
(1998) 07 MP CK 0043

In the Madhya Pradesh High Court

Case No : F.A. No. 244 of 1997 & First Appeal No. 244 of 1997

Agnel Valentine D'Souza

APPELLANT

Vs

Mrs. Blanche Agnela Piedade D'Souza

RESPONDENT

Date of Decision : 17-07-1998

Acts Referred:

Christian Marriage Act, 1872 — Section 60(3)
Divorce Act, 1869 — Section 22, 7

Citation : (1999) 1 MPLJ 140

Hon'ble Judges : D.M. Dharmadhikari, J

Bench : Single Bench

Advocate : Umesh Shrivastava, for the Appellant; R.S. Tiwari, for the Respondent

Final Decision : Allowed

Judgement

D.M. Dharmadhikari, J.

This is an appeal u/s 55 of the Indian Divorce Act, 1869 (shortly hereinafter referred to as the Act") filed by the husband against the Judgment dt. 6-3-1997 passed by the 4th Additional District Judge, Jabalpur, whereby his petition u/s 22 of the Act for grant of decree of Judicial Separation has been dismissed.

Some of the facts which are not in dispute are as under :

The parties are catholic Christians. Their parents live in Jabalpur and they also during their education and married life lived at Jabalpur. They developed intimacy during their college days and thereafter married on 3-1-1987 in accordance with Indian Christian Marriage Act, 1872. The husband is employed as an Executive in a Medical concern and the wife has taken employment as teacher in Christ Church Boys Higher Secondary School.

The couple has no issue from the marriage. The wife was pregnant after marriage but unfortunately had to suffer an abortion on 24-6-1987. The spouses are living separate since 19-10-1987.

The husband had earlier filed a petition in the Court below for grant of a decree of nullity of marriage. It was withdrawn and thereafter the present petition for grant of decree of judicial separation was filed on 19-4-1990. The husband has alleged acts of cruelty and desertion on the part of the wife for a period of more than 2 years.

Repeated efforts of reconciliation made by the members of the community and the Church as also by this Court through the counsel engaged have failed. In course of reconciliation proceedings the wife expressed before me her desire to return to the husband but the husband has expressed his unwillingness. He said that the marriage is emotionally dead and he would better prefer a peaceful life all alone than suffer again agony and tension in her company.

The allegations made by the spouses against each other can be better appreciated from their own statements recorded in the Trial Court.

According to the husband when he was only a child of four years, he lost his father and was brought up and educated by his mother with whom he lives at Jabalpur. Due to his employment as Medical Representative he had a touring job. After marriage they went on honeymoon trip to Mysore, Bangalore and Ooty. In their honeymoon trip also she quarreled on trivial issues like failure of the husband to give her expected quantity of Ornaments and Gifts. At some places she lost her temper and created scene in the presence of outsiders and onlookers.

On 22-1-1987 on return from their pleasure trip she insisted on going to her parents. The husband advised her not to make frequent visits to her parents. On 23-1-1987 while he was absent being on official tour, she left for her parents leaving his mother alone. After marriage they lived for about six months together but not once did she offer a cup of tea what to say of serving food to him. When she became pregnant, in presence of his friends she used to rebuke him that after putting her on family way he was freely enjoying out doors. She paid no respect to his mother and many times misbehaved and insulted her.

On 24-6-1987 the wife had to be hospitalised and she suffered abortion. From hospital she was unwilling to go to the matrimonial home and it is only after great persuasion that she agreed to go with him on the condition that she would be provided food from her mother's place. Thereafter the couple lived together for only about 10 days. On 3-7-1987 she again went to live with her parents.

On 19-10-1987 she came to him with determination to leave him forever. She packed her luggage saying that she was capable of supporting herself. She took out from her finger engagement and wedding rings and threw it at him saying that henceforth she would have no connection with him. After this departure she never returned till the filing of the petition by the husband.

In cross examination the husband had admitted that once in a fit of anger and perturbed by her erratic behaviour he had slapped her.

The wife in her statement has given her own version of their married life.

According to her the husband misbehaved, illtreated and beat her on the instigation of his mother.

On 19-10-1987 after her abortion and rest when she returned from her parents house, the husband rebuked her saying that if she was not willing to cook food she would have no place in his house. He returned to her all her ornaments and sarees and asked her to get out. He thereafter never went to bring her back.

In cross examination she denied that on 19-10-1987 before leaving the husband's house she had thrown away the engagement and wedding rings. In her statement she volunteered to say that he had removed the necklace from her person.

The husband has. also examined his acquaintances and neighbours, but their evidence is not very material and worth discussion.

On the above evidence the learned Trial Judge held that it was the husband whose conduct could be said to be cruel towards the wife and her separation was not without any reasonable cause. The trial Court held that no case either of cruelty or desertion is made out against the wife for grant of a decree, of judicial separation.

I have heard the counsel appearing for the parties and also the husband and wife who appeared before me during reconciliation proceedings. The version and instances narrated by the parties can at the most be described as quarrels between them during their initial period of adjustment in married life. To justify a decree on ground of cruelty, the acts and omissions by the alleged erring partner to the marriage should be sufficiently, grave and weighty and not such which can be called ordinary "wear and tear" of life. It appears that the wife did not get sufficient rest, nourishment and peace during pregnancy because of the absence of the husband on his touring job. Her eventual abortion might have caused bitterness in their mutual relationship. The mother of the husband and the parents of the wife also do not appear to have played any constructive role to save the marriage from reaching to a breaking point.

This Court does not think that the conduct of wife can be said to be so blameworthy as to describe it as a cruelty towards the husband. A decree of judicial separation on the ground of cruelty, therefore, is not warranted on the facts of this case.

The only other ground urged on behalf of the husband of alleged desertion of the wife needs serious consideration.

The provisions of Section 22 of the Act permit grant of decree of judicial separation on the ground of desertion and they read as under :

"22. Bar to decree for divorce a mensa et toro; but judicial separation obtainable by husband or wife. - No decree shall hereafter be made for a divorce a mensa et toro, but the husband or wife may obtain a decree of judicial separation, on the

ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce a mensa et toro under the existing law, and such other legal effect as hereinafter mentioned."

From the above quoted provision it is to be noted that mere desertion by a spouse is not a sufficient ground for decree of judicial separation.

The spouse should be guilty of "desertion without reasonable excuse" and it should continue for a period of two years or upwards. An essential element of desertion or abandonment is intent on the part of the deserter to sever the marriage relationship forever. Apart from the fact of separation there should be animus deserendi. This is usually described as an intent not to return or not to resume cohabitation. The withdrawal from cohabitation should, therefore, be proved to be wrongful and without justification. That is the requirement of the expression used in Section 22 "desertion without reasonable excuse."

The guilty intent to abandon may be manifested when, without cause or consent, either party withdraws from the home, and since intent to abandon is largely a matter of inference or presumption, the subsequent conduct of the parties frequently makes plain the intent with which a previous act was performed. The separation and intention to abandon need not be identical in their commencement. The separation in the first instance may not constitute a desertion, but if a subsequent intent to abandon is formed, this intent may constitute a legal desertion.

In the instant case the wife left the husband's house on 19-10-1987 and according to her own version she was compelled to do so as he had asked her to leave him if she was unwilling to cook food for the family. Even if this was true the question is whether it was reasonable for her to have deserted him for this alleged harsh conduct on his part. It is on record that after her abortion in hospital she lived for a short period with the husband but used to get food in tiffin from her mother. She then left and lived with her mother and came back only after a long stay there. In this background of her past conduct, if on her return he showed willingness to admit her to the matrimonial home only on the condition that she had to cook, it cannot be said that the conduct of the husband was so cruel and unreasonable as to compel her to desert him finally.

Animus deserendi on the part of the wife is apparent from her conduct of collecting her ornaments and sarees and returning her engagement and wedding rings. Neither the parties nor their counsel have explained to me what are the essential rituals of catholic Christian marriage. u/s 60(3) of Indian Christian Marriage Act, 1872 in accordance with which they were married, the only formality or ritual for marriage required is stated to be that the man and woman who are willing to marry, in presence of a person licensed u/s 9 and of two witnesses say to each other in the name of Lord Jesus Christ that they take each other as a wedded wife or husband.

In the course of reconciliation proceedings I am, however, informed that wedding

ring in Christian marriage has same sanctity as a "Sindoor or Mangalsutra" to a wedded woman in Hindus. Putting on the finger of the bride a wedding ring thus assumes religious sanctity amongst Christians. Return of wedding ring to the husband by the wife, therefore, signifies her intention to sever the marriage relationship, if not an intention to divorce.

I am also informed that Roman catholic Christians do not recognise divorce and that is the reasons why the husband has not filed any divorce petition but seeks only a judicial separation.

It is not seriously disputed that after the wife had left with her valuables and clothes the house of the husband, she never tried to establish any contact with him either directly or indirectly although both of them permanently live in Jabalpur. It is also not disputed that the husband also never tried to approach her for her return.

The learned trial Judge has blamed the husband for his stern and strict attitude towards the wife. Does his conduct constitutes constructive desertion of the wife? He had suggested to her to live with him only on her agreeing to the condition that she would cook for the family.

Under Section 7 of the Act, the Courts have been advised "to grant reliefs to Christian spouses on rules and principles as nearly as may be conformable to the principles and rules on which the Court for divorce and matrimonial causes in England, for the time being, acts and gives relief." This Court, therefore, is justified in referring and relying on the State of Law in Rayden on Divorce, 12th Edition, pg. 245 :

"In case of constructive desertion, the onus of proving that the intention to desert continues may be much lighter than in a case of mere withdrawal from cohabitation. A mere wish or intention that the other spouse should leave is insufficient by itself to constitute constructive desertion. The wish or intention must be accompanied by conduct which is of such grave and weighty character as to make cohabitation virtually impossible and which the Court can properly regard as equivalent to expulsion in fact."

In constructive desertion, therefore the deserting spouse must have intended to bring the matrimonial consortium to an end, or have acted with the knowledge that that was what would probably happen.

The conduct of the husband in this case on her first return after her abortion and stay with her mother in the background of the fact that while she stayed with him for a brief period during convalescence she had insisted on food being provided to her from her mother's house, cannot be described to be so offending or cruel as to compel her at that juncture to leave his house finally.

In Joske's Marriage and Divorce, Vol. II. pg 318, the pertinent comment made in a similar situation is as under :

"As a general rule one spouse cannot assert justification in leaving the other where it is reasonably possible to prevent the separation without surrendering any strict legal right."

The conduct expected from the wife at that point of time was that she should have accepted the condition of the husband to cook for the family as early as she would have been healthy and normal. The reason for which the wife left the matrimonial home cannot be described to be so "grave and weighty" as to constitute a reasonable excuse for her to desert her marriage partner.

The question of reasonable excuse depends entirely on the facts of each particular case. A reasonable excuse need not be a matrimonial offence. Conduct which amounts to something less than a matrimonial offence may be sufficient to constitute such excuse, provided it is grave and weighty. The question is whether it is practically impossible to live with the offending spouse. It is a question of reasonableness. Mere repugnance of one of the parties to the other is not sufficient. (See Joske's Marriage & Divorce, page 318).

The wife left the husband in the manner and circumstances discussed in detail above. This Court is, therefore, justified in inferring on the part of the wife an intention to desert the husband to end the matrimonial relationship. After leaving the husband during long statutory period until the reconciliation proceedings in this Court, she never expressed any desire to resume cohabitation. Intention to end matrimonial relationship is to be inferred not merely from the conduct of the alleged deserter at any particular point of time but from all his/her previous conduct and from what he/she afterwards does or fails to do. In this case not only the wife left him and lived separately but deserted him with willingness and obstinacy of desertion which throughout continued for more than the statutory period.

The petition filed by the husband for judicial separation on ground of desertion, therefore, deserves to succeed.

In the result the appeal is allowed. The Judgment and Decree dt. 6-5-1997 passed by 4th Additional District Judge, Jabalpur, is hereby set aside. A decree of judicial separation in favour of the husband and against the wife is hereby passed. A formal decree be drawn accordingly. The parties shall bear their own costs.

Before concluding the Court would still hope that with the advance of age and experience the spouses will realise their follies. They would reunite and approach to this Court for reversal of decree u/s 26 of the Act. Amongst catholic Christians divorce is not recognised and decree of judicial separation would be insufficient in law to allow them to resettle or remarry. Their own interest lies in forgetting the past and restarting their joint living with renewed love and hope. As true Christians they are to be reminded the Gospel from Bible "what God hath joined together, let not man put asunder."