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Kailash Nath Vs. Amarwati Devi

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Court : Punjab and Haryana

Decided On : Apr-01-2005

Reported in : I(2006)DMC289; (2005)141PLR2

Judge : Nirmal Yadav, J.

Acts : Hindu Marriage Act, 1955 - Sections 13; Evidence Act

Appeal No. : First Appeal Order No. 26-M of 2003

Appellant : Kailash Nath

Respondent : Amarwati Devi

Advocate for Def. : None

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

Disposition : Petition allowed

Judgement :

Nirmal Yadav, J.

1. This is appellant's appeal against the order of Additional District Judge, Kurukshetra dated 19.12.2002 dismissing his petition under Section 13 of the Hindu Marriage Act for dissolution of marriage by way of decree of divorce.

2. The facts in brief, are that parties were married on 24.12.1988 according to Hindu rites and ceremonies at Raja Umri, District Sultaripur (U.P.). Thereafter, the parties resided together at Kurukshetra. However, no child was born out of the wedlock. The appellant sought dissolution of the marriage on the ground of cruelty as well as desertion. According to him, respondent-wife withdrew from the society of the appellant in the year 1992 without any reasonable excuse and refused to join the matrimonial home despite best efforts. The notice of the petition was issued to the respondent but she did not come present despite service. Therefore, she was proceeded against ex-parte vide order dated 25.9.2002. In ex-parte evidence, the appellant appeared himself and produced Bhagwati Deen as PW-2. The trial Court after taking into consideration the evidence on record observed that though the ex-parte evidence of the appellant was unrebutted, but the same did not inspire confidence. The trial Court did not believe the evidence produced by the appellant basically, on the ground that the thumb-impression of the respondent on the summons and the thumb-impression on the affidavit produced by the appellant do not appear to be same on visual examination. The learned trial Court has observed that it is quite strange that the respondent did not appear in the Court but at the same time her affidavit was produced along with an attested photograph and, therefore, the evidence produced by the appellant does not appear to be trustworthy. The Court below further made out another ground for rejecting the evidence, that from the photocopy of voter identity card, the respondent is stated to be 23 years of age as on 1.1.2002 and therefore, she must be of 12 years of age at the time of her marriage.

3. The findings of the trial Court are merely based on conjectures and surmises. It is well established that the principle of res-judicata also applies between the two stages in the same litigation to the extent that a Court having at an earlier stage decided a matter in one way, cannot allow to re-agitate the same matter again at a subsequent stage of the same proceedings. Vide order dated 25.9.2002, the trial Court proceeded against the respondent ex-parte as she was not present despite service. The order proceeding ex-parte was not challenged by any of the parties and, therefore, the trial Court could not take a different view while deciding the petition finally. In case, the trial Court was not satisfied about the respondent having not been served properly, the order proceeding ex-parte could not have

been passed and the Court below should have tried to secure the presence of the respondent by other means of service. Principle of res-judicata applies also between two stages in the same litigation to the extent that a Court having at an earlier stage decided a matter in one way, will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. This view of mine finds support from the decision of the Supreme Court in Satyadhyan Ghosal and Ors. v. Smt. Deorjin Debi and Anr., : [1960]3SCR590 . Though an interlocutory order which had not been appealed from can be challenged in an appeal from the final decree or order in the present case none of the parties has challenged the interlocutory order dated 25.9.2002 vide which the respondent was proceeded against ex-parte.

4. After going through the order sheets, there is no order vide which the alleged affidavit of Amarwati Devi, respondent was placed on record nor there is any evidence or order to show that identity card which has been taken on record by the trial Court was produced in evidence. A perusal of statements of PW-1 and PW-2 also shows that none of them has produced the affidavit or the voter identity card of respondent-Amarwati Devi. The findings of the trial Court are merely based on conjectures. The trial Court could not take into consideration any such evidence which was not admissible as per the Evidence Act. The alleged affidavit of respondent-Amarwati Devi and her voter identity card could not be taken into consideration to rebut the evidence produced by the appellant. In the absence of any cogent and trustworthy evidence to rebut the evidence produced by the appellant, the trial Court could not disbelieve the testimony of the appellant. Admittedly, the testimonies of PW-1 and PW-2 have gone unrebutted and prove appellant's case accordingly. The parties are living separately since 1992. Therefore, the appellant has been able to prove that the respondent has deserted the appellant without any reasonable or sufficient cause.

5. Desertion for the purpose of seeking divorce under the Act means permanent forsaking and abandoning of one spouse by the other without consent and without reasonable cause. In other words, it is a total repudiation of the obligation of marriage. It is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawal from the matrimonial obligation in a way not

permitting or allowing and facilitating cohabitation between the parties. Desertion is not a single act, but it is continuous course of conduct to be determined in the facts and circumstances of each case. In the present case, admittedly, there is no rebuttal to the statement of the appellant that the parties are living separately since 1992 and till date the respondent has not come forward to challenge the same. There is also nothing on record to prove that the respondent was forced to leave the company of the appellant or she was thrown out of the matrimonial home or that she was forced to live away from her matrimonial home. There is also no rebuttal to the testimony of the appellant that he has always been ready and willing to perform his part of matrimonial obligations.

6. Accordingly, the appeal is accepted and the order of the trial Court is set aside. Marriage of the parties is ordered to be dissolved by way of a decree of divorce.

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