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Court : Himachal Pradesh

Decided On : Jun-27-2011

Judge : Deepak Gupta

Appeal No. : FAO No. 21 of 2009

Appellant : Bhikam Ram

Respondent : Satya Devi

Advocate for Def. : Shri. G.R.Palsra

Judgement :

DEEPAK GUPTA, J.

1. This appeal by the husband is directed against the judgement and decree dated 14.11.2008 whereby the learned trial Court dismissed the petition filed by the husband for grant of divorce on the grounds of desertion and cruelty.

2. The undisputed facts are that the parties got married in the year 1976 as per Hindu rites. At the time of the filing of the petition the husband was 49 years of age. Now, he is 56 years old. The allegation of the husband was that the wife used to torture, neglect, abuse, insult and humiliate him and only wanted his property. It was further alleged that in April, 1999 the respondent deserted the petitioner and started living separately in the same house. She separated her

mess and started living in two separate rooms and kitchen and had not cohabited with the petitioner since 1999 till the filing of the petition. Another allegation was that the wife had filed an application under Section 125 of the Cr.P.C. claiming compensation despite the fact that she was living in the house of the petitioner albeit separately and the entire expenses were being paid by the petitioner. This petition was dismissed. The wife also filed another false criminal case against the husband alleging that he had beaten her, which case was also found to be false and dismissed. It was, therefore, alleged that the wife had not only deserted the husband but had treated him with cruelty and the mental cruelty was of such an extent that the husband was entitled to divorce.

3. Three children, who are all major sons, were born out of the wed-lock. According to the wife, it was the husband who used to beat her and his only interest was to turn the wife out of the matrimonial home. According to the wife, the petitioner had constructed a new house and was not letting her stay in the house and therefore, she and her son were living in one dilapidated room. The parties led evidence. The husband reiterated what he had stated in the divorce petition and also placed on record the judgements of the Courts, both in the petition filed under Section 125 Cr.P.C. and the criminal case filed against him. He has also proved F.I.R and Rapat Rojnamcha in which he alleged that his wife and children had beaten him.

4. The wife in her examination-in-chief, which was recorded by way of affidavit, stated that the husband used to ill-treat her and the only reason for the dispute was that the husband did not want to give her any property. According to her, she was still willing to reside with her husband. In cross-examination she admitted that she has three sons and all of them are major. She also stated that she and her sons live with the petitioner in his house and he provides the meals. She denied that she had filed any case against the husband. She also denied that she had filed any petition under Section 125 Cr.P.C. She also denied that she had also filed any complaint on the basis of which case under Sections 498-A, 506 and 323 IPC was registered against the husband. Basically, she denied everything even facts which she was bound to admit. She had filed the petition under Section 125 Cr.P.C. but denied having filed the same. The criminal case

was filed at her instance but when she appeared in the witness box she had temerity to state on oath that she had not filed the criminal case. She was put a suggestion that she and her sons used to beat the husband. She denied the suggestion but at the same time stated that her husband is a person of loose morals and may have been beaten up while indulging in immoral acts. It is obvious that the wife who has appeared as a witness in a number of cases is not telling a truth.

5. The Apex Court in *Adhyatma Bhattar Alwar vs. Adhyatma Bhattar Sri Devi* (2002) 1 SCC 308, while dealing with the concept of desertion in matrimonial law held as follows:-

“7. 'Desertion' in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are:

1. The factum of separation; 2. The intention to bring cohabitation permanently to an end - *animus deserendi*; 3. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period; The clause lays down the rule that desertion amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the explanation. The explanation has widened the definition of desertion to include 'wilful neglect' of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence, desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the explanation, it is abundantly clear that the Legislature intended to give the expression a wider import which includes wilful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (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'. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.”

6. Applying these principles to the present case it is more than apparent that the parties have factually separated. They have not cohabited since 1999 and the wife had intended to permanently end the cohabitation.

7. From the evidence on record including the statement of the respondent's witnesses itself it is apparent that the husband and wife are living separately since the year 1999. The wife has not given any explanation as to why she was living separately. She in fact has denied that she is living separately. Once she has not given any explanation for living separately it is clear that she has deserted her husband.

8. Cruelty is not only physical cruelty, it can be mental cruelty. When a wife without any rhyme or reason refuses to cohabit with her husband for more than five years this itself amounts to cruelty. When the wife files false cases against the husband which are dismissed this also amount to cruelty. The wife has levelled false allegations against the husband and this would amount to cruelty. The learned trial Court in my view gravely erred in not taking into consideration all these relevant factors and totally misapplied the legal provisions in holding that the husband had not proved that he had been treated with cruelty.

9. In *Parveen Mehta vs. Inderjit Mehta* (2002) 5 SCC 706 the Apex Court while dealing with cruelty in the context of the Hindu Marriage Act held as follows:-

“21. Cruelty for the purpose of section 13(1) (i-a) is to be taken as a behaviour by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration

in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.”

10. These principles are applicable even today. A Division Bench of the Calcutta High Court in Smt. Kakali Das. Vs. Dr. Asish Kumar Dass AIR 2004 Calcutta 176 went on to hold that when the wife in the written statement makes allegations which amount to character assassination of the husband and fails to prove the same, this also amounts to cruelty. The Apex Court in Vijaykumar Ramchandra Bhate vs. Neela Vijakumar Bhate (2003) 6 SCC 334 held that the position of law is well settled and declared that when disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship of the spouse are levelled and not proved, they by themselves would amount to cruelty.

11. Shri G.R.Palsra, learned counsel for the respondent has relied upon a judgement of this Court in Ram Nath Thakur vs. Smt. Kanta Latest HLJ 2009(HP) 94 wherein this Court held that irretrievable break down of marriage is not by itself a ground for divorce though it can be used as an additional ground for divorce.

12. In the present case, from the facts which are established, it is apparent that the parties are living separately from 1999. They have not cohabited with each other. The marriage has irretrievably broken down and there are no chances of the party reconciling or living together. No doubt, the fact that the marriage is irretrievably broken down by itself is not a ground for divorce but this factor can be taken into consideration while deciding a divorce petition. The parties are

living separately. The wife has given no reasonable explanation as to why she is living separately. She deserted the husband for more than five years and has given no explanation why she is not living with the husband. Furthermore, she levelled false allegations against the husband. It is on her complaint that the husband had to face criminal proceedings and perusal of the judgement of the Criminal Court shows that the statement made by the wife was found to be incorrect and therefore, the husband acquitted. When the wife files a false complaint against the husband, on the basis of which he has to face criminal proceedings, this is also an act of cruelty.

13. Taking into consideration all these factors, I am of the considered view that the husband has proved that the wife had deserted him and also treated him with cruelty. Therefore, he is entitled to grant of divorce and a decree for dissolution of marriage. Therefore, the judgement and decree of the learned trial Court is set-aside and the petition filed by the husband is allowed and a decree for divorce is granted in favour of the husband and against the wife dissolving the marriage between them. No costs.

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