

Sunil Kumar Vs. Usha W/O. Sunil Kumar

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Court : Madhya Pradesh

Decided On : Sep-14-1993

Reported in : AIR1994MP1; 1994(0)MPLJ201

Judge : A.R. Tiwari, J.

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

Appeal No. : F.A. No. 91/91

Appellant : Sunil Kumar

Respondent : Usha W/O. Sunil Kumar

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

Advocate for Pet/Ap. : G.M. Chafekar and ;Om Dutta Sharma, Adv.

Disposition : Appeal dismissed

Judgement :

A.R. Tiwari, J.

1. This appeal presented under Section 28 of the Hindu Marriage Act,1955 (for short 'the Act') is directed against the judgment and decree dated 6-5-1991 rendered by Additional Judge to the Court of the District Judge, Indore in Hindu MarriageCase No. 237/91 thereby dismissing the application seeking dissolution of

marriage by a decree of divorce on the ground of cruelty and desertion.

2. Briefly stated the facts of the case are that the parties to this lis were married in June, 1956 according to Hindu rites. They have been living separately since October, 1986. The case pleaded by the appellant was that the respondent lived with him only for about 15 days and thereafter, deserted him. Another ground was that the respondent has treated the appellant with cruelty in that she denied him the sexual intercourse and threatened him about lodgment of false complaint and commission of suicide. The respondent resisted the claim of divorce and asserted that she never denied the company and did not refuse sexual intercourse. The other allegations were also denied. She also asserted that a letter (Ex. P/6) was also obtained from her and finally she indicated her willingness to return to join the company of the appellant. On evaluation of the evidence, the trial Court found that the allegations of cruelty and desertion were not proved and on this conclusion, the application was dismissed.

Aggrieved by this judgment and decree, the appellant has preferred this appeal and renewed the prayer of dissolution of marriage by a decree of divorce.

3. Right at the threshold, it may be mentioned that the trial Court made every endeavour to bring about the reconciliation between the parties in terms of Section 23(2) of the Act as is recorded in the proceedings dated 23-5-90. It is clearly recorded therein that the appellant was not prepared to welcome the respondent in the matrimonial home. This Court also made the same endeavour on 20th October, 1992. The respondent expressed her willingness and showed her preparedness to go and live with her husband i.e. the appellant, but the appellant declined the offer. In the circumstances, the case was posted for hearing on merits.

4. I have heard Shri G. M. Chaphekar, learned Senior Counsel with Shri Om Datta Sharma for the appellant and Shri K. G. Maheshwari, learned counsel for the respondent and have perused the record.

5. Shri Chaphekar attacked the decree of the trial Court on the following two grounds:

(a) Refusal about sexual intercourse constituted the ground of cruelty and as such, the Court below erred in negating this plea. The appellant as PW 1 deposed on oath that the respondent did not permit sexual intercourse, and this assertion was not assailed in the cross-examination. This part of the case must, therefore, be held as truthful and proved.

(b) The manner in which the respondent left the matrimonial home is itself such as would show the clear-cut case of desertion and this subjected the appellant to humiliation.

6. On the aforesaid contentions, the learned counsel for the appellant urged that the decree of the trial Court was erroneous and liable to be subverted and the prayer of the appellant was irrecusable;

6A. Shri MaheshWari on the other hand, supported the decree.

7. Before entering into the scrutiny of the contentions as raised, it is apt to notice the following two features-

(i) The application dated 3-5-89 seeking divorce was preceded by notice dated 1-5-89, marked in this case as Ex. P/4. This notice does not mention about the alleged refusal of sexual intercourse. The contention noted in para. 9 does not necessarily lead to the ground urged in the application. This conspicuous omission of material facts assumed greater significance when it is noticed that the application was filed only within a gap of two days. The reply to this notice was sent on 4-5-89, marked in this case as Ex. P/5.

(ii) The appellant filed in this case the letter dated 29-8-86, marked in this case as Ex. P/ 6. This letter also does not speak about the aforesaid avoidance of obligation. D.W. 1 Usha has asserted through her sworn testimony that the marriage was consummated and cohabitation was never denied.

8. As noted above, the husband petitioned under Section 13(ia) and (ib) of the Act for dissolution of marriage by decree of divorce. The provisions are as extracted below-

'That the other party-

(ia) has, after the solemnization of the marriage treated the petitioner with cruelty,

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

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 wilful neglect of the petitioner by the other party to the marriage and its grammatical variations and cognate expression shall be construed accordingly.

(Underlining mine)

9. The wife resisted the petition and asserted that grounds were meretricious and had been elvishly invented to get rid of her. On evaluation of the evidence, the trial Court negated the grounds and dismissed the petition.

10. I shall first deal with the ground of cruelty. The necessary pleading is contained in para 2 of the petition. The fulcrum is the resistance to sexual intercourse. This has been branded as an act of cruelty. This allegation has been categorically controverted in para 2 of the written-statement. AW 1 Sunil Kumar reiterated this grievance in this sworn testimony in the Court, corroboration was available in the statement of AW 2 Motilal, the father of the appellant. NAW 1 Usha rebutted this by saying that the marriage was consummated and that no objection or resistance was ever offered.

11. Moreover, Ex. P/4, notice dated 1-5-89, is conspicuously silent in this behalf. The notice is primarily concerned with the plea of desertion only. An effort had been made to explain Ex. P/6. However, it contained nothing to suggest the ground of cruelty even remotely.

12. The Court thus, rightly negated the ground of cruelty. Consequently, the conclusion is held to be on firm foundation and deserved to be sustained.

13. This brings me to the scrutiny of ground of desertion. The marriage was solemnised on 2-6-1986. It was the pleaded case that the respondent abandoned the matrimonial home in October, 1986, and thus, deserted the appellant without reasonable cause and without consent. Inferentially, it was also alleged to be the case of 'wilful neglect'. The defence of the respondent was that the unpalatable atmosphere and reign of terror in the matrimonial home drove her out. She feared risk to limb and life. The appellant (AW 1) did not tear up the tenebrosity and simply deposed about departure to parental home at Indore itself. In para 3 of the statement, he stated about insistence to keep the respondent with him. AW 2 also stated about the persuasion to keep her.

14. In statement in Court, the appellant indicated his unwillingness to welcome the respondent to live with him (para 5). In contrast, the respondent categorically stated that she opted to live with the appellant (para 3). The Court proceeding dated 20-10-92 also confirmed this position. Ex. P/6 also contained the surge of an urge to live together under the roof of matrimonial home. However, in such matters, it takes time to mend matters and operate on some wave length to come to terms. After all time waits for none and one sees that *Tempus fugit*'.

15. In Halsbury's Laws of England, desertion has been described to mean in its essence 'the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause' and to denote 'the total repudiation of marriage'. The crucial questions are-

(a) Whether the respondent caused separation with the intention of bringing cohabitation to an end permanently?

(b) Whether the respondent brought about total repudiation of marriage and cessation of conjugal rights?

(c) Whether the respondent exhibited 'wilful neglect'?

16. It is settled law that without '*animus deserendi*' there can be no desertion. In the instant case, there is demonstration of surge of an urge to live together and thus, to resume cohabitation. In other words, there is luculent indication of '*animus*

revertendi' to the matrimonial home.

17. Mere departure from home on being unable to stand the conditions prevalent there and so journey with parents for a while are not pointers to desertion as envisaged under the Act. One must rise to the occasion and be prepared to shed 'Teedium vitae'. The respondent did return only to be greeted by the command of 'no entry'. After all, how long should an Indian woman suffer the fate of having 'milk in breasts and tears in eyes'? It is time to grant her emancipation. The husband should realise his obligation and play his role ideally and really.

18. It appears that the appellant is determined to see that the respondent is not in the inbred question then is as to who has deserted and who is deserted. The expression 'without reasonable cause and without the consent' as employed in the explanation, inserted by Act No. 68 of 1976 and quoted above, must mean that the conduct of the other party should not be such as may reasonably cause formation of requisite 'animus deserendi'.

19. It might sound tautologous to define desertion. Yet enough light is shed by the Explanation (supra). In Modern society, the wife is certainly entitled to comfort and company of the husband and has a right to live with dignity. The husband cannot have vote or veto. The wife has to be treated properly. If the wife is forced to leave matrimonial home on failure of the husband to provide her home of congenial atmosphere and to provide her with protective umbrella of safety, then such an act, decreed by fate, cannot be given insignia of desertion. I hold against the appellant and answer the aforesaid three questions, as formulated above, in the negative. On scrutiny, I find the contentions as noted in para 5 above non-meritorious.

20. Montaigne once observed that 'A good marriage would be between a blind wife and a deaf husband'. Time has come to prove him wrong. Let wife have eyes and husband ears and let them live in harmony not antinomy with real concern for each other. Harmony, not anomie, is the need of hour. There has to be tolerance with sense of reciprocity.

21. It is well to remember that the Constitution of India has now provided Fundamental Duties in Article 51A. One of the duties is to 'renounce practice derogatory to the dignity of women'.

22. In the case on hand, the wife is keen to come in but the husband is equally keen to see her out and away. In the view of this Court, little misunderstanding here and there should be accepted as normal wear and tear of life. It is in evidence that precative attitude entreated the appellant to refrain from breaking the bond of the marriage. Yet he did not relent, and failed to come to terms with himself. In such setting, the inbred-illation is that the wife has not wronged but is wronged ruthlessly on matrimonial front. Parties ought to know that it was time to bid good-bye to priggery and to face facts of life. It is no point leaving the partner despite impeccability, in lurch. In this view of the matter, I find that the trial Court was thus, right in repelling this ground too, unsustainable on facts and untenable in law.

23. It is apt to remember that the institution of marriage is not in the need of being damaged or destroyed. The conduct, indicating obduracy and obsession with plea of divorce, operates as an escutcheon on the reputation of the appellant as a husband. Such a recalcitrant, attitude can earn no encomium. It was thus, essential to think of coalescence. After all, marriage is not like partnership 'at will' and both the parties should strive at defending it rather than dissolving it.

24. In the circumstances, the prayer for divorce deserves to be spurned. It found no infirmity or illegality in the verdict of the trial Court'. It is distressing to note that the parties have granted themselves the liberty of being separated for about seven years by now. Let them know that 'enough is enough'. The wife is willing to return. The husband should respond and discharge his obligations by taking her in. It is time to recall the celebrated saying that 'better late than never'. 'Late' it is, but will the parties ensure avoidance of 'never'?

25. In the ultimate analysis, I find this appeal devoid of merit and liable to be dismissed. It is accordingly dismissed with no order as to costs. Let a decree be drawn up. Counsel's on each side is fixed at Rs. 500/-.

26. The record of the Court below shall be returned.

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