

Bharti Sharma Vs. Surinder Kumar Sharma

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Court : Himachal Pradesh

Decided On : May-07-2003

Reported in : II(2003)DMC319

Judge : R.L. Khurana and; M.R. Verma, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1) and 28

Appeal No. : FAO (HMA) No. 167 of 1999

Appellant : Bharti Sharma

Respondent : Surinder Kumar Sharma

Advocate for Def. : Bhupender Gupta, Sr. Adv.,; Praneet Gupta and; Neeraj Gu

Advocate for Pet/Ap. : Ajay Sharma, Adv.

Disposition : Appeal allowed

Judgement :

M.R. Verma, J.

1. This appeal Under Section 28 of the Hindu Marriage Act (hereinafter referred to as 'the Act') has been preferred by the appellant against the judgment and decree dated 3.2.1999, passed by the learned District Judge, Una, in H.M.A. Petition No. 13/1996, whereby a decree of divorce by dissolving the marriage between the

parties has been granted in favour of the respondent.

2. Brief facts leading to the presentation of this appeal are as follows : The respondent herein instituted a petition Under Section 13(1)(ia), (ib) of the Act against the appellant for a decree for divorce. His case, as made out in the petition, is that the marriage between the parties was solemnised on May 11, 1986 according to the Hindu rites at village Khad, Teh. and Distt, Una. After the marriage, parties lived and cohabited as husband and wife at Yamuna Nagar and a female child named Puja was born out of the wedlock on 1.4.1987. While residing at Yamuna Nagar after the marriage, the appellant started compelling the respondent to leave Yamuna Nagar and to reside at her parents' house at village Khad and to serve her parents. The respondent, however, advised the appellant to the contrary. The appellant then came to her parents' house for delivery of the child which was delivered in District Hospital, Una, on 1.4.1987. After the birth of the child the appellant adopted an attitude of confrontation with the respondent and refused to live with him at Yamuna Nagar and demanded that the respondent should settle in village Khad with the appellant and her parents. The respondent advised the appellant not to insist on this wrong demand but the appellant stuck to her stand and refused to live with the respondent at Yamuna Nagar. In November or December, 1987, the respondent went to village Khad and with the intervention of the relatives and well-wishers, took the appellant to Yamuna Nagar where she again started compelling him to live at village Khad and to serve her parents. On refusal of the respondent, the attitude of the appellant towards the respondent became harsh and she started treating the respondent with cruelty by picking up quarrels on trifles and abusing and insulting him in the presence of friends and relatives. She would call the respondent 'Haramjada', 'Napunsak' and 'Bewakoof'. This behaviour of the appellant lowered the reputation and status of the respondent in the eyes of his relatives and friends. The appellant also stopped cooking food or even serving tea to the respondent and his guests and performing the marital duties. The respondent advised the appellant to live like a homely wife but in vain. On the contrary, the appellant started threatening the respondent that she would burn herself or take poison if the respondent did not agree to live in village Khad. She also threatened the respondent to leave the matrimonial house for ever. On 3.6.1988, the appellant voluntarily and without the consent and will of

the respondent, left the matrimonial house, declaring that thereafter she would not treat the respondent as her husband. Persuasion and requests of the respondent to the contrary yielded no fruitful results. After 3.6.1988, the appellant deserted the respondent for a continuous period of more than two years immediately preceding the presentation of the petition without any reasonable and justifiable cause. Several requests of the respondent made to the appellant to join the society of the respondent, were turned down by the appellant. Even the father of the appellant, despite requests, refused to send the appellant, to her matrimonial house. The said cruel act and conduct and the desertion by the appellant caused reasonable apprehension in the mind of the respondent that it is not possible for the parties to live, as husband and wife. The appellant filed a petition Under Section 125, Cr. P.C. and during the proceedings in the said petition also, she refused to join the company of the respondent. It is further claimed in the petition that the aforesaid acts of cruelty and desertion on the part of the appellant had not been condoned by the respondent and there had been no unnecessary and improper delay in filing the divorce petition. It has also been averred in the petition that earlier a petition Under Section 13 of the Act was filed by the respondent against the appellant which was dismissed on 2.4.1991 and another litigation between them was a petition filed by the appellant Under Section 125, Cr.P.C. wherein maintenance was allowed on 1.4.1994. Hence, the petition by the respondent for a decree of divorce on the grounds of cruelty and desertion.

3. The appellant contested the petition. In her written reply, the solemnisation of the marriage, birth of the child named Puja and status of the parties has not been disputed. It has, however, been denied that the appellant ever compelled the respondent to leave Yamuna Nagar to live in village Khad or she ever refused to accompany the respondent to her matrimonial house. The allegations of picking up quarrels on petty matters or insulting the respondent and not caring to discharge the matrimonial duties as alleged in the petition have been denied. It has been claimed that the respondent had not bothered to see the appellant during post natal period and had expressed his unwillingness to keep the appellant with him and she was compelled to live in her parents house because of the hardened and cruel behaviour of the respondent. It is also claimed that the appellant has always been ready and willing to live with the respondent but the respondent is adamant

not to keep the appellant in the matrimonial house. The previous litigation as alleged in the petition has not been disputed. The entitlement of the respondent for the reliefs claimed in the petition, however, has been denied.

4. The respondent filed rejoinder to the reply of the appellant wherein he denied all the grounds of defence as taken in the reply and reaffirmed the averments as made in the petition.

5. On the pleadings of the parties, the learned District Judge framed the following issues :

(1) Whether the respondent treated the petitioner with cruelty as alleged OPP

(2) Whether the respondent deserted the petitioner without any reasonable cause as alleged OPP

(3) Relief.

6. On consideration of the material brought on record, the learned trial Judge decided issue No. 1 against the respondent, and issue No. 2 in his favour and as a consequence of findings on issue No. 2, allowed the petition and granted a decree for divorce by dissolving the marriage between the parties. Hence this appeal by the appellant.

7. We had heard the learned Counsels for the parties and have also gone through the records.

8. At the very outset of the arguments, learned Counsel for the appellant had raised a preliminary objection about the maintainability of the divorce petition, though half-heartedly, on the ground that a petition for divorce was filed by the respondent in a Court at Jagadhari which had admittedly been dismissed Under Order 9, Rule 8 of the Code of Civil Procedure (hereafter referred to as 'the Code') and no steps were taken by the respondent to get the petition restored. Therefore, in view of the provisions of Order 9 Rule 9 of the Code, the respondent is precluded from filing the present petition.

9. On the other hand, it was contended by the learned Counsel for the respondent that the objection sought to be raised by the appellant in this appeal, for the first time, was not taken before the Trial Court in any form, therefore, stood waived and deserves no consideration.

10. Order 9 Rule 9 of the Code, which provides for the consequence of dismissal of a suit Under Order 9 Rule 8 of the Code reads as under :

'9. Decree against plaintiff by default bars fresh suit-(1) Where a suit is wholly or partly dismissed Under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.'

11. On a bare reading of the aforesaid provision, it is clear that where a suit is dismissed wholly or partly Under Order 9 Rule 8 of the Code, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. His remedy is to apply for an order to set aside the dismissal of the suit, which the Court may permit if sufficient cause for non-appearance on the due date is shown by the plaintiff. It is indisputably settled that the provisions of Order 9 of the Code apply to the suits as also to original proceedings in the nature of a suit such as a proceedings Under Section 13 of the Act. Therefore, the aforesaid provisions will be applicable even to a petition Under Section 13 of the Act. However, to attract these provisions, the party opposing the fresh suit or petition will have to raise the objection of the bar created by Rule 9 or Order 9 in its pleadings and the parties will have to be put to trial on the issue. In case such an objection is not taken in the pleadings or at any other stage of the proceedings, the objection shall stand waived and the party relying on the objection cannot be permitted to raise the objection for the first time in appeal in view of the principle of waiver. It is so because the bar created Under Order 9 Rule 9 of the Code is only a plea in bar of

a trial of a suit or an issue which a party is at liberty to waive. If the party has not raised the plea of bar Under Order 9 Rule 9 of the Code in the pleadings and at the trial and has chosen to waive such a plea and defend the cause on merits, the principle of waiver will debar the party from raising the plea in appeal for the first time without amendment of the pleadings.

12. In *The Commissioner, Hindu Religious and Charitable Endowments, Madras v. V. Krishnaswami and Anr.*, AIR 1975 Madras 167, while dealing with a similar question, a Division Bench of the High Court of Madras held as follows :

'A Bench of this Court in *Moturi Seshayya v. Venkatadri Apparao*, 31 Mad. LJ 219 : AIR 1917 Mad. 950, has held that the plea of *res judicata* is one which does not affect the jurisdiction of the Court and it is only a plea in bar of a trial of a suit or an issue as the case may be, which a party is at liberty to waive. Even so in respect of a plea Under Order 9, Rule 9, Civil P.C. it is one which a party can choose to waive and defend a later action on the strength of his case and on the merits of the controversy. Having invited the Court to render a decision on merits it will be most inequitable if the party is allowed to fall back upon a technical plea and oppose an action of the other party when such a plea was wholly available to him even at the very inception of the action and which plea he failed to put forward and instead chose to hazard a decision of the case on merits. We are, therefore, clearly of the opinion that the further contention of Thiru Kumaraswami that even if Ex. B-7 will not operate as *res judicata* to the suit instituted by the plaintiff, it would nevertheless preclude the plaintiff Under Order IX Rule 9, Civil P.C. from coming forward with the action cannot be sustained.'

13. In view of the above legal position, the plea regarding bar created by Order 9 Rule 9 of the Code having not been raised in the pleadings or at any other stage of the proceedings in the petition for divorce the objection regarding such bar stood waived and cannot be permitted to be raised now.

14. It was further contended by the learned Counsel for the appellant that the findings of learned District Judge on issue No. 2 are based on misappreciation of the evidence inasmuch as there is no evidence to prove that the appellant is living in the house of her parents and not living with the respondent without a reasonable

cause. Elucidating the contention, the learned Counsel submitted that learned District Judge had noticed vide Paras 11, 12 and 13 of the impugned judgment that the bone of contention between the parties was a house at Yamunanagar which, according to the appellant, was purchased in her name by her father but according to the respondent he had purchased it in a Benami transaction in the name of the appellant and subsequently the respondent instituted a suit against the appellant for declaration that he is the exclusive owner of the house and such a suit was decreed ex parte and it led the parties to drift apart. It was, therefore, urged by the learned Counsel for the appellant that the house in question was admittedly in the name of the appellant which the respondent got declared his absolute property by instituting the suit against the appellant and got the decision therein in her absence. Thus, divesting of the appellant of the ownership of the house by the respondent against her wishes was an act which affords a reasonable cause to the appellant not to live with the respondent. It could not, therefore, be held that the appellant is living separately from the respondent without reasonable excuse. The findings regarding irretrievability of the marriage in these circumstances could not be a ground in favour of the respondent to get the marriage dissolved. Therefore, according to the learned Counsel for the appellant, the desertion, as alleged, was not proved and the decree for dissolution of marriage could not be passed.

15. On the other hand, the learned Counsel for the respondent had contended that the appellant had left the company of the respondent more than eight years before institution of the petition and reason for her leaving the company of the respondent was that she wanted the respondent to live in the house of her parents in village Khad which involved giving up of the job by the respondent. The demand made by the respondent was highly unreasonable which could not be conceded nor the denial to accept such demand by the respondent gives a reasonable cause for the appellant to withdraw from his society. It was further contended that the respondent had made all out efforts at his own level by way of oral requests as well as written requests to the appellant and her father that the appellant should join his company and live with him along with their daughter. Even on the directions issued by the Chief Judicial Magistrate during the course of proceedings Under Section 125, Cr. P.C. the respondent had been visiting the house of the

parents of the appellant to persuade her to accompany him to her matrimonial house but despite his best efforts she had failed to do so now for about 14 years. In these circumstances, the learned District Judge has rightly come to the conclusion that the appellant had left the company of the respondent with animus deserendi and there has been fatal cessation of cohabitation and consortium between the parties since 3.6.1988 and has thus rightly passed the impugned judgment granting decree of divorce by dissolution of marriage between the parties.

16. The appellant in her written reply had averred that she did not leave her matrimonial house of her own accord but was compelled to stay in the house of her parents because of hardened and cruel behaviour of the respondent. In her statement as R.W. 1 she has stated that her parents had given her a house at Jagadhari which was in her name. The respondent started asking her to execute a General Power of Attorney in his favour. On her refusal, the respondent gave her beating which led her to go to her father's house in village Khad. She has further stated that the respondent instituted a suit against her at Jagadhari, copy of the judgment whereof is Ext. RA admittedly the judgment decreeing the suit of the respondent ex parte and declaring that the house at Yamunanagar shown in the ownership of the appellant being a Benami transaction, the respondent was the owner thereof. It is further stated by the appellant that when she came to know about the institution of the suit she moved an application, copy whereof is Ext. RB, for setting aside the ex parte decree vide Ext. RA on the grounds that the respondent had intentionally given her wrong address and the report regarding service of the appellant therein was manoeuvred, fictitious and got effected by the respondent collusively. This application was admittedly dismissed. It is further stated by the appellant that the differences between the parties arose because of the demand by the respondent to give General Power of Attorney regarding the cause to him. The institution and outcome of this suit and further proceedings to set aside the ex parte decree is not in dispute. The version of the respondent in this regard, as stated by him in his cross-examination, is that vide sale deed dated 2.8.1996 a house at Yamunanagar was purchased in the name of Bharti Sharma (the appellant) for a consideration in the sum of Rs. 30,000/-. He has denied the suggestion that the house was purchased in the name of the appellant by her

father who paid the sale consideration. He has further stated that he instituted the suit against the appellant 'for getting the sale deed cancelled from the name of Smt. Bharti Sharma' and 'also sought the relief in that suit that I may be declared as owner of the purchased property after declaring Benami transaction in the name of Bharti Sharma and the suit was decided ex parte in my favour.' He has admitted that on 19.5.1989 the appellant moved an application for setting aside the ex parte decree which was dismissed and the appeal was filed in the Court of District Judge, Jagadhari by the appellant which was also dismissed on 20.7.1996. He has further admitted that there was no dispute between the parties from the date of marriage till the date of registration of the sale deed of the house.

17. The question as to who purchased the house in question stands finally decided vide judgment Ext. RA whereby an ex parte decree for declaration that the purchase of the house in the name of the appellant being Benami the respondent is the exclusive owner of the house was passed. It is, however, evident from the act of the appellant in instituting the application for setting aside the said ex parte decree and filing of an appeal by her against the order dismissing her said application that she never intended to part with the ownership of the house. Evidently, this act of the respondent in claiming the absolute ownership of the house standing in the name of the appellant affords a reasonable cause to the appellant to suspect his bona fides as a husband and not to join the company of the respondent.

17-A. It may be pointed out that according to the respondent the appellant deserted him on 3.6.1988. However, in a petition Under Section 125 of the Code of Criminal Procedure instituted by the appellant after the said date the respondent agreed to pay maintenance to the appellant and as a consequence of his statement maintenance was awarded to her. Thus by necessary implications he conceded the claim of the appellant that she had reasonable cause to live separately from him. The respondent challenged the order granting maintenance to the appellant despite the concession given by him in the Court of the Sessions Judge and this Court but without success.

18. It may also be pointed out that the claim of the respondent is that the appellant left her matrimonial house on 3.6.1988 without the consent of the respondent and proclaimed at the time of leaving that she would not live with the respondent and would spoil his life as is more or less averred in Para-7 of the petition and as stated by the respondent (P.W. 4) in his statement. The averment in the petition and the statement of P.W. 4 are belied and fully rebutted by the statement of the appellant (R.W. 1) and the contents of letter dated 21.2.1989 admittedly written by the respondent to the appellant, an attested copy whereof is Ext. P-6. The appellant (R.W. 1) in her cross-examination specifically denied that she left her matrimonial house on 3.6.1988 saying that she had forever abandoned the respondent as her husband. As per the contents of the letter Ext. P-6 produced and relied on by the respondent and written by him to the appellant, the appellant left her matrimonial house at Yamunanagar on 2.1.1989 without the consent and willingness of the respondent leaving the house open when the respondent was attending to his official duties. These contents of the letter clearly proved that as per the admission of the respondent the appellant left his society on 2.1.1989 and not on 3.6.1988 as claimed by the respondent in his pleadings and in his evidence. It is further evident from these contents that when the appellant left her matrimonial house the respondent was not present in the house, therefore, he was falsely averred in the petition that the appellant at the time of leaving her matrimonial house on 3.6.1988 declared that she was leaving the respondent permanently and thereafter would not treat him as her husband as averred in the petition and has falsely stated that she proclaimed at that time that she would not live with the respondent and would spoil his life. Thus, on the basis of the material on record it could not be said that the appellant had left the company of the respondent without any reasonable cause and with animus deserendi and the conclusion of the learned District Judge to the contrary is apparently based on misappreciation of evidence on record.

19. The learned District Judge has also held that there is no love lost between the parties and they have drifted apart to the point of no return and their marriage has irretrievably failed. This conclusion has also weighed with the learned District Judge in deciding Issue No. 2 in favour of the respondent and in passing the impugned judgment and decree.

20. We have already concluded hereinabove that the act of the appellant in withdrawing from the society of the respondent and living separately from him at her parents' house is not without reasonable cause, therefore, the question which arises for determination is whether the impugned decree can be maintained on the ground that the marriage between the parties has irretrievably failed.

21. In *Smt. Senh Prabha v. Ravinder Kumar*, AIR 1995 SC 2170, the Apex Court during the pendency of the appeal made efforts on several occasions to have the differences between the parties settled but with no success. Therefore, on being satisfied that the marriage between the parties had irretrievably broken down and there was no chance of their living together, the Hon'ble Court granted decree of divorce dissolving the marriage between the parties with immediate effect.

22. In *Smt. Kanchan Devi v. Promod Kumar Mittal and Anr.*, I (1997) DMC 257 (SC)=AIR 1996 SC 3192, the Hon'ble Supreme Court held as under :

'6. In view of the peculiar facts and circumstances of the case and being satisfied that the marriage between the appellant and the respondent has irretrievably broken down and that there is no possibility of reconciliation, we in exercise of our powers under Article 142 of the Constitution of India hereby direct that the marriage between the appellant and respondent shall stand dissolved by a decree of divorce.'

23. In *Parveen Mehta v. Indetjit Mehta*, IV (2002) SLT 381=II (2002) DMC 205 (SC), (2002) 5 SCC 706, the Apex Court held as follows :

'24. As noted earlier, the parties were, married on 6.12.1985. They stayed together for a short period till 28.4.1986 when they parted company. Despite several attempts by relatives and well wishers no conciliation between them was possible. The petition for the dissolution of the marriage was filed in the year 1996. In the meantime so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably without any fault on the part of the respondent. Further, the respondent has remarried in the year 2000. On this ground also the decision of the High Court in favour of the respondent's prayer for

dissolution of the marriage should not be disturbed. Accordingly, this appeal fails and is dismissed.'

24. It prima facie appears from the aforesaid decisions that a decree of divorce may be passed in a case where the marriage between the parties has irretrievably failed. However, the view taken in the aforesaid cases does not seem to be consistent inasmuch as contrary view has also been taken by the Apex Court in certain other cases.

25. In *V. Bhagat v. Mrs. D. Bhagat, II* (1993) DMC 346=AIR 1994 SC 710, the Apex Court held as follows :

'23. Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble, mess, when the Court finds it in the interest of both the parties.'

26. In *Chetan Dass v. Kamla Devi, III* (2001) SLT 420=I (2001) DMC 714 (SC)=(2001) 4 SCC 250, the Apex Court held as under :

'14. Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important

place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of 'irretrievably broken marriage' as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case.'

27. In *Savitri Pandey v. Prem Chandra Pandey*, I (2002) SLT 103=I (2002) DMC 177 (SC)=(2002) 2 SCC 73, the Apex Court reiterated the view taken in *V. Bhagat's* case (supra), and held as under:

'17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The Legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in *V. Bhagat v. D. Bhagat*, held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.'

28. Thus, in view of the above decisions, the latest position in law is that irretrievability of a marriage by itself is no ground for dissolution of marriage but can be taken into account along with any other ground on which a divorce can be claimed and granted within the framework of Section 13 of the Hindu Marriage Act.

29. Insofar as the case in hand is concerned, it is true that the parties are now living separately for the last about 15 years. The appellant, however, has specifically stated in her statement that she was still willing to reside with the respondent but the cause of dispute between them is the house. This may though appear not to be a very sincere offer the fact, however, remains that the appellant is residing in her parents' house not without a reasonable cause but for the sufficient reason that she was deprived of the ownership of the house which was purchased in her name at Jagadhari. The respondent instead of settling the dispute regarding the ownership of house by amicable means with his wife has created a situation affording reasonable cause to the appellant not to live with him

but to live at the house of her father. Therefore, the long separation between the parties being attributable to the act and conduct of the respondent, he cannot be permitted to take advantage of the plea of irretrievability of the marriage.

30. In Savitri Pandey's case (supra), the Apex Court has held as follows :

'13. In any proceedings under the Act whether defended or not the Court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated Under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the Court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.'

31. In view of the above settled position in law the respondent whose act and conduct has led the appellant to live separately from him could not be granted the relief of a decree of divorce.

32. The above discussion leads to the conclusion that the respondent was not entitled to the decree of dissolution of the marriage as granted in his favour, therefore, the impugned judgment and decree cannot be sustained.

33. As a result, this appeal is accepted and the impugned judgment and decree are set aside and the petition for divorce filed by the respondent is dismissed. Parties, however, are left to bear their own costs.