

Ram Kishan Singh Vs. Savitri Devi

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SooperKanoon Citation : sooperkanoon.com/688914

Court : Delhi

Decided On : May-28-1982

Reported in : AIR1982Delhi458; ILR1983Delhi962; 1982RLR622

Judge : Charanjit Talwar, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1); [Evidence Act, 1872](#) - Sections 112

Appeal No. : First Appeal No. 176 of 1981

Appellant : Ram Kishan Singh

Respondent : Savitri Devi

Advocate for Def. : Mr. B. S. Charya

Advocate for Pet/Ap. : M.L. Varma,; Rashmi Saini and; B.S. Charya, Advs

Judgement :

Charanjit Talwar, J.

(1) This appeal under section 28 of the Hindu Marriage Act (hereinafter called 'the Act') the appellant. Ram Kishan Singh, has challenged the judgment and decree passed by Shri R. D. Aggarwal, Additional District Judge, Delhi, on 4th May, 1981, whereby he granted the application, of the respondent Savitri Devi, for permanent

alimony under section 25 of the Act.

(2) The facts leading to the filing of the petition by the wife under section 25 of the Act briefly are that a petition for divorce under section 13 of the Act was filed by the husband against the wife on 20th August 1977, on the ground that wife had deserted him for a continuous period of not less than two years. A decree in his favor under section 13(1)(ib) of the Act was granted on 9th May, 1979.

(3) It is relevant to note that Smt. Savitri Devi had filed written statement contesting the petition under section 13 of the Act but later on absented herself and as such was proceeded ex parte. Another admitted fact is that a child was born to Smt. Savitri Devi during the pendency of the petition on 15th December, 1977. An application for setting aside the ex parte decree granted in favor of the husband was moved on 8th August, 1979. This application was dismissed on 11th October, 1979. Another application under Order 9 Rule 13 of the Code of Civil Procedure was made by the wife seeking restoration of the earlier application. That application was also dismissed for non-prosecution. The result was that the decree of divorce granted in favor of the husband-appellant herein became final.

(4) In the present petition for permanent alimony under section 25 of the Act the case made out was that the wife had no movable or immovable property and had no source of income. And that she had to maintain herself and the minor child. She has demanded Rs. 300 as permanent alimony Rs. 100 for the child and Rs. 200 for herself. It was averred that the husband owns immovable property worth about Rs. 15,000 ; that he had valuables and articles worth more than Rs. 10,000 besides jewellery etc. and that he was employed in the Ministry of Finance and was getting Rs. 550 as total emolument per month.'

(5) The husband contested this petition. His case was that the wife was not interested to seek any maintenance; it was her brother who had coaxed her into filing this petition although the petition for divorce had been deliberately not defended. On merits his case was that on the wife's own showing she has been unchaste as she had given birth to a child who was apparently illegitimate as the parties had separated and the child was born after atleast two years of the separation. Further, the plea of the husband was that after the decree of divorce

had become final he re-married on 31st July, 1979 and a son was born from that wedlock in September, 1981; that with the emoluments which he is getting he is hardly able to meet his day to day expenses. thereforee, as he has not enough income and the wife being a partner with her father in the family business which earns them about Rs. 2000 per month, she was not entitled to permanent alimony.

(6) On the pleadings of the parties, the following issues were framed : (1) Is the petitioner employed anywhere and what is her income OPR. (2) Had the respondent no access to the petitioner since 31-7-1974 and as such the child born to the petitioner on 15-12-1977 is an illegitimate one OPR. (3) To how much amount, if any, the petitioner is entitled by way of permanent alimony from the respondent OPP.

(7) On issue No. 1 the learned Judge noticed that this was not pressed on behalf of the husband at the time of arguments. Even otherwise on appraisal of the evidence it was observed that the wife had no income of her own. Accordingly this issue was decided against the husband.

(8) Issue No. 2 was; also decided against the husband. It has been held by the learned Additional District Judge that the husband was not able to prove that there was no access between the parties after 31st July, 1974; and, thereforee, the marriage having subsisted up to 9th May, 1979, on which date the degree of divorce was granted in favor of the husband. Thus the child born to the wife on 15th December, 1977, is not illegitimate in view of the provisions of section 112 of the Indian Evidence Act.

(9) In the result, the learned trial Court granted the amount of Rs, 125.00 for the maintenance of the wife per month from the date of the petition under section 25 of the Act.

(10) It is contended by Mr. M. L. Verma, learned counsel for the appellant that in the facts and circumstances of this case the wife is not entitled to permanent alimony under section 25 of the Act. According to him vide judgment and decree passed on 9th May, 1979, by Shri Jaspal Singh. Additional District Judge, it had been established that the respondent deserted her husband on 31st July, 1974,

and thereafter the husband had no access to his wife at all. Thus, he submitted, the child born on 15th December, 1977, to the respondent was illegitimate. The argument is that by giving birth to an illegitimate child, the wife on her own showing is living an unchaste life and as such not entitled to permanent alimony under section 25 of the Act. In support of his contention, the finding given in paragraph 6 of the judgment passed by Shri Jaspal Singh, Additional Sessions Judge, while dissolving the marriage between the parties, has been relied upon. It reads as under :

'6.From the evidence referred to by me above, it is clearly borne out that the parties were married according to Hindu rites on June 26, 1973, and last resided at New Delhi. It is also proved that the respondent deserted the petitioner on 31-7-1974 and since then has been in desertion and tether that in spite of best efforts made by the petitioner the respondent has refused to return to the matrimonial home without any sufficient cause. Thus, not only the factum of desertion is proved, the evidence further goes to show that there is *aminus desrendi*. The record further shows that in August 1974 when the petitioner went to the house of his in-laws to fetch the respondent not only his in-laws but the respondent also behaved very rudely with him and that in October 1976 also he has not only abused by the respondent but was kicked by her'.

(11) The learned Judge (Shri Jaspal Singh) has determined that the intention of the wife was to bring cohabitation permanently to an end. The submission is that by way of present petition any finding given in that judgment cannot be challenged, the decree having become final. The husband, therefore, claims that it is established that he had no access to his wife since 31st, July 1974.

(12) Mr. B. S. Charya, learned counsel for the respondent however, submitted that the child having born to the respondent during the time when the marriage was subsisting, the child has to be considered legitimate as per the provisions of section 112 of the Indian Evidence Act. He submits that it was for the husband to prove conclusively that he had no access to the respondent-wife at any time between 31st July, 1974, till about the middle of March, 1977. Otherwise the presumption in law is that the child is legitimate.

(13) The learned trial Court meeting with the above submission of the respondent has held in the impugned judgment that there was no proof that the husband had no access to the wife during the period of separation. Hence, the presumption under section 112 of the Indian Evidence Act has not been displaced. As great emphasis is laid on behalf of the respondent on the provisions of section 112 of the Indian Evidence Act, it may be noticed. The same reads as follows:

'112. The fact that any person was born during the continuance of a valid marriage between his mother and any son, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten'.

(14) It is no doubt true that mere allegation of the husband that the child is illegitimate as he was born during the period of separation, is not enough to prove that the child is illegitimate. It is mandatory for the husband to prove that he had no access to his wife during the relevant period. The expression in the above section 'unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten' has been construed to mean that strict proof of non-access has to be established. In the present case, however, the findings of Shri Jaspal Singh in the divorce case, as quoted earlier, being binding on the parties, coupled with the facts that all along during the relevant period the husband was living at Delhi which is far away from the village where the wife was residing and that only time during the relevant period when he visited that village to attend a marriage, he was given beating by the wife and her relations (these facts were proved during the earlier proceeding) are enough to discharge the onus which lay on the husband to prove that he had no access to his wife. In the peculiar facts of this case it was for the wife to prove at least by preponderance of probabilities that the husband had access to her. She nowhere gives any instance about the husband's stay at her parent's house in that period or that she had visited her husband at Delhi.

(15) The authorities cited by Mr. Charya are not applicable to the facts of this case as in none of those cases there was a finding by a competent Court that the husband had no access to his wife at all for over a period of three years immediately preceding the decree of dissolution of marriage.

(16) In *Perumal v. Ponnuswami*, : [1971]1SCR49 relied on by Mr. Charya, the facts were that separated spouses were living in the same village; therefore, it was held that it was for the husband to establish absence of access otherwise the presumption under section 112 of the Indian Evidence Act could not be displaced. In the present case during the period of separation the husband did not have access to the wife at all as they were living far away from each other.

(17) In fairness to Mr. Charya I may note that he is right when he says that the finding regarding animus desendi has to be given in every case where marriage has been dissolved on the ground of desertion but in the facts of this case, nothing turns on this submission.

(18) For the foregoing reasons the finding on issue No. 2 in the impugned judgment, therefore, is wrong and is liable to be set aside.

(19) However, the question which arises for consideration is whether a wife who has given birth to an illegitimate child during the pendency of proceedings under section 13(1)(b) relief under section 25 of the Act The decision on that of the Act, i.e., on the ground of desertion, is entitled to application will depend upon the facts in each case. In case, the marriage has been dissolved under section 13(1)(i) of the Act on the ground that the wife was living in adultery or was leading an immoral life, her application for permanent alimony may be dismissed on the ground that even after the decree of divorce she continue to lead such a life. Where, however, the evidence is, like in the present case, that she had conceived during the period of desertion and delivered a child, her application for permanent alimony cannot be thrown out on that ground alone. It is wellsettled that illicit conception by itself is not 'living in adultery'. I would, however, be open to a husband whose marriage has been dissolved on the ground that wife has deserted him to prove, while contesting that application, that the wife lives in adultery.,

(20) In my view, the present application is maintainable.

(21) Now, the next question which arises for consideration is whether in the facts and circumstances of the present case, the wife has to be granted any permanent alimony. The appellant after the decree of dissolution of marriage, which was not challenged, got married. His averment that a child was born from that wedlock is also not being disputed. According to the respondent's own showing the appellant is merely getting Rs. 517.00 per month as is evidenced by Exhibit R/3. It appears from the record that he holds substantive post of a peon and at present he is working as a clerk on temporary basis. On oath he stated that he was in possession of an one-room tenement which had been allotted to him by the Delhi Development Authority. This accommodation was given to him in place of a Jhuggi wherein he was earlier living. He is paying Rs. 8 .00 per month as rent. It was stated at the bar that he had taken loan from his provident fund to repair this house.

(22) This is the house which according to the wife is valued at Rs. 15,000.00 and is owned by him. In my view even if the husband is held to be owner of this one room tenement he cannot possibly earn any income from it as he is in occupation thereof. His only income, therefore, is his salary of Rs. 517.00 . This amount is hardly sufficient in Delhi to make both ends meet. He was re-married; he is to support his wife and a child. The respondent on the other hand, is living in a village with her parents and is stated to be helping them in their business. Her conduct during the earlier proceedings shows that she was really not interested in contesting the petition. After filing of the written statement the case was proceeded ex parte in default of her appearance. After the decree an application for setting it aside was filed but it was also not prosecuted. Again another application was filed for restoration of that application. That too was dismissed for default.

(23) The present application under section 25 of the Act was filed by her on 10th April, 1980, after about a year of the passing of the decree of divorce. It is clear, therefore, that the application was moved more to harass the husband who can ill-afford to pay any subsistence amount to the respondent.

(24) Keeping in view the income of the appellant and his responsibility I do not consider it just to direct alimony by way of monthly payment by him to the respondent.

(25) However, I do not consider it just to direct that the amount of Rs. 1825 deputed by the husband under direction of this Court on 2nd July, 1981, be refunded, maiden wife. Further, the amount of Rs. 125.00 per month deposited by the applicant from August, 1981, is also allowed to be retained by her. In my view in the facts of the present case the grant of these amounts in lump sum is enough by way of 'starvation allowance' which the respondent wife is entitled to. The said amounts if not withdrawn by the wife already. shall be paid to her. However, henceforth, the wife will not be entitled to any other amount.

(26) In view of my discussion above the judgment and decree of the trial Court are modified to the extent indicated by me above and the appeal stands disposed of in terms thereof.

(27) No order as to costs.