

Om Parkash Vs. Smt. Sareshta Devi

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Court : Himachal Pradesh

Decided On : Nov-30-1992

Reported in : AIR1993HP71,I(1994)DMC308

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

Acts : [Hindu Marriage Act, 1955](#) - Section 13

Appeal No. : F.A.O. (H.M.A.) No. 108 of 1987

Appellant : Om Parkash

Respondent : Smt. Sareshta Devi

Advocate for Pet/Ap. : A.K. Goel, Adv.

Disposition : Appeal allowed

Judgement :

Devinder Gupta, J.

1. Appellant has come up in appeal against the judgment and decree of District Judge, Hamirpur, dated 31st October, 1987 dismissing his petition seeking to have the marriage dissolved by a decree of divorce.

2. The parties to the petition are working as teachers. They were married on 21st November, 1968, but there is no child of this marriage. The parties could not pull

on together despite the fact that efforts were made to have the matter reconciled. Ultimately, the appellant on 14th November, 1983 filed a petition under Section 9 of the [Hindu Marriage Act, 1955](#) (hereinafter referred to as the 'Act') praying for a decree for Restitution of Conjugal Rights against the respondent. It is not disputed that on 9th January, 1985 the said petition was dismissed as not pressed. On the same day an application under Section 13B(1) of the Act was moved jointly by the parties seeking to have the marriage dissolved by a decree of divorce by mutual consent. Copy of the said petition is Ex.P1. While presenting the petition parties made their respective statements that they wanted divorce, copies of such statements are Ex.P2 and Ex.P3. The Court adjourned the petition for 1st August, 1985. Before the next date, the respondent, by putting in appearance, expressed her desire to withdraw the petition stating that she filed the application under some duress from her husband. The Court permitted the application to be withdrawn. Resultantly Court did not grant the divorce. The matter was carried by the appellant to this Court by way of civil revision and an appeal. The order passed by District Judge was set aside and case remanded for fresh decision. The said petition was ultimately dismissed. Again the husband preferred an appeal to this Court, which was allowed and decree of divorce by mutual consent was granted. This time the wife felt aggrieved and took the matter to the Supreme Court. Her Civil Appeal No. 638 of 1991 was allowed by the Supreme Court on 7-2-1991 (Sureshta Devi v. Om Prakash, 1991(1) Hindu Law Reporter 467 : (AIR 1992 SC 1904)), in which it was held that it is open to a party to a petition for divorce by mutual consent under Section 13B of the Act to withdraw the consent at any time till a decree of divorce is granted. In other words, the consent once given is revokable.

3. During the pendency of the aforementioned proceedings of divorce by mutual consent, another petition for divorce under Section 13(1)(ib) of the Act was preferred by appellant on 28th August, 1986 praying for dissolution of marriage by a decree of divorce on the ground that the respondent had deserted the petitioner for a continuous period of two years immediately prior to the presentation of the petition. This petition was contested by the respondent. The District Judge, Hamirpur, through the impugned judgment and decree dated 31st October, 1987 dismissed this petition holding that the appellant has failed to prove that there was

desertion on the part of respondent for a continuous period of two years prior to the presentation of petition. It is this judgment which is under challenge in this appeal.

4. The appeal was admitted for final hearing on 22nd April, 1988, after notice to the respondent. When the matter came up for final hearing counsel for the parties pointed out that respondent's appeal against the judgment of this Court dissolving of marriage by a decree of divorce by mutual consent was pending in the Supreme Court, therefore, the matter was adjourned sine die. On 11th September, 1992, on an application made on behalf of the appellant, the appeal was directed to be listed for final hearing on 6th November, 1992. Today when the appeal was taken up for final hearing, nobody appeared for the respondent. We have heard learned counsel for the appellant and gone through the record of the case.

5. It is the appellant's case that at the time of marriage both the parties were employed and working as J.B.T. Teachers in different schools. The wife declined to live in the matrimonial home provided by the appellant. The respondent also declined to get herself transferred to the place where the appellant was posted. With a view to save the marriage the appellant got himself transferred to a place which was close to the place where the respondent lived with her mother. Despite this the respondent failed to join the appellant's company. The appellant was also visiting the house of respondent's mother but the arrangement could not continue for long. After the year 1979 the parties ceased to cohabit and since the year 1980 the respondent has deserted the appellant without any reasonable and sufficient cause. The appellant still wanted the marriage to be saved and made an effort to reconcile the matter, for which purpose he filed a petition claiming a decree for restitution of conjugal rights, which was got dismissed since a joint prayer for dissolving the marriage by mutual consent was made which ultimately failed as a result of the judgment of Supreme Court in *Sureshta Devi v. Om Prakash*, 1991 (1) Hindu Law Reporter 467. Since the respondent had no intention to join the appellant's company and since she deserted the appellant for a continuous period of more than 2 years, the appellant was entitled to a decree of divorce.

6. The respondent in her reply denied the factum of desertion by stating that she never refused to live in the matrimonial home. In fact the appellant intentionally

want to avoid the company of the respondent. The respondent did not dispute the filing of petition under Section 9 of the Act and petition under Section 13B of the Act. It was stated that the respondent had lived with the appellant at village Lahru, Tehsil Palampur during the year 1984 and 1985, statutory period of two years of the alleged desertion was not complete. She stated that for obtaining a decree by mutual consent, her consent was obtained by duress. No other special defence was made.

7. During the course of evidence, the appellant while appearing as PW 1 admitted that the respondent had stayed with him from 9th December, 1984 to January, 1985, but the same was in response to the orders of the Court during conciliation proceedings when the previous petition for restitution of conjugal rights was pending in Court. In his examination-in-chief the appellant also stated that despite the instructions of the Court the respondent did not join his company. He denied the suggestion that irrespective of the Court's orders both of them also stayed together at Sujanpur Tira. It was denied that the respondent had been visiting him off and on after 1979. He was also categorical in stating that after 1979, except for the short duration from 9th December, 1984 to January, 1985, they never lived together. Appellant was supported in his stand by PW 2 Shri Harbans Lal, PW 3 Shri Hoshiar Singh son of Shri Mathra Ram, PW 4 Shri Vijay Singh, PW 5 Sh. Hoshiar Singh son of Shri Mahesha Ram and PW 7 Shri Sansar Chand, PW 6 Shri Madan Rattan, Advocate, was examined to establish that no pressure was exercised either by the appellant or by him at the time when joint petition for mutual divorce was preferred.

8. The respondent appeared herself as RW 1 and examined Shri Ajudhia Parshad as RW 2. She stated that after the marriage, both of them lived together till 1981, whereafter she remained ill for about two years. A petition was filed thereafter in the Courts at Hamirpur. The Court tried to have the matter reconciled by calling upon the parties to stay for about one month together. Consequently, the parties did stay together at village Lahru. In her examination-in-chief she did not disclose any ground or reason of her staying away from the company of the appellant. She was unable to support her version of her having fallen ill during 1981 to 1982. Although she stated that she had been visiting Sujanpur Tira, the husband's place

after 1981 also, but during cross-examination she stated that she went to Sujanpur Tira only after the Court's orders. The only time they lived together after 1981 was when the Court tried to have the matter reconciled in 1984. Ajudhia Parshad (RW 2) has been examined to show that the respondent was staying in a tenanted premises owned by him and the appellant had expressed desire to stay with her provided she gets a separate residence otherwise he was not prepared to visit her parental house.

9. From the evidence, the lower Court concluded that since the appellant and the respondent had lived together from 9th December, 1984 to January, 1985, which fact was disclosed by the appellant in his petition and the statutory period of two years was not complete, the appellant was not entitled to a decree of divorce on the ground of desertion. The District Judge also held that since both the parties were employed as Teachers and as per arrangement they had been visiting each other, there was no question of desertion.

10. Both the grounds taken and considered by the District Judge in declining to grant the petition and as a consequence decree for divorce, in our opinion, are not valid one.

11. Even according to respondent's version, after 1981 the parties did not live together except for a short duration from December, 1984 to January, 1985. This stay of the parties together was not a voluntary stay but a stay at the intervention of Court with a view to have the matter reconciled. It is a case in which the husband has come before the Court praying for a decree of divorce on the ground of desertion. A petition on this ground can succeed only when it is shown that desertion is without any reasonable cause and is for the statutory period. Before granting a relief on the ground of desertion Court must be satisfied the matrimonial offence complaining of desertion is established. The onus is on the petitioner to establish that desertion was without cause. Once such an evidence is led by a petitioner that despite his or her efforts the other party refused the company, the Court from the facts may infer that the other party has deserted the petitioner without sufficient cause. Once the petitioner proves the fact of refusal the other party may seek to rebut the inference of desertion by proving that the respondent

had a just cause for refusal.

12. Considering important English decisions as also the statement contained in authoritative text books, the Supreme Court in *Bipinchandra Jaisinghbhai Shah v. Prabhavati*, AIR 1957 SC 176, explained the position as regards the offence of a desertion, when an inference from the facts and circumstances can be drawn and when such desertion would commence by saying (at page 183):-

'If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.....Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But it is not necessary that they should commence at the same time. The *de facto* separation may have commenced without the necessary *animus* or it may be that the separation and the *animus deserendi* coincide in point of time'.

13. The majority decision in *Bipinchandra Jaisinghbhai Shah's* case (*supra*) was followed in *Lachman Utamchand Kirpalani v. Meena alias Mota*, AIR 1964 SC 40 and *Smt. Rohini Kumari v. Narendra Singh*, AIR 1972 SC 459.

14. In the instant case, after 1981 admittedly parties have not lived together and it is the case of appellant that all efforts made on his part failed and it was also

proved by him that he also made an effort to take the respondent back to matrimonial home to enable her to discharge her matrimonial obligations for which purpose he had to resort to proceedings under Section 9 of the Act. When the respondent declined to come and stay with him and contested the proceedings, the Court intervened and wanted to have the matter reconciled. Parties were called upon to try to live together. From 9th December, 1984 till the first week of January, 1985, for a period of less than one month they lived together, but they have had no cohabitation. It was under the orders of the Court. The petition for restitution of conjugal rights in fact was thereafter got dismissed when both of them realised that it was rather not possible to live together. It was mutually agreed to have the marriage dissolved by a decree of divorce by mutual consent.

15. In the aforementioned circumstances, it was but necessary for the respondent to have led some evidence or taken a defence as to what precise was the reason for her staying apart and not resuming the appellant's company. Assuming the stand taken by the respondent to be correct that till 1981 both of them had been residing together, the stand of appellant was that there is no reason why the respondent should not resume his company and discharge her marital obligations. According to him, the marriage had irretrievably broken since the respondent had without a reasonable and sufficient cause been staying apart and declining to discharge her marital obligations. All efforts on his part to bring her back failed. He even wanted to resume the company by staying at a place where respondent was residing with her mother, but this effort also failed. Suggestion put to the respondent during her cross-examination that she was not being treated well or subjected to cruelty by her husband were denied by her, meaning thereby that there was no complaint by her about the conduct of the appellant.

16. In these circumstances, we are of the clear view that in the instant case, the appellant had discharged the burden which lay upon him by leading cogent and sufficient evidence that as a matter of fact, there was physical separation with necessary animus deserendi, meaning thereby that on the part of the respondent, intention has clearly been proved that she had been staying apart with a view to bring the co-habitation permanently to an end. In so far as the appellant is concerned, there is nothing on the record that such staying apart was with his

consent. It has also not been pleaded by the respondent that staying apart is with consent of the appellant. Otherwise, on the facts, we are satisfied that there was no reason for the respondent to have stayed away from the matrimonial home and not to discharge her marital obligations since 1981, which is the admitted year, according to the respondent since when they started living apart.

17. The question which now remain to be examined is about the impact of parties staying together from 9th December, 1984 to the first week of January, 1985. As observed earlier, it was not a voluntary act, but was as a result of efforts made by the Court during the conciliation proceedings with a view to have the matter reconciled.

18. Since it is necessary in all matrimonial matters to have reconciliation of a broken marriage, in *V, K. Gupta v. Nirmala Gupta*, 1980 Hindu LR 290, the Supreme Court emphasised the duty of the Court and the counsel in matrimonial disputes to bring about the reconciliation by saying:

'... It is fundamental that reconciliation of a ruptured marriage is the first essay of the judge, aided by counsel in this noble adventure. The sanctity of marriage is, in essence, the foundation of civilisation and, therefore, Court and counsel owe a duty to society to strain to the utmost repair the snapped relations between the parties...'

19. Neither, it is shown that in December, 1984 the respondent expressed any desire to live with the appellant voluntarily nor it is her case that after the Court's order, her stay with the appellant was with an intention to put an end to the desertion. The circumstances on the record are otherwise. After the efforts failed and when the case was taken up again in the Court on 9th January, 1985, the petition for a decree for restitution of conjugal rights was got dismissed and instead another petition for dissolution of marriage by a decree of divorce by mutual consent under Section 13B(1) of the Act was preferred jointly by the appellant and the respondent, on which date statements Ex.P2 and Ex.P3 were also made. In Ex.P2, the respondent stated that it was not possible for them to live together and they wanted to have the marriage dissolved. She in her statement, recorded by the Court, endorsed the statement Ex. P3 made by the husband that

after the marriage was solemnised on 21st November, 1968, both of them had stayed only for a period of six months. As noticed above, these proceedings did not culminate in passing of a decree of divorce by mutual consent. In view of the judgment of the Supreme Court, when her appeal was allowed and the petition was dismissed.

20. The trial Court placing reliance upon Lachman Utamchand Kirpalani and Rohini Kumari's case (supra) held that the joint stay of the parties from 9th December, 1984 to the first week of January, 1985, if taken into consideration, period of two years was not complete and desertion, if any, had come to an end. We are afraid that the trial Court has not correctly understood the ratio of the judgments and not correctly applied the law. In Lachman Utamchand Kirpalani's case (supra), the apex Court on a consideration of various English decisions, narrated as follows, the distinct matters which must coexist in order that desertion might come to an end (at pages 52 and 53):--

'... In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance that is that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse. It appears to us that the principle that the conduct of the deserted spouse which is proved not to have caused the deserting spouse to continue the desertion does not pull an end to the desertion appears to be self-evident and deducible from the legal concepts underlying the law as to desertion. The position is besides supported by authority ...'

21. This position was reiterated in Rohini Kumari's case (supra) by the Court.

22. Applying the ratio of the aforementioned two decisions, we find that in the absence of any material on record, the trial Court was not justified in saying that the desertion, which admittedly had commenced in the year 1981 had come to an end by the parties staying together from 9th December, 1984 to the first week of January, 1985, since it was not the stay at the behest of the respondent with a view to put an end to the desertion.

23. In this view of the matter, we have no hesitation in coming to the conclusion that in the instant case, the appellant had rightly proved desertion for the statutory period on the part of the respondent without reasonable and sufficient cause, and the judgment of the trial Court accordingly is liable to be set aside. Moreover, a marriage which took place on 21st November, 1968, in the facts and circumstances has not remained successful despite all efforts. It will be futile to allow the parties to suffer further agony.

24. Consequently, we allow the appeal and set aside the impugned judgment of the Court below and allow the petition filed by the appellant by granting a decree of divorce dissolving the marriage of the parties.

25. No costs.