

Kanchan Sahu Vs. Premananda Sahu

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Court : Orissa

Decided On : Aug-27-1998

Reported in : I(1999)DMC483

Judge : P.C. Naik and ;P.K. Mohanty, JJ.

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

Appeal No. : Civil Appeal No. 39 of 1996

Appellant : Kanchan Sahu

Respondent : Premananda Sahu

Advocate for Def. : R.K. Nayak, ;C.R. Swain and ;B. Mohanty-3, Advs.

Advocate for Pet/Ap. : Mahadeva Misra, ;S. Barik and ;M. Misra, Advs.

Disposition : Appeal allowed

Judgement :

P.C. Naik, J.

1. In this appeal under Section 19 of the Family Courts Act, 1984, the wife, who was the respondent before the Court below, assails the decree of divorce granted in favour of the respondent-husband who was the petitioner there.

2. The facts giving rise to this appeal are that the present respondent (hereinafter referred to as 'the husband') had filed a petition under Section 13 of the [Hindu Marriage Act, 1955](#) before the Subordinate Judge, First Court, Cuttack, for a decree of divorce dissolving the marriage on the ground of wilful desertion by the present appellant (hereinafter referred to as 'the wife'). According to the husband, the marriage between him and the present appellant was solemnized at Cuttack on 29.5.1975 according to Hindu caste custom and rites. After the marriage, both stayed together at Cuttack for about a week whereafter the wife left for her father's place on the pretext of her cousin's illness. Thereafter, in spite of repeated correspondence and personal requests, she did not turn up and resume the matrimonial obligations. It is also his case that she has been seen in the company of 'objectionable characters', moving in the company of strangers in the town of Cuttack and ever since she left the matrimonial home some time after the marriage and, has never cared to return to the marital home. There was thus no marital life between the husband and the wife for the last thirteen years. So, as she has deserted him for a continuous period of over two years, he was entitled to a decree of divorce dissolving the marriage between them.

3. Before proceeding further, we may refer to some material facts which have a bearing on the case.

4. In the cause-title of the petition filed by the husband under Section 13 of the Act, he had described the present appellant wife as under :

'Kanchan Sahu,

d/o. Dinabandhu Sahu,

At: PO Panchapalli,

P.S. Ersama.

Dist. Cuttack.

At present c/o. Bata Krushna Swain,

s/o. Rama Chandra Swain,

At. Apania,

PO: Chauliaganja,

Dist. Cuttack.....Respondent.'

5. The order dated 1.7.1988 passed by the Court below indicates that notices were ordered to be issued to the wife both ways fixing 5.9.1988 for service return and personal appearance. Postal requisites were directed to be filed the same day. The next order sheet dated 5.9.1988 indicates that as summons had not been issued by that time, an order was passed for issuing summons fixing 8.11.1988 for appearance. Orders dated 8.11.1988 and 4.1.1989 indicate that on both these dates service report was not received back. Surprisingly, on the next date, i.e. 13.3.1989, the husband filed a petition for publication of the notice in a local daily newspaper which was accepted and publication of the notice was ordered. Accordingly, the notice was published in 'The Prajatantra' dated the 8th of December, 1989. The order dated 2.4.1990 indicates that as the wife did not appear in spite of repeated calls, she was set ex-parte and the case was posted to 24.4.1990 for ex-parte hearing. On the next two dates, the matter could not be taken up and ultimately, on 12.7.1990 the husband examined himself as PW1 and closed his evidence, arguments were heard and the judgment was delivered on 24.7.1990 whereby the ex-parte decree of divorce was passed in favour of the husband and against the wife dissolving the marriage between them.

6. On 24.4.1992, a petition under Order 9, Rule 13 of the Code of Civil Procedure supported with an affidavit was filed by the wife for setting aside the ex-parte decree on the ground that the decree had been obtained behind her back without the summons being served on her. It was pleaded that she came to know about the ex-parte decree for the first time in the proceeding for enhancement of maintenance wherein it was stated by the husband that an ex-parte decree of divorce had been granted in his favour. Thereafter, she made inquiries and came to know that summons were sent to a fictitious address where she did not reside and thus she had no notice and as such, she had no knowledge about the pending proceedings. The notice also being in English language could not be understood by her. This petition was opposed to by the husband. The Court found that neither

the service return nor the postal receipt or the A.D. was on record. Thus, relying on the evidence of the wife that at no point of time her address was 'C/o. Batakrushna Swain, Apania, Chauliaganj, Cuttack', it returned a finding that summons had never been tendered or served on the wife in the original suit and that she had no knowledge regarding publication of the notice, which was in English, in the local daily newspaper. Accordingly, it was held that the decree had been obtained behind her back by suppressing the material facts and without her knowledge and hence the ex-parte decree was set aside by order dated 16.3.1994. However, as in the meantime, the Family Court had been constituted at Cuttack, the suit was transferred to the Judge, Family Court, Cuttack for trial and disposal. After receipt of the matter by the Family Court on transfer, it was registered as C.P. No. 49 of 1994 wherein on 2.8.1994, the Judge, Family Court, ordered that in case the husband pays a sum of Rs. 50,000/- to the wife within a period of six months, his petition for divorce shall be allowed. On being assailed before this Court, the said order was set aside and the matter was remitted to the Judge, Family Court, for a decision in accordance with law.

7. On remand, the wife filed her written statement opposing the husband's petition for divorce. Her case is that she is not guilty of desertion nor did she leave the matrimonial home on her own accord. According to her, they stayed together as husband and wife for about seven years during which she was subjected to both physical and mental cruelty for not bringing sufficient dowry. And, apart from the husband, her in-laws also assaulted and humiliated her. It is her further case that the husband had also brought a lady named 'MINA' to the matrimonial home and because of such a situation, she was compelled to leave the matrimonial home. As she had no source of income, she resorted to the proceeding under Section 125, Criminal Procedure Code and was awarded Rs. 150/- per month as maintenance with effect from 5.11.1984. Denying the averments of the husband that she was moving with objectionable characters and other persons in the town of Cuttack, she averred that all these allegations were made with an ulterior motive merely with an Object of somehow obtaining a decree of divorce dissolving their marriage. It was with this aim that by suppressing the summons an ex-parte decree was obtained which was ultimately set aside. The husband, according to her, was still living in the company of the woman named 'MINA'.

8. As many as five issues were framed which read thus :

- '1. Whether the proceeding is maintainable in law?
 2. Whether the plaintiff has got cause of action to bring this proceeding?
 3. Whether the plaintiff was cruel towards the respondent and drove her out of the house ?
 4. Whether the plaintiff has married another lady ?
 5. To what relief, if any, the plaintiff is entitled?'
9. The husband and wife examined themselves in support of their case sticking to their respective version.

10. Issue Nos. 3 and 4 were taken up for consideration, but no positive finding has been given on either of the same. However, considering the fact that the husband and the wife were living apart since last many years and there being no possibility of their joining the matrimonial home, relying on the decision of the Apex Court in *Ramesh Chander v. Savitri*, 1(1995) DMC 514, and considering the statement of the wife that there is no possibility of their living together as husband and wife, the Court below came to the conclusion that this was a fit case where the marriage between the parties should be dissolved. Accordingly, it held that the proceedings were maintainable and the husband had a cause of action to bring the suit and was entitled to the relief claimed.

11. From a mere perusal of the impugned order, we find that the marriage between the parties has been dissolved relying on the decision of the Apex Court in *Ramesh Chander's* case (supra). Admittedly, the reasons which compelled the Court below to pass the order it did was that the husband and wife were staying apart for the last many years and that there was no likelihood of their being united. Though on the basis of the material on record, it has been held that the husband and wife were staying apart for last many years, the question as to why the wife left the matrimonial home has not been considered. Since it was the claim of the husband that the wife had deserted him by leaving the matrimonial home, which

the wife denied, a finding as to whether the wife's leaving the matrimonial home was on her own volition or due to circumstances brought about by the husband because of his conduct, was relevant and needed consideration. The wife admits that she left the matrimonial home, but it is her case that she was compelled to do so because of the constant physical and mental cruelty and as the husband had brought a stranger woman named 'MINA' into the matrimonial home. Hence, it was incumbent upon the Court below to have considered this aspect and determined as to whether or not mental and physical cruelty inflicted on the wife coupled with the fact that the husband had brought a stranger woman (mistress) into the matrimonial home, was a sufficient ground for the wife to live apart and claim maintenance. Because in case the wife was compelled to leave the matrimonial home due to the ill-treatment meted out to her by her husband, who, in addition thereto, had kept a mistress in the matrimonial home, the husband could not blame her for desertion and obtain a decree of divorce' dissolving their marriage on the ground of desertion. This will amount to giving a premium to the husband for his wrongful act.

12. The expression 'desertion' has been explained to mean 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. It also includes the wilful neglect of the petitioner by the other party to the marriage. Thus, it was incumbent upon the Judge, Family Court, to arrive at a finding as to whether or not the desertion in this case was without reasonable cause, without the consent and against the wish of the petitioner. For the said purpose, he was required to consider the case of the wife who has assigned reasons which compelled her to leave the matrimonial home, for in case the wife withdrew from marital cohabitation for a good cause, say hostile atmosphere, ill-treatment in the husband's house, the husband keeping a mistress -- to mention a few, it would not imply the intention to desert though she may have left the matrimonial home, as the law cannot be construed in a manner so as to compel a wife to live in the matrimonial home in spite of hostile atmosphere, ill-treatment, intemperate habits of the husband or his immoral activities, etc. This aspect of the case, we find, has not at all been considered by the Judge, Family Court, though, in our opinion, it was relevant.

13. As observed above, a decree of divorce dissolving the marriage has been passed placing reliance on the judgment of the Apex Court in Ramesh Chander's case (supra) and by taking into consideration the statement of the wife that there was no possibility of the husband and the wife living together, but this statement should not have been read in isolation. Rather, it should have been read in the context of the wife's explanation and the husband's statement that he had married another lady in February, 1991. The Judge, Family Court, ought to have considered the fact as to whether under the circumstances, the wife was justified in making the statement that it was not possible for her and the husband to live together.

14. It is no doubt true that in Ramesh Chander's case (supra), the Apex Court passed a decree on the ground that as the marriage was dead both emotionally and practically, continuance of marital alliance for name-sake was prolonging the agony and affliction, but what the Judge, Family Court, failed to notice was that in that case the marriage was dissolved by the Apex Court in exercise of its jurisdiction under Article 142 of the Constitution of India. The Supreme Court, in exercise of this jurisdiction, has the power to make such order as is necessary for doing complete justice 'between the parties in any cause or matter pending before it'. As observed by the Apex Court in *Supreme Court Bar Association v. Union of India & Anr.*, (1998) 4 SCC 409=IV (1998) SLT 573 (SC), indeed these constitutional powers cannot, in any way, be controlled by any statutory provision, but at the same time, these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with a subject.

15. A marriage (Hindu) cannot be dissolved by a decree divorce de hors the ground available under Section 13 of the [Hindu Marriage Act, 1955](#), as new grounds cannot be added to the section because to do so would amount to granting divorce on grounds other than those mentioned in Section 13 of the Act. In this connection, a reference may be made to the decision of the Apex Court in *Reynold Rajatnani & Anr. v. Union of India & Anr.*, AIR 1982 SC 1261, where it has been observed that when a legislative provision specifies the grounds on which divorce may be granted they constitute the only conditions on which the

Court has jurisdiction to grant divorce. Thus, in the present case, the Judge, Family Court, was obliged to return a finding as to whether or not the husband had made out a ground on which a decree of divorce dissolving his (the husband's) marriage with the wife, was claimed. This he has failed to do.

16. In the above view of the matter, the impugned judgment has to be set aside and the matter used to go back to the Judge. Family Court, for a fresh decision in accordance with law keeping in mind the observation made by us above and we do so.

17. The Civil Appeal is accordingly allowed to the extent indicated above without any order as to costs.

P.K. Mohanty, J.

I agree.

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