

Sunita Devi Vs. Shri Lala

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Court : Himachal Pradesh

Decided On : Feb-24-2009

Reported in : AIR2009HP52,2009(1)ShimLC478

Judge : Sanjay Karol, J.

Appellant : Sunita Devi

Respondent : Shri Lala

Disposition : Appeal allowed

Judgement :

Sanjay Karol, J.

1. The appellant wife has assailed the judgment and decree dated 1st March, 2004 passed by District Judge, Bilaspur, in HMA Petition No. 23 of 2002, titled as Shri Lala v. Smt. Sunita.
2. The petition filed by the husband under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 stands allowed and the marriage between the parties dissolved.
3. The respondent-husband filed a petition for divorce against the appellant-wife. For the sake of convenience the wife is referred to as the appellant and the husband as the respondent.

4. Brief facts for adjudication of the present appeal are as under:

The respondent filed a divorce petition alleging that some time in 1980 the parties were married as per Hindu rites and rituals. One son and one daughter were born out of the wedlock. Certain dispute having arisen between the parties, according to the respondent, the appellant left the matrimonial house without any rhyme or reason in the year 1989-90. Since then the parties have been residing separately and the appellant has not only deserted him but also caused mental cruelty. Her conduct and behaviour both towards him and his parents was unbecoming of a wife. The appellant has been ignoring him and not performing her matrimonial obligations.

5. The petition was opposed by the appellant on the ground that it was the respondent who had failed to take care of the family and in fact had been maltreating her and caused mental and physical pain, anguish and thus caused cruelty. The respondent who was married earlier took divorce and then married the appellant. She was ill-maintained and the husband wanted to get rid of her as he had done with his first wife. He wanted to maintain relations with another woman. It was also alleged that she had to even litigate for maintaining herself and her minor children and the Chief Judicial Magistrate, Bilaspur, vide orders dated 14.3.2002 awarded maintenance of Rs. 500/- per month.

6. Based on the pleadings of the parties the Court below framed the following issues:

1. Whether the respondent-wife had deserted the petitioner? OPP.

2. Whether the respondent-wife has treated the petitioner with cruelty? OPP.

In order to prove his case respondent-husband examined himself as PW-1, and also examined Shri Salig Ram (PW-2).

In rebuttal, the appellant-wife examined herself as RW-1.

7. Appreciating the material on record (oral and documentary), the Court below came to the conclusion that the marriage between the parties had broken down

irretrievably and since 1990-91 the parties had been separated in mess and worship. The Court found that the charge of adultery levelled by the appellant was baseless and she had been levelling wild allegations about cruelty and desertion against her husband. By giving liberal interpretation to the provisions of Section 13(1)(ib) and considering that the appellant, who had been receiving maintenance had deserted and had failed to take care of the respondent and his aged parents, the charge of cruelty and desertion stood proved and accordingly the marriage was dissolved.

8. The trial Court has disbelieved the statement of the appellant being self-serving.

9. Importantly the Court has failed to correctly appreciate the fact that the appellant had filed petitions for maintenance in which it was held that the husband had failed to maintain the wife. Learned Counsel for the appellant-wife has placed on record copy of the order dated 1.6.1991 passed in Cri. Petition No. 12/4 of 90/89/29/4 of 1989, titled as Sunita Devi and Ors. v. Lala. The same pertains to a petition filed under Section 125, Cr.P.C. by the wife and two minor children born out of the wedlock. Paras 6 and 7 of the said order, which is self-explanatory are reproduced in toto:

The respondent appeared as RW-1 and he has controverted the version given by the applicant and asserted that the applicant is in habit of filing of false application under Section 125, Cr.P.C. He further states that the applicant left the house of the respondent of her own and she was never given beatings threats of any kind. She states that he is earning only Rs. 750/- per month as a postal peon. In his cross-examination, he admitted that in the previous petition of the applicant under Section 125, Cr.P.C. he gave statement before the court that he will not beat the applicant and he will provide her with necessities of life. He also admits that at present he is not maintaining either of three applicants. He also admitted that he married another woman prior to his marriage with the applicant No. 1 who left the house of the respondent. In support of the version given by the respondent he also examined RW-2 Shri Jagdish she has admitted in his cross-examination that a postman is earning not less than Rs. 1400/- per month. He also admitted that at present, the petitioner is living in the house of her father alongwith applicants No. 2

and 3 and that father of the petitioner is- a poor man and so he is not in a position to provide the necessities of life to the applicants. He also admitted that respondent Lalaman married another woman prior to his marriage with the petitioner but she has also left the respondent.

7. From the entire evidence available on record, the applicant has been able to prove that she has been given maltreatment by the respondent which has forced her to leave the house of her husband. The petitioner time and again filed petitions under Section 125 Cr.P.C. but each time, the respondent gave a statement in the court that he will not beat the petitioner and shall maintain her properly as a result of which these petitions were dismissed as compromised. The petitioner has also been able to prove that the respondent being in service working as postal peon is earning a salary not less than Rs. 1400/- per month and that he has also some earnings from his landed property. This fact has also been admitted by Shri Jagdish Ram RW-2 who appeared as a witness for the respondent. The perusal of the entire statement of the petitioner AW-1 and Mangtu Ram AW-2 has fully established the facts that the applicants have been neglected by the respondent No. 2 and he is not maintaining any of the applicants despite having sufficient means, this point is, therefore, decided in favour of the applicants and against the respondents.

(Emphasis supplied)

The aforesaid findings have attained finality and stand unassailed till date.

10. In fact the divorce petition was filed on 30.9.2002 much after the passing of the aforesaid order. The petition for divorce is extremely cryptic and sketchy and the same is being reproduced in entirety:

1. That the marriage between the parties were solemnized on Nov., 1980 in accordance with Hindu customs and ceremonies. An affidavit duly attested enclosed herewith.

2. That the status & place of residence of the parties to the marriage is as under:

Husband Wife Status Place of Resi Status Place of Resi Before filing the petition Hindu Village Peharwin Hindu Village Chuwari At the time of filing the -do- -do- -do- -do- petition 3. That the parties lived together as husband & wife & two children born out of the said wedlock and for the last more than 12 years the parties are residing separately & have not cohabitated.

4. That the respondent also filed one maintenance petition Under Section 125 Cr.P.C. on her behalf and on behalf of her children, which was allowed by the Ld. C.J.M., Bilaspur vide order dt. 19.6.91 and further vide order dt. 14.3.2002 the Ld. C.J.M. Bilaspur enhanced the maintenance allowance Under Section 127 Cr.P.C. to the extent of Rs. 500/- per month, which the petitioner is making payment to her.

5. That just after the marriage the respondent and her family members started maltreating the petitioner and some time humiliated and insulted him publicly & the respondent have deserted the petitioner for the last 12 years. Parties have not been able to live together and the marriage should be dissolved by a decree for divorce.

6. That the respondent is not looking after the petitioner and living separately for the last more than 12 years and do not want to live together and wants that the marriage be dissolved.

7. That the petition has not been presented in collusion with the respondent.

8. That there have not been unnecessary delay in filing the present petition as the petitioner tried his level best to reconcile the matter with the respondent but failed.

9. That the petitioner filed petition Under Section 9 of Hindu Marriage Act against the respondent in the year 1982 which was dismissed as withdrawn as the parties compromised at the instance of the local respectable persons.

10. That the hon'ble court have the jurisdiction to hear and decide the petition as the marriage was solemnized within the local limits of the hon'ble court.

Prayer

It is therefore prayed that the marriage between the parties be dissolved and a decree for divorce be passed in favour of the petitioner and against the respondent.

11. The appellant filed reply categorically pleading that the respondent maltreated and physically beat her. His behaviour was cruel, rude and torturous. In spite of her best efforts the respondent did not improve his attitude and finally turned her out from the matrimonial house alongwith her children. She was still ready and willing to join her husband's company with the assurance that not only should she be not further maltreated but also maintained properly. The respondent has deserted both the appellant and the children. The reply was amended wherein it was specifically pleaded that the matter was brought to the notice of the police when FIR No. 69/89 under Sections 498-A, 504, 506, IPC was registered, which, however, was compromised when the respondent promised to mend his ways. On the assurance that she would not be maltreated, she repeatedly went to the matrimonial house, but, however, he did not improve his behaviour and maltreatment continued.

No replication was filed denying the aforesaid averments.

12. Respondent as PW-1 has undoubtedly deposed that his wife used to maltreat him and abuse his parents. Whenever he would make efforts to improve her she would insult him. In the year 1990 the appellant left him without any cause of her own will leaving him to take care of his old and aged parents. In cross-examination he admitted the pendency of the criminal proceedings, which were found to be false. He denied the suggestion that it was he who had turned out his wife after physically beating her, but admitted the fact that prior to the marriage in question he was married but denied that he was involved with another woman and, therefore, wanted to get rid of his wife.

13. However, in cross-examination, he categorically deposed that he was not willing to take back his wife nor was he willing to either keep the children with him or look after them and get them married. Importantly, there is no explanation for the same. Except for a bald and self-serving statement there is no specific instance narrated by the respondent with regard to the abuses hurled by the

appellant. There is nothing on record to corroborate his testimony.

14. PW-2 has only deposed that the marriage between the parties has broken down irretrievably. The appellant refused to patch up the disputes between the parties and the appellant ignored her husband and also beat him up. In his cross-examination he admitted that litigation between the parties was pending. He denied that PW-1 was not willing to keep the appellant.

15. This witness has contradicted PW-1 to the said extent. Be that as it may be, his testimony is vague, unspecific and does not corroborate the version of PW-1 with regard to any specific instance of cruelty.

16. On the other hand, RW-1 categorically deposed that the respondent used to demand dowry and beat her up for having brought insufficient dowry. He would neither maintain her nor provide enough food and clothes. His behaviour was extremely quarrelsome bringing mental and physical pain and agony to her. On one such occasion she had reported the matter with the Police Station, Ghumarwin, where her husband apologized and assured that he would treat her gently in future. Consequently she joined the matrimonial home, but, however, after a period of 2 to 4 months she was again beaten up by her husband and thrown out of the matrimonial house alongwith her children. For the last 15-16 years she has been staying separately alongwith children and had to litigate for maintenance. With an endeavour to reconcile the matter sometime in the previous winter she again visited the matrimonial house, but, however, her husband did not allow her to enter the matrimonial house, as such, she had to spend night at her sister-in-law's house and return back the following day. Importantly, she has deposed that even now she is ready and willing to go back to her matrimonial house.

17. The Court below has seriously erred in appreciating the evidence. It appears that the Court was swayed with the self serving statement of the respondent that his wife allegedly did not take care of her aged in-laws. With regard to cruelty meted out by the appellant, except for bald statement there is nothing on record to prove the same. Even the self-serving statement does not refer to any specific instances. The parents were not examined. The respondent has not denied* that

his wife had to litigate and claim maintenance both for herself and for her two minor children. There is nothing on record to show as to why the respondent failed to take care of the children. The burden and onus to prove desertion and cruelty was on the husband which in my view was not discharged. Simply that the marriage has broken down irretrievably or the parties have been living separately for more than 16-17 years without fulfilling their matrimonial obligations by itself would not be a ground for divorce under Section 13(1) (ia) and (ib) of the Hindu Marriage Act.

18. On the contrary, there is sufficient evidence to prove that it is the respondent who had caused mental cruelty and forced desertion on the appellant. There was no animus deserendi on the part of the appellant to have severed the matrimonial relationship and title. She was thrown out of the house and as such her staying separately cannot be an act of voluntary action.

19. The Constitution Bench of the Apex Court in *Lachman Utamchand Kirpalani v. Meena alias Mota* : AIR 1964 SC 40 has held:

In the 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 obligations of marriage.

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 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.

It is settled Law that the burden of proving desertion - the 'factum' as well as the 'animus deserendi' - is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.

The question whether a deserting spouse has a reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be a question of fact. The question for consideration in such cases is 'Is the conduct of the deserted spouse such as to excuse the deserting spouse from making any attempt to put an end to the desertion or from attempting any reconciliation?.'

Heavy burden lies upon a petitioner who seeks relief on the ground of desertion to prove four essential conditions, namely, (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence of desertion must be proved beyond any reasonable doubt and as a rule of prudence the evidence of the petitioner shall be corroborated. In short the proof required in a matrimonial case is to be equated to that in a criminal case.

The inclusive definition of desertion in the Explanation to Section 10(1) is only intended to incorporate therein the doctrine of 'constructive desertion' known to English law and the language is designedly made wide to cover the peculiar circumstances of our society.

The ingredients of desertion as well as constructive desertion are the same, namely, animus and factum, though in one case there is actual abandonment and in the other there is expulsive conduct. Under certain circumstances the deserted spouse may even stay under the same roof or even in the same bed-room. In our society, it is well known that in many a home the husband would be guilty of expulsive conduct towards his wife by completely neglecting her to the extent of denying her all marital rights, but still the wife, because of social and economic conditions, may continue to live under the same roof. The words 'wilful neglect' in the Explanation were designed to cover constructive desertion in the English law. If so, it follows that wilful conduct must satisfy the ingredients of desertion as indicated above.

To sum up the legal position the legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bonafide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not prevent the other spouse by his or her action by words or conduct from cohabitation. The expression 'wilful neglect' included in the section does not introduce a new concept in Indian law unknown to the English law, but is only an affirmation of the doctrine of constructive desertion. The said doctrine is not rigid but elastic and without doing violence to the principles governing it, it can be applied to the peculiar situations that arise in an Indian society and home. No inspiration could be derived from Section 9 of the Act in order to construe the scope of the expression 'without reasonable cause' and whether there is a reasonable cause or not is a question of fact to be decided on the facts of each case.

20. The Court took into account its earlier decision delivered in *Bipinchandra Jaisinghbai Shah v. Prabhavati* : AIR 1957 SC 176, to the effect that in proceedings of divorce the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt and the Court insisted upon the corroborative evidence unless its absence is accounted for to the satisfaction of the Court.

21. In : (1975) 2 SCC 326, the Apex Court while dealing with the provisions of Hindu Marriage Act, 1955 has held as under:

The belief regarding the existence of a fact must be founded on a balance of probabilities. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the Court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note. But whether the issue is one of cruelty or of a loan on a pro-note, the test to apply is whether on a preponderance of probabilities the relevant fact is proved.

22. In Chetan Dass v. Kamla Devi : (2001) 4 SCC 250, again dealing with the provisions of Hindu Marriage Act, 1955 has held that '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 strait-jacket 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'.

23. In Savitri Pandey v. Prem Chandra Pandey : (2002) 2 SCC 73, the Court reiterated the principles laid down in Lachman Utamchand Kirpalani (supra), and has further held that desertion cannot be equated with separate living by the parties to the marriage and the constructive desertion can be inferred from the

attending circumstances as desertion is a matter of inference to be drawn from the facts and circumstances of each case and the approach of the Court to preserve the marriage and reluctant to dissolve the marriage merely on the asking of one of the parties. The marriage cannot be dissolved merely on the averments made by one of the parties that as the marriage has broken down no useful purpose would be served to keep it alive.

The Court further held as under:

Cruelty has not been defined under Section 13(1)(ia) of the Hindu Marriage Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have 'caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of the other spouse which causes mental suffering or fear to the matrimonial life of the other. 'Cruelty', therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

24. The decision of Apex Court in Satish Sitole v. Ganga : AIR 2008 SC 3093 was in exercise of its powers under Article 142 of the Constitution of India and hence the ratio is not applicable to the facts of the present case.

25. That the respondent used to beat his wife and had promised to improve his conduct is borne out from the findings of the Chief Judicial Magistrate as reproduced hereinabove.

26. Taking into account the entire material on record, I am of the considered view that the Court below has seriously erred in holding that the respondent had been able to prove that the appellant had not only caused cruelty but also deserted him. The findings of fact returned by the Court below on Issues No. 1 and 2 are reversed.

The appeal is accordingly allowed with the aforesaid observations.

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