffering from such venereal disease like gonorrhoea certainly amounts cruelty on the part of the husband; that itself would be a sufficient reason for the wife to stay away from her husband. In the circumstances, therefore, we are satisfied that the learned Civil

Judge Was perfectly justified in dismissing the petition of the husband for divorce on the ground of desertion.

19. The learned Civil Judge has awarded Rs.150/- per month towards alimony under Section 24 of the Hindu Marriage Act. It is submitted before us by the learned counsel for the appellant that the amount awarded by the learned Civil Judge was on the higher side. The evidence on record shows that the husband is getting a salary of Rs. 700/- per month. It is obvious that he is likely to get more as his service increases. That being so, Rs.150/- given to the wife towards maintenance cannot be considered as more, in these bard days of inflation. Hence, we have no reason to interfere with the quantum of alimony awarded by the learned Civil Judge on the facts of the case.

20. In the result, the appeal fails and is dismissed. Having regard to the close relationship between the parties we make no orders as to costs.

21. Appeal dismissed

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com