

(2017) 09 RAJ CK 0029
In the Rajasthan High Court
Case No : 2157 of 2009

Dr. Naresh Agarwal S/o Shri Shiv Prasad Agarwal	APPELLANT
Vs	
Smt. Pallavi W/o Dr. Naresh Agarwal	RESPONDENT

Date of Decision : 13-09-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 498A](#)/
[Section 406](#) - Husband or relative of husband of a
woman subjecting her to cruelty - Punishment for Criminal breach of trust
[Hindu Ma](#)

Citation : (2017) 09 RAJ CK 0029

Hon'ble Judges : Ajay Rastogi, Ashok Kumar Gaur

Bench : DIVISION BENCH

Advocate : Ashok Mehta, Mudit Singhvi, Gaurav Choudhary, Harshad Kapoor,
Rajesh Kapoor

Final Decision : Allowed

Judgement

1. The present misc. appeal has been filed against the judgment dated 19.02.2009 passed by the learned Family court, Kota, wherein the application filed by the appellant-husband under Section 13 of the Hindu Marriage Act seeking decree of divorce on the ground of cruelty and desertion has been rejected.
2. The facts in nutshell are that appellant-husband and respondent-wife got married on 17.04.2002 at Talvandi, Kota as per Hindu customs. That because of their strained matrimonial relation, the appellant filed an application under Section 13 of the Hindu Marriage Act on 16.03.2005 before the learned Family

Court, Kota stating inter alia that appellant got married with respondent on 17.04.2002 at Kota and no child was born out of the wedlock but the behaviour of respondent-wife with the appellant and his parents and relatives was abusive. It was further stated that the appellant was posted as Medical Officer in Primary Health Center, Mishroli, District Jhalawar. On 11.05.2002, the appellant's mother was hospitalized on account of heart attack where she remained in hospital upto 14.05.2002. On 15.05.2002, parents of the respondent came to Mishroli, District Jhalawar and remained with their daughter for almost 2-3 hours in closed room and thereafter, the behaviour of the respondent with the appellant and his family members became rude. It was averred that because of the accident of appellant's elder brother Shri Damodar, he had to stay in hospital from 26.05.2002 at Kota. The appellant being a doctor had to take care of his elder brother but even during that period, the respondent-wife insisted the appellant to go back to Mishroli instead of taking care of his elder brother.

3. The appellant pleaded that on 15.06.2002, the respondent's father wrote a letter to the appellant's father and sent a copy to one Shri M.C.Mittal of Orai and to Mr.Ghanshyam Das Ji of Kota, their close relative/friend. The said letter was full of allegations against the appellant about his relation with his elder brother's wife (Bhabhi) and the contents of the letter not only caused mental agony but serious disrepute in the society as the letter was circulated to the members of the family.

4. It was averred that on receipt of the said letter, everybody was called and respondent's father felt sorry by saying that the respondent was immature and allegations were levelled in utter confusion. It was averred that respondent regularly abused the appellant and his family members and on 13.11.2002, the

respondent's parents came to Mishroli and she left the place with her jewellery & personal belongings and since then, the respondent was living away from her matrimonial home, at Aligarh.

5. The appellant further made an averment that on 21.11.2002, the respondent informed him that he was pregnant but at the same time, she threatened to abort as she did not want any sign of him in her body. The appellant was treated as Veerappan (Sandalwood smuggler) by the respondent-wife and she continuously abused the appellant by alleging illicit relation with her elder brother's wife (Bhabhi). The appellant further pleaded that a letter was written on 23.11.2002 by the respondent containing various false allegations including those of having illicit relationship with his Bhabhi. The respondent's father also wrote letters on 04.12.2002, 07.01.2003 and 14.02.2003 (Exhibits-2, 3 & 4 respectively) containing false allegations and these letters were addressed to different people.

6. The appellant faced with such a situation after explaining by writing a letter on 27.02.2003 (Exhibit-5) to his father-in-law, had no option except to file an application under Section 9 of the Hindu Marriage Act. The appellant had tried to settle the dispute but since the respondent had filed complaint under Sections 498-A & 406 IPC in the ACJM Court No.3 of Aligarh, where cognizance was taken on 23.01.2004, the appellant withdrew his application filed under Section 9 of the Hindu Marriage Act for restitution of conjugal rights.

7. The respondent had also meanwhile filed an application under Section 24 of the Hindu Marriage Act on 12.11.2003, wherein the order was passed by the learned Family Court on 04.02.2004.

8. After service of notice of application filed by the appellant under Section 13 of the Hindu Marriage Act, the respondent-wife filed reply denying the allegations levelled by the appellant. She has stated in reply that she had not abused the appellant and his family members and regarding the letters which were written by her father it was not in her knowledge.

9. She also stated that the letter which she herself has written was the outcome of feeling of a lady-wife who wanted to convey her mental state but the language was not such as could be construed causing mental cruelty.

10. On the basis of the pleadings of the parties, the following issues were framed:-

"VERNACULAR MATTER OMITTED"

11. The appellant in support of his case, produced himself as A.W.-1, AW-2 Dr.Vishnu Mangal (brother) and AW-3 Ghanshyam Gupta (uncle).

12. The respondent wife in support of her case got herself examined as N.A.W-1, N.A.W.-2 Prashand Agarwal (her brother), N.A.W-3 Dr.J.C.Agarwal (father).

13. The learned Family Court after considering the material on record came to the conclusion that grounds of mental cruelty and desertion were not proved and as such, rejected the application filed by the appellant.

14. The learned counsel for the appellant has urged that the court below has committed a serious legal infirmity while passing the impugned order and same is not sustainable in eye of law. The learned counsel for the appellant submitted that there was enough evidence on record to prove the fact of mental cruelty, that apart from the documentary evidence, there was oral evidence as well where serious allegations about character of the appellant was

levelled of having illicit relation with his elder brother's wife (Bhabhi), as such, the said fact was enough to grant him decree of divorce.

15. The learned counsel for the appellant has argued that the baseless allegations and letters alleging inter alia illicit relation of the appellant were sent out by respondent's father at her behest and they were further circulated to different persons and as such it caused great mental agony to the appellant.

16. The learned counsel for the appellant has argued that after filing an application under Section 9 of the Hindu Marriage Act for restitution of conjugal rights, false criminal complaints were preferred by the respondent-wife alleging demand of dowry by the appellant and his family and as such, the appellant-husband suffered great humiliation and mental agony and thus, he had to withdraw the application under Section 9 of the Hindu marriage Act.

17. The learned counsel for the appellant has argued that not only pleadings while filing reply, even during the course of recording of evidence, his brother and his family members were humiliated by asking questions about appellant's illicit relation with his Bhabhi and she crossed the stage of mental cruelty being suffered by the appellant and has made out a case of divorce under Section 13 of the Hindu Marriage Act.

18. Per contra, the learned counsel for the respondent has supported the order impugned and has submitted that there is no legal flaw in the impugned order and the learned Family Court has come to just conclusion that both the issues of cruelty and desertion were not proved and as such, there is no scope of interference by this Court.

19. We have considered the rival submissions and scanned the

material available on record.

20. The Apex Court has consistently held by various decisions that when a party to marriage i.e. either husband or wife casts doubt on the reputation, character and fidelity of spouse, the same causes mental agony which amounts to cruelty. The Apex Court has also held that manifestations of wife suspecting the husband's fidelity, character and reputation are of serious nature. The Apex Court in the case of A.Jyachandra Vs. Aneel Kaur, reported in (2005) 2 SCC 22 has held as under:-

"10. The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are

required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

11. The expression "cruelty" has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or

unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted (See *Sobh Rani v. Madhukar Reddi*, AIR 1988 SC 121)."

21. In the instant case, the perusal of Exhibit-6, the letter written by respondent's father to appellant's father clearly revealed that allegations have been levelled against the appellant that he was more attracted to his elder brother's wife (bhabhi) and various incidents were narrated to link the appellant's alleged abnormal behaviour with his elder brother's wife by praising her, spending time with her, talking to her etc. The contents and language of the letter speaks volumes about character of the appellant being doubted by his wife by levelling different kinds of allegations of having inclination towards his brother's wife. The respondent's father not only wrote this letter to the appellant's father but also addressed this letter to two different persons.

22. The evidence brought on record clearly established that the respondent has casted a serious doubt on reputation and character as well as fidelity of her husband and the same caused mental agony which amounts to cruelty. This Court further finds that the statement, which has been recorded further reiterate the plea of the respondent that she doubted the character of her husband but failed to place any tangible evidence on record to establish her doubt. The relevant portion of the examination-in-chief of the respondent-wife, being relevant for the present

purpose is reproduced as under:

"VERNACULAR MATTER OMITTED"

23. The relevant portion of examination-in-chief of appellant- husband is reproduced as under:-

"VERNACULAR MATTER OMITTED"

24. The cross-examination of the appellant dated 02.08.2008 where again the question was asked about his character in cross-examination, the same is reproduced as under:-

"VERNACULAR MATTER OMITTED"

25. The finding of the learned Family Court that allegation of the respondent of having intimate relations with his brother's wife were not to the extent where any physical relations were said to have been established between them and as such, the learned Family Court reached to the conclusion that these kind of allegations did not amount to mental cruelty and after application being filed under Section 9 of the Hindu Marriage Act, when the appellant was prepared to keep his wife with him and as such, all acts are said to be condoned, in the opinion of this Court, the finding of the learned Family Court being perverse is not sustainable.

26. The finding of learned Family Court that assuming that mental agony was caused, which amounted to cruelty, the same was not to be accepted as the appellant had condoned the said acts while he had filed an application under Section 9 of the Hindu Marriage Act, the said reasoning of the learned Family Court is not sustainable as there was no condonation of the acts of causing mental cruelty by the respondent on the contrary, he withdrew said application as criminal case was also initiated against him.

27. The learned Family Court has cursorily recorded a finding that the letter dated 16.06.2002 (Exhibit-6) written by the father

of the respondent contained normal allegations of demand of dowry and further about relations with elder brother's wife, which cannot be construed to be of such a gravity where it can be said that mental agony has been caused.

28. This Court had also an occasion to deal with the issue of writing letters by wife alleging husband's illicit relation with his Bhabhi and as such, the Court has found the said act causing mental agony amounting to cruelty. In the case of Smt. Anita Jain Vs. Vs. Rajendra Kumar Jain, reported in (2010) 1 WLC 423, the Division Bench of this Court has held as under:-

"16. In this case, the appellant has not only instituted a number of cases against the respondent and his family members but she has also made allegations against the respondent regarding illicit relations with his Bhabhis and niece which are worst types of allegations and she has also admitted these allegations to be untrue. The conduct of the appellant clearly amounts to cruelty to the respondent."

29. In our opinion, the finding of the learned Family Court on the issue of cruelty is perverse and the same is not based on correct reading of evidence and as such, not sustainable.

30. The second ground on which decree of divorce has been granted is desertion.

31. For grant of decree of divorce on the ground of desertion, it has to be established that the other party to the marriage has deserted the party seeking divorce for a continuous period of not less than two years immediately preceding the presentation of the petition. The law on the point of desertion is well settled by the Apex Court in catena of cases. The Apex Court in the case of Malathi Ravi, M.D. Vs. B.V. Ravi, M.D., (2014) 7 Supreme Court Cases 640 has laid down the law for proving the desertion. Inferences may be drawn from certain facts of those acts or by conduct, expression of intention, both anterior and subsequent to

the actual acts of separation. The relevant para is quoted here under:-

"18. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the petition and the evidence adduced by the parties and the judgment of the Family Court and that of the High Court. The plea that was raised for grant of divorce was under Section 13(1)(i-b) of the Act. It provides for grant of divorce on the ground of desertion for a continuous period of not less than two year immediately preceding the presentation of the petition. The aforesaid provision stipulates that a husband or wife would be entitled to a dissolution of marriage by decree of divorce if the other party has deserted the party seeking the divorce for a continuous period of not less than two years immediately preceding the presentation of the petition. Desertion, as a ground for divorce, was inserted to Section 13 by Act 68 of 1976. Prior to the amendment it was only a ground for judicial separation.

19. Dealing with the concept of desertion, this Court in Savitri Pandey v. Prem Chandra Pandey has ruled thus:-

"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other

words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbai Shah v. Prabhavati¹ held that if a spouse abandons the other in a state of temporary passion, for example, anger [pic]or disgust without intending permanently to cease cohabitation, it will not amount to desertion."

20. In the said Savitri Pandey case, reference was also made to Lachman Utamchand Kirpalani's case wherein it has been held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. 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 (2) absence of conduct giving reasonable cause

to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved 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."

32. In the instant case, the finding of the learned Family Court with regard to desertion is factually incorrect as the appellant had specifically pleaded that respondent-wife had permanently left the matrimonial home on 13.11.2002 with her parents and she started living separately. This Court further finds that the application under Section 9 of the Marriage Act was filed on 09.05.2003 and an application to withdraw the same was filed on 16.03.2005 as the criminal complaint was lodged against the husband. The assertion of the appellant that there was no just valid reason at the time of initial leaving the matrimonial home, was amply proved as the respondent had deserted him without any justifiable cause.

33. The finding of the learned Family Court on the issue of desertion mainly rests on the fact that the reply which was filed by the respondent in response to Section 9 of the Hindu Marriage Act for restitution of conjugal rights, she had asserted that if the appellant-husband was prepared to change his behaviour/mend his ways, she was prepared to go back to the matrimonial home, the finding of the learned Family Court being perverse on desertion, is set aside.

34. This Court further finds that the reasoning given by the learned Family court that it was not possible for the respondent to stay with the appellant due to registration of criminal cases under Section 498-A and 406 IPC, the same cannot be a valid ground to draw a conclusion that one spouse can desert the other one

without any reason or cause.

35. Consequently, the appeal filed by the appellant is allowed and the judgment & decree dated 19.02.2009 passed by the Family Court, Kota is set aside. Their marriage solemnized as on 17.04.2002 stands dissolved and the appellant-husband is held entitled for the decree of divorce. Registry to do the needful. No costs.