

Chander Prakash Vs. Sudesh Kumar

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Court : Delhi

Decided On : Nov-27-1970

Reported in : AIR1971Delhi208; 7(1971)DLT244

Judge : Hardayal Hardy and; D.K. Kapur, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 10; [Evidence Act, 1872](#) - Sections 114; [Code of Civil Procedure \(CPC\), 1908](#) - Order 7, Rule 7

Appeal No. : Letter Patent Appeal No. 107 of 1969

Appellant : Chander Prakash

Respondent : Sudesh Kumar

Advocate for Pet/Ap. : A.N. Monga,; Anoop Singh and ; S.L. Bhatia, Advs

Judgement :

D.K. Kapur, J.

(1) The appellant in this Letters Patent Appeal is the husband, who had brought a petition for divorce under section 13 of the [Hindu Marriage Act, 1955](#), against his wife, who is the respondent in this appeal. The decree for divorce was claimed on the ground that the respondent was living in adultery. The case was tried by Shri K. S. Sidhu, Additional District Judge, who found from the circumstances of the case that the respondent had left the appellant one day after the marriage and was

living in adultery. He, therefore, granted the decree, as claimed, by his judgment dated 25th September, 1967. On appeal to this court, Deshpande, J. held that adultery had not been established and thus reversed the decision of the trial court on this ground. However, the learned Single Judge granted a decree for judicial separation on the ground of desertion by his judgment dated 7th October, 1969. On the facts found, it was clear that the marriage took place on 16th January, 1966, and only one day after the marriage, i.e. on 17th January, 1966, the respondent left the appellant. I shall subsequently deal with the circumstances in which the relief of judicial separation has been granted.

(2) The case of the appellant is that he was married to the respondent on 16th January, 1966, but she only stayed with him till 17th January, 1966, and the marriage was not consummated. It was further claimed that the respondent left the appellant and thereafter lived in adultery with various persons unknown. The respondent was examined by a medical board, who found that she was 'habituated to sexual intercourse'. This expression was explained by Dr. B. G. Kotwani, A.W.O., who was a member of the medical board, as being 'the same thing as having 'frequent sexual intercourse'. From this medical evidence coupled with the oral evidence and the circumstances on record, it is sought to be inferred that the respondent was living in adultery.

(3) The Additional District Judge held that as the respondent left the appellant on 17th January, 1966, and went to live with her cousin M. C. Rampal from 30th January, 1966, it should be inferred that between 17th and 30th January, 1966, she was living in adultery with some unknown persons. The respondent lived with her cousin M. C. Rampal from 30th January, 1966, to 24th May, 1966, and there is evidence to show that she was seen in this period in the company of strangers in Karol Bagh and Connaught Place. The Additional District Judge relied on the evidence of R. C. Sharma A. W., who was working in the office of Messrs Heatly and Gresham, Limited, New Delhi, along with the respondent up to 19th January, 1966, who deposed that the respondent was seen leaving the office in the company of strangers. From all these circumstances, coupled with the medical evidence, the trial court held that the respondent had an inclination for adulterous sexual life and she had ample opportunities to indulge in the same with strangers.

As the facts showed that the respondent never had sexual intercourse with her husband but the medical evidence was to the effect that she was habituated to sexual intercourse, it could be inferred that the respondent had been living in adultery with persons unknown. Thus, the decree for divorce was granted.

(4) On appeal, the learned Single Judge did not accept the conclusion of the Additional District Judge as being valid. He upheld the finding that the respondent had deserted the appellant on 17th January, 1966, but held that as the evidence in the present case was entirely circumstantial, the inference that the respondent was living in adultery could only be drawn if it was an inevitable conclusion from the evidence. He found that, as a matter of fact, the conclusion was not inevitable and in the absence of more direct evidence he was not prepared to hold that the mere fact that the respondent was habituated to sexual intercourse and the fact that she was seen in the company of strangers could lead to the inevitable inference that the respondent was living in adultery. He, therefore, refused to uphold the decree for divorce on the ground of the respondent's living in adultery.

(5) We have examined the correctness of this conclusion. It is un-

'doubtedly true that it is not known as to where the wife lived from 17th to 30th January, 1966, but this does not mean that she must have been living in adultery. It is true that she had been found by the medical board to be habituated to sexual intercourse but it does not follow from this that she must have committed adultery during this period. The medical board examined the respondent on 29th April, 1967. It is quite possible that she may have been habituated to sexual intercourse even before her marriage and the medical board could not possibly distinguish between sexual intercourse before the marriage or after the marriage and no attempt has been made to get any opinion on this question from the doctors who appeared in court. We are, therefore, left only with the evidence that she has been habituated to sexual intercourse. It is possible, of course, that she may have committed adultery but mere suspicion cannot take the place of evidence. The finding of adultery has necessarily to be based on some sort of positive evidence superior to suspicion.

(6) Mr. Monga. the learned counsel for the appellant. has referred us to Raydon on Divorce. Tenth Edition. 1967. and particularly to para 1 10 thereof. He relies on the passage which reads as follows :-

* * * * it is rarely indeed that parties are surprised in the direct act of adultery, and such evidence is looked at carefully, in nearly every case the fact is inferred from circumstances which lead to it, by fair inference, as a necessary conclusion; and, unless this were so held, no protection whatever could be given to marital rights. The court must be satisfied that there was something more than opportunity before it will affix guilt, evidence of a guilty inclination or passion is needed in addition. But proof of general cohabitation excludes the necessity of proof of particular facts to establish adultery. The conjunction of strong inclination with evidence of opportunity affords strong prima facie evidence of adultery, but it is not an irrebuttable presumption.

(7) Mr. Monga relies particularly on the last part of this passage. He says that inclination there was, because the wife had obviously been having sexual intercourse with strangers. This. he says, is established by the medical evidence. He says that it is established that the wife had been living with strangers and had generally been seen in the company of others and had not been living with her parents. He wants us to apply the principle that the respondent had a strong inclination as well as opportunity to the circumstances of this case. On the other hand, the earlier part of this passage says that the court must be satisfied that something more than opportunity exists before it will affix guilt and even earlier it is stated that there would be no protection to marital rights if the circumstances were not such as would lead to a fair inference as a necessary conclusion that adultery had been committed. It is conceivable that in the present case the wife has committed adultery but looking to the type of proof that is before us, it must be held that adultery is not established as a fact for the purpose of affording relief under the Hindu Marriage Act. It would be almost impossible to apply the principle suggested by Mr. Monga to any practical case of marital separation in which the wife and the husband go and live separately by themselves. In such a case. in view of the modern conditions of life, the wife is likely to go and work somewhere and is likely to meet others in public places. Applying the test suggested by Mr.

Monga as the correct test, such a case would almost inevitably involve a finding that adultery had been committed because there would be inclination as well as opportunity and there would be no protection whatever to marital rights. Thus, it would be impossible to distinguish between the guilty and the innocent. . thereforee, conclude that this is not the correct principle to apply to Cases of this type. There must be more positive evidence to show that adultery had actually been committed. For example, in this case, if there was evidence that the respondent had lived in the period 17th to 30th January, 1966, with some particular person that could be a circumstance justifying the conclusion that she had committed adultery. But in view of the state of the evidence in the present case, she may have lived with her friends (of female sex) or some other relations or even in a hotel by herself. As we do not know where she lived, we cannot conclude that adultery had taken place. In the period 30th January to 24th May, 1966, she lived with her cousin M. C. Rampal but there is no suggestion that she committed adultery with him. Thereafter, it seems, she went to live with her parents and she was living with them even when the petition was filed. There is, thereforee, no evidence whatsoever to show that she had an opportunity or even inclination within the meaning of this test to commit adultery with somebody. We may also in this connection refer to para 109 of Rayden on Divorce. which is as follows :-

'THEburden of proof is throughout on the person alleging adultery, there being a presumption of innocence. Reference to the statute shows that the standard of proof is that the court must be 'satisfied on the evidence'. The Act makes no distinction between the standards of proof of adultery and that of any other ground of divorce but this has not in the past been reflected in the cases, which have required the same strict standard of proof in respect of adultery as is required in a criminal case before an accused person is found guilty, that is, that the tribunal must be satisfied beyond all reasonable doubt. But it has been held that a suit for divorce is a civil and not a criminal proceeding and that the analogies and precedents of criminal law have no authority in the Divorce Court, which is a civil tribunal. It is wrong, thereforee, to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case. As far as the standard of proof is concerned, adultery, like any other ground for

divorce, may be proved by a preponderance of probability.'

It would be clear from this passage that there is a presumption to innocence. I think that this is the correct principle to apply. It has also been pointed out in this passage that there must be a preponderance of probability to infer adultery. There is no preponderance of such probability in the present case. I need, therefore, not refer to the ample case law on which the principles stated by Rayden on Divorce in paras 109 and 110 are based, and merely conclude that it is not proper to infer adultery from the circumstances of the present case.

(8) Mr. Monga has also relied on *Mst. Zuli w/o Gopciliu v. Gopalin Tukaram*, Air 1946 Nag 375. That was a case in which the wife claimed maintenance from the husband and the husband contested the same on the ground of her unchastity. She had given birth to an illegitimate child and the conclusion of the court was that P once the allegation of unchastity was made and it was found that she had been unchaste, the burden was on her to show that she had abandoned a life of immorality and returned to purity. We do not think that this principle is at all applicable to the facts of the present case. The wife may have been unchaste before her marriage and afterwards. The question we have to deal with is not her unchastity but her living in adultery and unless her adultery is established in some positive form as a necessary inference from facts it cannot be held that she has been living in adultery.

(9) Mr. Monga has also referred to *Mlfaunnin Sluiflul v. AUnit Rachayo* und another 34 IC 504. a judgment to the Sindh Judicial Commissioner. That was a case in which the general presumption under section 114 of the Evidence Act was applied to a case of profligacy : the principle being that once a set of things has been found to exist it continues to exist, ^he argument of Mr. Monga is that here the wife was unchaste and. therefore, she continues to be unchaste even afterwards. According to him. the fact that the wife was habituated to sexual intercourse leads to the inference that such a state of affairs continues, but I do not think that this sort of principle can be applied to a case of divorce on the ground of adultery. Adultery cannot be interred from the circumstance that the wile is habituated to sexual intercourse. It does not follow as a natural inference. In

fact, if we apply this test to any other normal case divorce would have to be granted in every single case. The only difference in the present case is that the marriage only lasted one day and, therefore, the wife must have had sexual intercourse with somebody else; but it does not follow as a necessary conclusion that this was done after the marriage. Undoubtedly, the present case is an exceptional case in this respect, but we are bound to apply the same test to this case as we would apply to any other marriage which had lasted for some time. In the circumstances, I conclude that in the present case, the husband is not entitled to a divorce on the ground that his wife is living in adultery. In a sense this is a novel case because it is sought to establish that the wife is living in adultery on the basis of the medical evidence alone. We have not been referred to a single case where this has been done. The decision of the learned Single Judge is, therefore, upheld on this part of the case.

(10) I now turn to the question as to whether the husband can be granted a different relief. On this aspect of the case the learned Single Judge concluded that as the respondent deserted the appellant on 17th January, 1966, he would be entitled to present a petition for judicial separation on 17th January, 1968, but he was prevented from doing so because he had already been granted the relief of divorce on 25th September, 1967, by the decision of the Additional District Judge. As the said judgment was now found to be erroneous, on appeal, the principle to be applied was that the husband should be relegated to the same position as he would have been in, if he had not been granted the relief of divorce by the trial court. On the ' principle *Actus Curiae Neminem Gravabit*, which may be translated as 'the act of court shall prejudice nobody'.

(11) The learned Single Judge has concluded that but for the decision of the trial court, the husband could have obtained a decree for judicial separation after 16th January, 1968. and he had been prevented by an error of the court from getting this relief. As desertion was fully proved on the record, the relief of judicial separation was granted with effect from 7th October, 1969, which was the date of the learned Single Judge's judgment. The consequences of this relief would be that the appellant could apply for divorce on or after the 7th October, 1971, and after getting divorce he would be able to re-marry after a period of one year from

the date of the decree by virtue of section 16 of the Hindu Marriage Act. Thus, the earliest that the husband could re-marry would be 7th October, 1972.

(12) We find that the consequence of this approach causes a terrible hardship to the husband. The marriage took place on 16th January, 1966, and lasted only till the next day. The wife never lived with the husband and there is no possible chance in these circumstances of any reconciliation. Yet the husband will have to wait till October, 1972, to be able to re-marry.. This is a period of six and a half years from the date of this unfortunate marriage. We have, therefore, approached the case from a different angle in order to see if relief cannot be granted to the appellant in some other way. We have accepted the principle on which the learned Single Judge has acted but tried to apply it in a different manner.

(13) What are the facts in the present case The wife left the husband a day after the marriage without the marriage being consummated. She has been living in different places with different people. She may or may not have been living in adultery, but she has not been living with her parents. An intolerable burden must necessarily have been placed on the appellant in these circumstances. He has been unable to re-marry and his wife has refused to live with him. He has been fighting this litigation for a number of years. On top of this, the wife has shown by her conduct that she has no desire whatsoever to continue the marriage. On 8th March, 1966, i.e. very shortly after the marriage, she moved an application for annulment of marriage on the ground that the marriage had not been consummated and that there had been no cohabitation between the parties. She also stated that the marriage had been brought about with fraud and without her consent and she further alleged that she was never interested in the marriage as the husband belongs to another caste and this fact was concealed from her. A copy of the application is Exhibit A.8/1. For some reason this application was given up. We then have the respondent's application to the police which is in the form of a report, dated 24th May, 1966, stating that her marriage had been arranged by her parents and that after she came away from her husband's house, her parents would not keep her and while the divorce case was pending in the court she desired to seek legal protection from being harassed by her relatives. It is

apparent from this that even her parents were not prepared to keep' her and she had no desire whatsoever to continue that marriage. In this report she says: 'I could not pull on with the person to whom I was married as I was not interested in that marriage'. Then we have a complaint made by her in her maiden name on 31st January, 1966, to Shri B. Sivaraman, I.C.S. Secretary to Government of India, Department of Agriculture, Ministry of Food and Agriculture. New Delhi. This complaint is dated 31st January, 1966, and is directed against Shri J. S.

(14) Bali, Deputy Adviser on Soil Conservation, and accuses him of trying to get the respondent's 'services terminated and making base and nasty charges against her. She refers in this document to some domestic problems but does not elaborate any more. This Shri J. S. Bali is known to the appellant and was the person responsible for the bringing about of the marriage. The appellant worked under Shri Bali in Dehradun. All these documents show that the respondent has acted in at least a dog-in-the-manger fashion against the appellant. Though she had no intention of going on with the marriage she has been making complaints against Shri Bali. She applied for annulment of marriage and has throughout been saying that she is not interested in the marriage but she did not continue with that application. In such circumstances, it may be inferred that the conduct of the respondent taken as a whole, amounts to cruelty to the appellant.

(15) It is true that the cruelty in this case is of a moral and mental type and there is in section 10(1)(b) of the [Hindu Marriage Act, 1955](#), a restriction on the type of cruelty which may lead to judicial separation. The said restriction is in the following terms:-

'SUCH cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.'

(16) As the facts of the present case show, there is no chance of the parties living together, but if they were to live together, it would certainly be very harmful or injurious to the appellant as the respondent has most certainly stated that she has no intention of continuing the marriage with him. In the circumstances of this case, this certainly amounts to cruelty within the meaning of the qualifying words in section 10(1) of the Act.

(17) The entire conduct of the respondent beginning from 17th January, 1966, when she left him one day after the marriage and went to live in some unknown place, her subsequent stay with her cousin M. C. Rampal during which period she was seen with various persons in public places such as Karol Bagh and Connaught Place and also her subsequent conduct in withdrawing the annulment petition and making complaints against Shri Bali and applications to the police. all lead to the inference that great mental, normal and psychological cruelty must necessarily have resulted to the appellant. The very facts that his wife was living in some unknown places and being seen in the company of others and was refusing to live with him for no fault of his, were enough to amount to cruelty to the appellant.

(18) I think the provisions of the Act have to be construed in a reasonable manner in relation to what the subjective feelings of people involved must be. It is, therefore, in the best interests of both the parties that this marriage be terminated as quickly as possible. In the circumstances, the appellant is entitled to a decree for judicial separation on the ground of cruelty.

(19) This brings me to the question as to what date this decree for judicial separation should date back to. If it was a decree on the ground of desertion, then that relief could not have been granted by the Additional District Judge as the two years' period prescribed by the Act was not over on 25th September, 1967, the date of his judgment, but as I come to the conclusion that this is a case in which cruelty has been made out from the circumstances of the case. this is a relief, which could have been granted by the Additional District Judge. The next question, is as to whether this relief could have been granted by him in an application made under section 13 of the Act.

(20) Proceedings under the Hindu Marriage Act are governed by the provisions of the Code of Civil Procedure. This is so provided by section 21 of the Act. This means that Order VII. Rule 7 of the Code of Civil Procedure is also applicable to the present case. It is provided in the said Rule :-

'EVERY'plaint, shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other

relief which may always be given as the court may think just to the same extent as if it had been asked for. And the same rule shall apply to the relief claimed by the defendant in his written statement.'

(21) Applying this rule to the present case it appears that another relief may be given by the court to the same extent as if it had been asked for. The relief of judicial separation in the present case is a lesser relief than the relief of divorce and, therefore, can be granted when divorce was claimed in the original application. There is, of course, no alternative prayer for judicial separation but as the facts in the ' present case entitle the appellant to judicial separation such a relief can be granted by applying the provisions of Order VII, Rule 7 of the Code. There is nothing in the Code and in the Act to prevent such a relief being granted and it is in the interests of justice that the court should grant the relief to which the appellant is entitled on the facts of the present case. I, therefore, hold that it is possible for the court to grant a decree for judicial separation on the application filed by the appellant in the present case. I further hold that such a decree could have been granted on the ground of cruelty by the Additional District Judge.

(22) In this connection Mr. Monga has referred to *Avinuth Prasad Srivasava v. Smt. Chandra Mohini and another* : AIR1964 All486 where the court found that cruelty was found to be established as well as desertion. It was held that though, normally, a decree for judicial separation would be granted, the time which had passed showed that there was no possibility of reconciliation between the parties and, therefore, an immediate dissolution of marriage was ordered and a decree for divorce was granted. We have also been referred by Mr. Monga to *Kusum Lata v. Kemptu Prasad* : AIR1965 All280 , where it has been held that the cruelty envisaged by section 10(1)(b) of the Hindu Marriage Act did not necessarily mean physical cruelty and it could be mental cruelty and the harm or injury contemplated by the qualifying words of section 10(1)(b) did not only mean physical cruelty or injury but psychological harm or injury. These two judgments support Mr. Monga's case.

(23) In the circumstances, the judgment of the learned Single Judge on this question is affirmed but the decree for judicial separation will be granted to the

appellant on the ground of cruelty and will. therefore. date back to the date of the judgment of the Additional District Judge. who could have granted a decree for judicial separation on the ground of cruelty under section 10(1)(b) of the Act, but did not do so as he granted a decree for dissolution of marriage on the ground that the respondent was living in adultery. This means that the decree for judicial separation granted by the learned Single Judge will now be operative from the date of the judgment of the Additional District Judge, Delhi.

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