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Nirmala Devi Vs. Ved Prakash

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Court : Himachal Pradesh

Decided On : Jan-03-1992

Reported in : AIR1993HP1,II(1992)DMC155

Judge : Devinder Gupta and; Lokeshwar Singh Panta, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 41, Rule 27; ;Code of Criminal Procedure (CrPC) - Section 125; ;Hindu Marriage Act, 1955 - Sections 9, 13, 23(1) and 28

Appeal No. : F.A.O. No. 113 of 1988 with C.M.P. No. 28 of 1989

Appellant : Nirmala Devi

Respondent : Ved Prakash

Advocate for Def. : G.D. Sharma, Adv. Vice; K.D. Shreedhar, Adv.

Advocate for Pet/Ap. : G.C. Gupta, Adv.

Judgement :

Devinder Gupta, J.

1. The present appeal under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), is against the judgment and decree passed on August 17, 1988, by District Judge, Solan and Sirmaur Districts at Nahan, Camp at

Solan, allowing the husband's petition filed under Section 13 of the Act and granting a decree of divorce dissolving the marriage of the parties.

2. On December 20, 1986, a petitionunder Section 13 of the Act was filed by the husband against the wife for dissolution of marriage by a decree of divorce on the ground of cruelty and desertion. The allegation of the husband was that his marriage with the respondent was solemnised 12/13 years ago. Whereafter, they continued to live happily in village Gohar. After few years, behaviour of the wife became abnormal. She started picking-up quarrels on one pretext or the other and also showing disrespect to the family members. On one occasion, she even went to the extent of levelling false allegation that her father-in-law intended to have illicit relations with her. She also started levelling false allegations of alleged misbehaviour towards her by the husband and other family members and that of not providing necessary amenities and getting hard work from her as also neglecting her. According to the petitioner-husband, these acts on the part of wife, amounted to cruelty. The other ground, which was made the basis for seeking decree of divorce was desertion, for which it was alleged that the wife had deserted the husband (or a continuous period of more than two years immediately preceding the presentation of the petition. Petitioner alleged that in the year 1975, he fell ill and his condition started deteriorating day-by-day. The respondent wife instead of discharging her marital obligations of looking after him, left his house and she even did not pay a visit to him at Bilaspur hospital where he was under treatment. She thereafter did not come back and declared that she had no intention of doing so. The further allegation of the petitioner was that after the year 1979, the wife-respondent had deserted him. It may, however, be noticed at this stage that in his petition, petitioner had categorically asserted that there had not been any previous proceedings between them under the provisions of the Act, except that the wife had preferred a petition under Section 125 of the Code of Criminal Procedure before Gram Panchayat, Dhudan in which maintenance at the rate of Rs. 100/-per month was awarded in favour of the wife. Petitioner also asserted that there was no undue delay in preferring the petition and that he had not condoned the acts of cruelty of the wife-respondent.

3. The petition was contested by the wife. She admitted having taken out proceedings under Section 125, Cr. P. C. claiming maintenance from the husband since he had failed and neglected to provide any maintenance to her. It was asserted by her that she had been treated with cruelty by the husband and allegations made by him in the petition levelling allegations of cruelty and that of desertion were false and baseless. According to her she had at no point of time refused to join the husband's company. It was due to the act and behaviour of the husband and the other members of the family that she was forced to leave her marital home and live with her parents. She in fact was turned out from the house since the husband-petitioner wanted to get rid of her as she could not bear a child. It was the conduct of husband-petitioner which forced her to move petition before the Gram Panchayat for grant of maintenance. A specific plea was raised by her that the husband had earlier filed a petition under Section 9 of the Act seeking decree for restitution of conjugal rights. After having withdrawn the said petition, now the present petition had been moved which act on the part of the husband itself was sufficient to refuse him any relief. She denied that the husband had not condoned the alleged acts of cruelty on her part.

4. During the course of pendency ofproceedings before the district Court, the husband gave up one of the grounds seeking divorce, namely, the desertion and claimed decree only on the ground of cruelty. As such, it is not necessary to advert in details to the ground of desertion and the evidence led on the said plea. The district Court on the basis of evidence came to the conclusion that the wife had made false allegation against her father-in-law in the proceedings pending before the Panchayat, which act on her part was held as an act of cruelty and on the said basis the petition of the husband was allowed by granting decree in his favour and dissolving the marriage by divorce. It is this judgment and decree which is under challenge in this appeal.

5. During the course of hearing, learned counsel for the appellant assailed the judgment and decree under appeal primarily on the ground that the District Judge failed to take note of the mandatory requirement of law, namely, Clause (b) of Sub-section (1) of Section 23 of the Act, due to which the judgment and decree was vitiated. According to Mr. G. C. Gupta, there was a specific plea raised by the

wife that the husband had condoned the alleged act which amounted to cruelty and that no decree could have been passed on that basis. The conduct of the husband in having prayed for being granted a decree for restitution of conjugal rights by filing a petition under Section 9 of the Act and thereafter withdrawing the same and filing a fresh petition for divorce itself amounted to condoning the alleged act of cruelty. The other ground on which the impugned judgment and decree was challenged, was the averments made in the application, moved during the pendency of this appeal, under Order 41, Rule 27 of the Code of Civil Procedure seeking permission to lead additional evidence by placing on record the proceedings of the Gram Panchayat, in order to demonstrate that as a matter of fact no allegation was made by the wife-respondent against her father-in-law in the proceedings launched before the Gram Panchayat. These arguments of the learned counsel for the appellant have been refuted by the learned counsel for the respondent by asserting thatthere was no condonation of the acts of cruelty and since she in her statement made before the Court had admitted that in the proceedings before the Gram Panchayat she had made allegation against her father-in-law, there was hardly any ground for permitting the appellant-wife to lead additional evidence.

6. Having heard the learned counsel for the parties and having gone through the record, we find that there is much substance in the submissions made on behalf of the appellant and the appeal deserves to be allowed and the petition filed by the husband deserves dismissal.

7. As per the version of the husband, the wife, after about one year of their marriage, started neglecting him. In September 1979, when he fell ill, instead of looking after him, she left for her parental home and declared openly that she would not return back and claim maintenance while residing at her parental home. At the time of the death of the grandfather of the husband, in December 1980, the wife stayed at her marital home for about a fortnight but again left for her parental home and thereafter she filed a petition for maintenance before Gram Panchayat, which ultimately was granted by the Panchayat at the rate of Rs. 100/- per month. When proceedings were pending before the Panchayat, she levelled false allegation that her father-in-law had an eye on her and wanted to have sexual

relations with her. According to the husband-petitioner, when he enquired from his father, who is about 75 years of age. about all this, he denied the said allegation. The husband in his statement further asserted that the wife finally left his house in the month of July, 1981 and ever since she has been residing with her parents. During the cross-examination he, however, stated that after she had left his house, she had been occasionally visiting his house and used to leave the house after staying there for 5 to 7 days. Despite the fact that maintenance had been granted to his wife, but he was not in a position to clear the arrears thereof for the last 3/4 years and that proceedings for which were pending before the Chief Judicial Magistrate. The husband during cross-examinationadmitted that a petition under Section 9 of the Act was filed by him claiming a decree for restitution of conjugal rights as at that stage he wanted his wife to come back to his house but those proceedings were later on withdrawn and the present petition was filed. Besides, examining himself as P.W. 1 he placed reliance upon the statement of P.W. 2, Smt. Damodri Devi, Member Gram Panchayat, in whose presence also the wife is alleged to have made the allegation against her father-in-law.

8. The wife, who appeared as RW1, denied having treated the petitioner with cruelty. According to her she was ready and willing to join the husband's company but as she had been maltreated on earlier occasions, therefore, she wanted an assurance of being treated properly in case she resume the company of her husband. During cross-examination she admitted that in the proceedings before the Gram Panchayat she had made a statement that her father-in-law wanted to have sexual relations with her.

9. None of the parties tried to place on record the statement alleged to have been recorded by the Panchayat in which the wife is alleged to have made the statement. Learned counsel for the appellant prayed for being allowed permission to place on record by way of additional evidence the proceedings of the Panchayat, including the statement of wife, in support of his submission that no such statement was ever made by the wife but from the averments made in the application and in view of the admission made by the wife during her cross-examination, we are not inclined to grant such permission at this stage of the proceedings, especially when no cogent reason has been assigned as to why a

copy of such statement was not produced earlier. The District Judge, on the basis of this evidence came to the conclusion that such a serious allegation about the conduct of husband's father made by the wife in the proceedings before the Panchayat was sufficient to hold the wife guilty of treating the husband with cruelty. We in view of this are not inclined to differ with such finding recorded by the District Judge. However, the question which survives is as to whether merely on suchfinding the District Judge could have granted the decree as a matter of course. The answer to this question is in the negative.

10. Section 23 of the Act contains some vital clauses of considerable importance and significance regarding power and duty of the Court in the matter of granting any relief recognised under the Act. The language employed in Sub-section (1) of Section 23 clearly shows that Clauses (b) to (e) and later part of Clause (a) lay down certain absolute bars to the making of any relief under the Act. The relevant portion of Section 23 may be extracted as under:--

'23. (1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that-

(a) Any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in Sub-clause (a), Sub-clause (b) or Sub-clause (c) of Clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in Clause (i) of Sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(bb) xxx xxx xxx xxx xxxxxx xxx xxx xxx xxx(c) xxx xxx xxx xxx xxxxxx xxx xxx xxx xxx(d) xxx xxx xxx xxx xxxxxx xxx xxx xxx xxx (e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the Court shall decree such relief accordingly. (2)XXX XXX XXX XXX XXXXXX XXX XXX XXX XXX

11. Reading the aforemention Sub-section (1) with Clause (b), it would be seen that the words contained therein are mandatory in character wherein emphasis laid is that relief in any proceedings under the Act cannot be granted to a petitioner who is in any way taking advantage of his or her own wrong or disability for the purpose of such relief. In such cases, where the ground of the petition is one specified in Clause (i) of Sub-section (1) of Section 13 of the Act, namely, cruelty, the words contained in Sub-section (1) of Section 23 read with Clause (b) emphasis that connivance, condonation, collusion are absolute bars to the granting of relief.

12. In case reference is made to the pleadings, it can be seen that wife in her reply has in clear terms pleaded that the husband is not entitled to any relief from the Court since he had not come to the Court with clean hands and was breathing hot and cold in the same breath. The husband filed a petition under Section 9 of the Act, which was withdrawn and now he has claimed a decree for dissolution of marriage. To the specific averments made in para 8 of the petition that the husband had not condoned the acts of cruelty of the wife, the reply denied the said averments. This in our opinion amounts to taking up a plea that even if the allegation of cruelty, if proved, amounts to husband's condoning the said acts by having filed a petition under Section 9 of the Act. Even if it be assumed that condonation is not pleaded as a defence by respondent in a petition seeking a decree for divorce, as held in Dr. N. G. Dastane v. Mrs. S. Dastane, AIR 1975 SC 1534, it is the duty of the Court in view of the provisions of Section 23(l)(b) to find whether the cruelty was condoned. The learned Judges in their report in para 54 said that:

'.....Even though condonation was notpleaded as a defence by the respondent it is our duty, in view of the provisions of S.23(l)(b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefendedcases. The relief prayed for can be decreed only if we are satisfied 'but not otherwise', that the petitioner has not in any manner condoned the cruelty. . . .'

13. In view of the mandatory requirement of Sub-section (1) of Section 23 of the Act, it was incumbent for the District Judge to have also considered whether the husband was entitled to a decree for divorce even if the act of cruelty was found to have been proved by him. From the record, it was not possible to have pin-pointed the exact point when the wife made statement making allegation against her father-in-law. However, it was, during the course of hearing arguments, stated at the bar that the proceedings before the Panchayat commenced in the year 1981 and petition under Section 9 of the Act seeking decree of restitution of conjugal rights was filed after a period of four years of making such allegation. Having waited for four years during which period the wife continued to remain residing at the house of her parents and thereafter, as admitted by the husband in his statement, his act of continuing making efforts to bring the wife to his house and then filing a petition for restitution of conjugal rights amounts to an act which can be termed as an act of forgiveness which conduct of the petitioner will amount to condonation depending upon the facts and circumstances of each case. Condonation has not been defined anywhere. 'Condonation' is a word of technical import, which means and implies wiping of all rights of injured spouse to take matrimonial proceedings. In a sense condonation is reconciliation, namely, the intention to remit the wrong and restore the offending spouse to the original status which in every case deserves to be gathered from the attending circumstances. The forgiveness in order to constitute condonation need not be express. It may be implied by the husband of the wife's conduct and vice versa. Ordinarily, as a general rule, condonation of matrimonial offence deprives the condoning spouse of the right of seeking relief on the offending conduct. When a petition is filed claiming a decree for restitution of conjugal rights, it clearly stipulates that the person seeking reliefhas no grouse or cause of complaint against the other, spouse and even if there was any cause or complaint, the same has either been condoned or forgiven. The intention being to resume normal cohabitation. As held in Dastane's case (AIR 1975 SC 1534) (supra), matrimonial offence is erased by condonation. In view of clear provisions contained in Clause (b) of Sub-section (1) of Section 23 of the Act, it is always for the person who has approached the Court to satisfy that the act of cruelty has not been condoned. When such allegations were made by the wife in her reply that the husband petitioner had filed earlier a

petition under Section 9 of the Act, it was incumbent for the husband to have led evidence that after the wife left in the year 1981, she never returned and stayed with him as his wife. His statement is quite vague. According to him, after she had left his house, he made all efforts to bring her back. She used to come back from her parental house and stay with him for 7/8 days and then used to leave his house. This part of the statement when read with the remaining part of the statement would show that even after the Panchayat had decreed her claim she had been visiting the husband's house. The conduct, in this case, of the husband in having moved the petition thereafter under Section 9 of the Act would amount to his intention to forgive the offending spouse in having made the statement before the Panchayat which alone was the ground made out which according to the husband was cruelty on the part of the wife. Admittedly, the allegation! was made once and was not repeated thereafter. Due to the parties having lived together even for a short duration of 7/8 days on couple of occasions, as admitted by the husband, after the wife made the allegation amounts to the restoring of the offending -spouse to the original status. By this act and conduct on the part of husband it can reasonably be inferred that the act stood condoned and as such husband was not entitled to the relief claimed.

14. The rules of the Court further require a party to the petition to make specific averments about the previous litigation, under the Act, if any, mentioning the purposeof taking of the same and the result thereof but in the present case the husband deliberately avoided to make any - reference to the previous petition under Section 9 of the Act which he had admittedly taken out and which had been dismissed as withdrawn.

15. In this view of the matter, we are satisfied that because of the condonation of the act of cruelty, the husband was not entitled to a decree for divorce in view of clear provision of Clause (b), Sub-section (1) of Section 23 of the Act.

16. In the result, we allow the appeal and set aside the judgment and decree passed by the learned District Judge and dismiss the petition of the husband for divorce leaving the parties to bear their respective costs.

17. In view of the observations made above, C.M.P. (Main) No. 28 of 1989 is also dismissed.

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