

Julmi Devi Vs. Ravi Kumar

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Court : Himachal Pradesh

Decided On : Jun-07-2005

Reported in : I(2006)DMC210

Judge : Deepak Gupta, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 9, 23(1) and 28

Appeal No. : F.A.O. No. 95 of 2005

Appellant : Julmi Devi

Respondent : Ravi Kumar

Advocate for Def. : Lovnesh Kanwar, Adv.

Advocate for Pet/Ap. : Vivek Sharma and; Sanjeev Sharma, Adv.

Disposition : Appeal allowed

Judgement :

Deepak Gupta, J.

1. This appeal under Section 28 of the Hindu Marriage Act has been filed by the wife against the judgment and decree passed by the learned District Judge, Mandi in Hindu Marriage Petition No. 20 of 2002 dated 27.10.2004 whereby he has granted a decree of divorce in favour of the husband.

2. The facts of the case necessary for decision of the appeal are that the marriage between the parties took place on 13.12.1988. One daughter was born out of the wed-lock. After the birth of the daughter the wife left for her parental village to live with her parents. According to the allegations made in the petition for grant of divorce, the wife from the very beginning, was not interested in living with the husband and she did not permit the husband to have sexual relations with her. The wife was employed whereas the husband was unemployed at that time.

3. The wife was earlier posted at village Garli and was residing there. Thereafter the wife was transferred to village Chuhaku which was at a distance of 3 kms. from the house of the petitioner. Despite the request of the petitioner the wife did not join his company and continued to stay at Chuhaku. He further states that thereafter the wife was posted at Gopalpur but continued to reside separately and did not join his company.

4. Since the wife did not join his company the petitioner filed a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. This petition remained pending for about 2 years. Then the wife agreed to join the company of the husband and the matter was compromised before the Lok Adalat. It is alleged that despite the compromise the wife did not join the company of the husband and, therefore, he is entitled to a decree of divorce.

5. The wife in her reply denied the allegations. She specifically stated that she has been cohabiting with the husband and had sexual relations with him. According to the wife it was the husband who had neglected her. She further alleged that she was ready and willing to live with the husband. The wife specifically took up the plea that despite the compromise arrived at between the parties before the Lok Adalat the petitioner did not comply with the same and again maltreated the wife and threatened her with dire consequences when she was staying with him. She states that she was asked to sign a blank papers with ulterior motive.

6. The husband appeared as P.W. 1 and repeated the allegations made by him in the petition. In cross-examination the husband stated that he does not want to take the wife to his house. He denied the suggestion that he had never gone to call the wife to his house. He states that he had sent one Amar Nath in the month of May,

1998 to call his wife. He also states that he had also gone himself but could not give the month, date and year when he asked his wife to join his company.

7. P.W. 2 is Amar Nath who states that the wife is living separately at Chuhaku. He states that on the asking of the father of the husband he had gone along with the husband to bring her back to her in-laws's house in May, 1998. However, the wife refused to come.

8. P.W. 3 is Bakshi Ram. He is Pradhan of Gram Panchayat, Goplapur. He also stated that the wife is residing at Chuhaku. He states that he had tried to settle the dispute between the parties. His evidence is not very relevant.

9. P.W. 4 Kamla Devi is a close relation of the husband. She states that the respondent resides at village Paunta. According to her the wife had not joined the company of the petitioner because according to the wife the petitioner is not good looking and is impotent. She states that she went 4-5 times to ask the respondent to join the company of the husband but she refused to do so. In cross-examination she states that she visited the respondent some time in the year 1990. Thereafter, also she went 2/3 times. However, she does not give the month or year when she went after 1990.

10. On the other hand the wife has stated that the husband did not behave with her properly and used to beat her. He would call her names. She states that their daughter is living with her. She wants to live with her husband but he does not permit her to live with her. In cross-examination she has admitted that at the time of marriage she was employed and the husband was unemployed. The daughter was born in the year 1990 in hospital. After that she had gone to her parental home. She however states that first she went to her husband's house but he and his mother gave her severe beatings and then she went to her parental house. She states that then she went to Garli where she was posted, the husband also resided with her in her accommodation. After Garli she got posted to Chuhaku. She continued to live in separate accommodation. She has denied the suggestion that she is living in a separate accommodation on of her own volition. She has denied the suggestion that she took menial work from her husband and did not cohabit with him. She denied the suggestion that her husband asked her to live in

his house. She further states that she was then transferred to Gopalpur but has kept her residence at Chuhaku. She was admitted that the husband filed a petition for restitution of conjugal rights and that in this petition a compromise was arrived at between the parties wherein she agreed to live with her husband. A suggestion has been put to her that thereafter she went to the house of the husband. She has admitted this suggestion. She has denied the suggestion that thereafter she had left the house of the husband of her own accord. According to her she was ousted by the petitioner who give her beating and wanted her to sign blank papers.

11. R.W. 2 is Kanshi Ram. His statement was recorded on 26.6.2004. He states that about 2 or 2 1/2 years back he had gone along with the wife and her daughter to the house of the husband. When they reached the house, the husband and his mother closed the gate of the house and asked them to go away. In cross-examination he states that he had gone to the house of the petitioner on 10th October. He states that though he is not a numberdar of the village of the petitioner or the respondent he is a numberdar of the village where the wife is presently residing.

12. R.W. 3 is the daughter of the parties. She stated that her parents have not had very good relations and that the father beats up the mother. She also states that 2 or 2 1/2 years earlier she along with her mother, Kanshi Ram and one Urmila Devi had gone to the house of the father where the father and his family members had not permitted them to enter his house. She also states that about 2-3 months prior to this incident the husband had taken her and her mother to his house. Thereafter, he locked them in one room. She has stated that thereafter she and her mother had come back to their own house. In cross-examination a suggestion has been put to her that she and the mother are living at village Paunta in a house which has been provided to them by the husband. She has admitted this suggestion. In response to another suggestion she has admitted that after her mother was transferred to Gopalpur they lived at Paunta because the father beat the mother. She states that at Paunta the husband visited their house twice and stayed for the night. She has denied the suggestion that the mother abuses or maltreats the husband. This is the entire evidence of the case.

13. The Court below has granted the divorce by holding that the wife has maltreated the husband. He has disbelieved the statement of the respondent and her witnesses on the ground that they are not consistent with each other and also on the ground that Kanshi Ram is neither a pardhan nor numberdar nor Member of the panchayat of the petitioner or the respondent. He has found that the wife is treating the husband with cruelty and the marriage between the parties has irretrievably broken down.

14. Mr. Sharma, learned Counsel for the petitioner has submitted that the finding of the learned Court below is totally incorrect. He has further submitted that the pleadings with regard to desertion and cruelty are totally vague and not at all in consonance with the rules framed by the High Court of Himachal Pradesh especially Rule 5.

15. On the other hand Mr. Lovnesh Kanwar, learned Counsel for husband has submitted that the finding of the learned Court below is correct. According to him, the wife is guilty of ill-treating the husband. She has humiliated the husband and left the matrimonial home. According to him the marriage is dead and, therefore, the appeal should not be allowed.

16. I have given my careful consideration to the matter. One important fact which has to be kept in mind is that the petitioner originally filed a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. Mr. Sharma, submits that without conceding and even assuming for the sake of arguments that there were any earlier acts of cruelty on behalf of the wife the same are deemed to be condoned by the husband once he files a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. The question is, whether the filing of a petition under Section 9 of the Act for seeking a decree for restitution of conjugal rights amounts to condoning the earlier acts of cruelty, if any? In this behalf it would be apposite to refer to the observations of a Division Bench of this Court in *Nirmala Devi v. Ved Prakash* , which are as under:

13...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 relief has 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 : [1975]3SCR967 (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.... 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.

17. Following the law as expounded by a Division Bench of this Court above it is clear that filing a petition for restitution of conjugal rights would prima facie amount to condoning the acts of cruelty. In the present case not only was the petition for restitution of conjugal rights filed but the matter was settled between the parties. There is a dispute between the parties whether thereafter there was any cohabitation between the parties or whether the parties complied with the settlement arrived at. Be that as it may, in the absence of any specific allegations or proof to the contrary it has to be presumed that the husband had condoned the

earlier acts of cruelty, if any. Therefore, in my opinion, the Court below gravely erred in considering the so called earlier acts of cruelty. A perusal of the petition for divorce and the statement of the husband shows that there are no allegations of cruelty or desertion relating to the period after the settlement arrived at between the parties.

18. It is interesting to note that both the parties did not deem it fit to place on record the copy of the order passed by the Lok Adalat of the statement recorded between the parties. What were the terms of the settlement are not clear but can only be deciphered from the statements of the parties.

19. According to the husband after the settlement in 1998 the wife did not join his company and also that she used to say he suffers from AIDS and from TB and is impotent. The only witness in this regard is P. W. 2 AmarNath who does not state that the wife made any such allegations against the husband. Even P.W. 3 only states that the wife says that the husband is not good and she does not want to stay in his house. As far as P.W. 4 is concerned she states that she had visited the respondent in the year 1990 and thereafter 2-3 times. She does not say that she visited the wife in the year 1998 or thereafter. Therefore, her statement cannot be treated as relevant.

20. On the other hand the witnesses of the wife have clearly stated that the wife tried to join the company of the husband after the settlement but she was not permitted to do so by the husband and his family members. The Court below has wrongly held that the statements of these witnesses are contradictory. The burden of proof was on the husband. It was he who had pleaded cruelty. In the present case the allegations are themselves totally vague. The evidence led also does not prove that the wife had committed acts of cruelty or deserted the husband.

21. It appears that the husband and wife started living separately when the wife was employed. Thereafter, the husband came to his parental home. He was not employed. He expected his wife to join his company at his parents' house even though he was not working. Why should a woman who is earning and is supporting the husband be compelled to live in the house of her in-laws? In my opinion the allegation of desertion made out is totally ill-founded. In a case relating

to desertion not only has it to be proved that the other spouse is living separately but also that there is animus deserendi. The husband also has to prove that on his part there has been no such conduct which gives reasonable cause to the wife to leave her matrimonial home. Reference in this behalf may be made to a case, Dharam Dev Malik v. Smt. Raj Rani AIR 1984 Delhi 389, wherein it was held as follows:

It is well settled that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligation of marriage. The inference of desertion has to be made on a balance of probabilities.

22. Similar observations have been made in Rajinder Kumari v. Padam Parkash AIR 1985 Punjab and Haryana, 232, wherein it has been held as follows:

In its essence, desertion meant the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent, and without reasonable cause. It was taken as a total repudiation of the obligations of marriage. The offence of desertion was said to commence when factum of separation and the animus deserendi co-existed, it being not necessary that they should commence at the same time. But, ultimately, at one point of the time the animus deserendi had to co-exist.

23. Mr. Lovnesh Kanwar, learned Counsel has placed reliance on Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi : AIR 2002 SC88 , and states that where the wife had not been able to substantiate the allegations as to the cause why she was living separately desertion is deemed to be proved. He has also placed reliance upon Parveen Mehta v. Inderjit Mehta (2002) 5 SCC 706, and submits that mental cruelty is a state of mind. In my opinion both these judgments are not applicable to the facts of the present case.

24. It is no doubt true, in the present case, that the wife is living separately. She was earning while the husband was unemployed. It is also admitted that the husband lived with her separately for some period of time. After the settlement of the earlier proceedings she agreed to live with the husband in his house. However,

she was not permitted to do so. Therefore, the fault, if any is, that of the husband and not of the wife.

25. In view of the above discussion, I am of the considered view that the husband has failed to prove that the wife has either deserted him or has treated him with cruelty entitling him to a decree of divorce. Therefore, the appeal is allowed. The decree of divorce granted by the District Judge, Mandi in Hindu Marriage Petition No. 20 of 2002 dated 27.10.2004 is set aside and the petition for divorce filed by the husband is dismissed. No order as to costs.

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