

**Smt. Anandi Devi Vs. Raja Ram**

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**SooperKanoon Citation :** [sooperkanoon.com/752199](http://sooperkanoon.com/752199)

**Court :** Rajasthan

**Decided On :** Jul-11-1972

**Reported in :** AIR1973Raj94; 1972()WLN525

**Judge :** Kan Singh, J.

**Acts :** [Hindu Marriage Act, 1955](#) - Sections 9, 13 and 29(2); [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 2 - Order 23, Rule 1

**Appeal No. :** Civil Misc. Appeal No. 24 of 1968

**Appellant :** Smt. Anandi Devi

**Respondent :** Raja Ram

**Advocate for Def. :** Hastimal, Adv.

**Advocate for Pet/Ap. :** J.K. Singhi, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**Kan Singh, J.**

1. This is an appeal by a wife directed against the judgment of the learned District Judge, Pali dismissing the wife's application under the [Hindu Marriage Act, 1955](#) for restitution of conjugal rights against her husband.

2. The parties belong to the Sadh (Yaishnaval community and were married according to Hindu rites in Samvat year 2013. They lived together as husband and wife for about 6 years. Thereafter when the wife had conceived she was sent to her father's house for delivery. A male child was born to her. Unfortunately the male child had died. The grievance of the wife was that after the child birth her husband Raja Ram had withdrawn from her society without a reasonable excuse and had failed to look after her. The reason assigned by the wife for this behaviour was that she was being ill-treated and the husband and his people wanted an educated wife. It was further stated in the petition that prior to the present petition a similar petition was filed in the District Court, but it was withdrawn by the wife on 3-3-1964 as a result of fraud practised on her by the husband. Therefore, regarding this withdrawal it was urged that it should not operate as a bar to the maintainability of the present petition.

3. The husband resisted the petition. He pleaded that the petitioner had been divorced by him according to the custom prevalent in their community. The custom of divorce was that a husband would be tearing a piece from his turban and giving it over to the wife saying that they were no more husband and wife. It was further pleaded that the wife had been living in adultery with one Madanlal Teacher.

4. The learned District Judge set down the following issues for trial:--

1 vk;k nj[kkLr lgh rjhds ls odkuwu ds ekfQd fy[kh gqbZ ugh gS a vkSj D;k bl dkj.k ;g nj[kkLr [kkfjt gksuhpkfg, A

2 vk;k iwoZ esa tks lk;yk ustks vnk;s gds lkSgjh dk izkFkZuk i= is'k fd;k mls jsLiks UM.V jktkjk ds eqxyrnsus o mlds cgdkcV es vktkus ls [kkfjt dj;k;k Fkk vkSj vk;k lk;yk vc ;g u;kizkFkZuk i= vnk;s gd lksgjh ds fy, is'k dj ldrh gS A

3 vk;k jsLiksUMs.V jktkjk uslk;yk vkuUnh nsoh dk rkjh[k 7&11&63 ds iwoZ tkfr fjokt ds vuqlkj NksM+kfpB~Bh ;kfu rykd ns fn;k A

4 vk;k lk;yk vkuUnh nsoh dkfdlh O;f ds lkFk uktk;t rkyqd Fkk vkSj Fkk rks fdlls vkSj D;k bl dkj.k mldhvnk;s gd 'kkSgjh dh fMf ikus ds vf/kdkj ugha gS A

5 nknjlh D;k gksxh

Five witnesses were produced by the wife and 12 by the husband. Regarding issue No. 4, that is about adultery, after considering the evidence led by the parties, the learned Judge thought that there was only the uncorroborated testimony of P. W. 2 Heera Dass and it was unsafe to rely on his statement in such an important matter. Brushing aside this direct evidence the learned District Judge, however, emphasised one circumstance that had emerged in the case. It was the statement of Smt. Anandi Devi. The learned Judge referred to it and observed that Smt. Anandi Devi had a pregnancy of four months when she was sent to her father's home for delivery and she has admitted in her statement in this connection that her husband had come from Jodhpur after full one year when she was being sent to her father's house. Apart from this the learned Judge observed that during April, 1962 the husband was at Sumerpur under training and the wife was at Takhatgarh, a place 20 miles away from Sumerpur. Regarding this period he observed that the couple were not in touch with each other. In the result, the learned District Judge found that as there had been no cohabitation between Smt. Anandi Devi and her husband, according to Smt. Anandi Devi's own statement, the child born to her could not have been of Raja Ram. Therefore, the learned District Judge reached the conclusion that the husband has been successful in discharging the burden that the petitioner was leading an adulterous life, having conceived a child from someone other than her husband Raia Ram. As regards issue No. 3, regarding the giving of divorce, the learned District Judge came to the conclusion that there was a custom of divorce in the community to which the parties belonged and that Smt. Anandi Devi had been sent away to her father's house after she had been divorced by her husband Raja Ram. Regarding issue No. 2, the learned District Judge held that the matter was governed by the provisions of Order 23, Rule 1, Civil P. C. and as permission to file a fresh application had not been sought from the Court, the present application was not maintainable as it was based on the same cause of action. Learned District Judge, however, declined to go into the question of alleged fraud as he felt that the previous order of the Court should have been challenged by a suit on the ground of alleged fraud. In view of the findings of the learned District Judge on the above issues he came to the conclusion that issue No. 1 was redundant. In the result, the learned District Judge dismissed the application for restitution of conjugal rights.

5. In assailing the judgment and decree of the learned District Judge, learned counsel for the petitioner-appellant contended that the finding about adultery was not based on sufficient evidence. He maintained that it had not been pleaded by the husband in his written statement that he had no access to his wife during the period when she could have conceived from him. Therefore, the learned Judge was in error in referring to bits of Smt. Anandi Devi's statement in reaching the conclusion of adultery against her. Then as regards withdrawal of the previous petition, learned counsel submitted that Smt Anandi Devi had been induced to sign the withdrawal application as a result of fraud practised on her by her husband.

6. So far as the first contention of learned counsel is concerned I think it should prevail. The learned District Judge had brushed aside the direct evidence led by the defendant regarding the wife living in adultery with one Madanlal Teacher. He however, relied on the statement of Smt. Anandi Devi herself regarding the alleged non-access of the husband during the period when Smt. Anandi Devi could have conceived. The normal presumption is that a child born during wedlock is legitimate. In other words, the child is not the product of any illicit intercourse or adultery. This presumption will not be attracted where a husband is able to prove non-access to his wife during the period when the child could have been conceived, but in that event it will be for the husband to plead such non-access and to have a proper issue framed and then lead satisfactory evidence. In the absence of this whatever admissions or statements the wife might have made in an unguarded moment without due deliberation cannot be flung against her only at the time of arguments. I am therefore, unable to affirm the finding of the learned District Judge regarding adultery alleged to have been committed by the wife.

7. I am also unable to affirm the finding of the learned District Judge that a custom in a community whereby one of the spouses namely, the husband is entitled to divorce his wife merely by, tearing a piece from his turban can be recognised as a reasonable one. A custom to be recognised by Courts must satisfy the standard of reasonableness. If the custom permits one of the spouses to divorce the other against his or her will, then that may not be countenanced by the Courts as a valid custom. However, the appellant has an unsurmountable hurdle on account of the withdrawal of the previous petition under Section 9 of the [Hindu Marriage Act,](#)

[1955](#) without the permission of the Court concerned to file another. Order 23, Rule 1. Civil Procedure Code comes in the way of the petitioner as the present petition is based on the same cause of action. This position is not disputed by learned counsel for the appellant. Although the learned District Judge has refrained from considering the question of fraud allegedly practised on the petitioner. I should think this question should not have been left at large. On this point there is only the solitary statement of Smt. Anandi Devi. From her bald statement I find it exceedingly difficult to accept that any fraud had been practised on her. The withdrawal application as also the Court's order dated 3-3-1964 dismissing the petition as withdrawn are on record. The withdrawal application has been presented by none other than Smt. Anandi Devi who had been identified by her counsel Shri M. L. Qureshi. The petition had been verified by her before the learned District Judge on 3-3-1964. On the same day the learned District Judge dismissed the petition as withdrawn. In the order sheet Smt. Anandi Devi's presence along with her counsel Shri M. L. Qureshi is noted. It is further mentioned therein that Smt. Anandi Devi had filed an application and had stated that she did not want to proceed with her application for restitution of conjugal rights. It was for this reason that the Court dismissed the application. I am afraid in the teeth of this order of the Court the present petition based on the same cause of action is not competent.

8. The result is that the appeal has no force and is consequently hereby dismissed. The parties are, however, left to bear their own costs of this Court.