

(1991) 06 AP CK 0015

In the Andhra Pradesh High Court

Case No : Appeal Against Order No. 1222 of 1987

Ganta Nagamani

APPELLANT

Vs

Ganta Lakshmana Rao and another

RESPONDENT

Date of Decision : 12-06-1991

Acts Referred:

Hindu Marriage Act, 1955 — Section 13, 13(1), 23, 23(1), 28

Citation : AIR 1992 AP 76 : (1991) 3 ALT 506 : (1992) 1 DMC 234

Hon'ble Judges : Venkatarama Reddy, J; Sardar Ali Khan, J

Bench : Division Bench

Advocate : C. Sada Siva Reddy, for the Appellant; D. Govardhana Chary, for the Respondent

Judgement

Sardar Ali Khan, J.—This C.M.A. is preferred u/S.28 of the Hindu Marriage Act, 1955 (Act No. XXV of 1955) and is directed against the order and decree dated 21-8-1987 made in O.P. No. 13 of 1982 on the file of the Court of the Subordinate Judge, Machilipatnam.

2. The husband, who is the 1st respondent before us, filed the Original Petition u/ S. 13 of the Hindu Marriage Act, 1955. The allegations levelled against the 1st respondent-wife by the petitioner-husband, in a nut-shell, are as follows:-- The petitioner and the 1st respondent were married, according to Hindu rites and customs, on 9-5-1971. They lived together and a son, by name Satish Kumar, was born in the year 1975 and at the time of the filing of the O.P. the boy was aged about 7 years. Thereafter, a daughter, by name Hemalakshmi, was born to the couple, who was aged about 6 years at the time of the filing of the O.P. The petitioner was working as a Basic Health Worker at Avakur Sub-Centre in Kaikalur taluk and kept his family at Prodduvaka. The allegation of the petitioner is that the 1st respondent somehow got in contact with the 2nd respondent, whose father-in-law's place is also Prodduvaka, and developed illicit intimacy with him. The main charge made by the husband is that the 1st respondent-wife has been living in adultery with the 2nd respondent. There were several persons

who were visiting the house of the petitioner in his absence and carrying errands from the 2nd respondent, thus having the way for their illegal association. The petitioner came to know of this illegal intimacy existing between his wife and the 2nd respondent and shifted his residence to Bomminampadu village. The further case of the petitioner is that the 1st respondent-wife admitted her misconduct with the 2nd respondent in the presence of his (petitioner's) brother-in-law, Dr. R. Bhaskara Rao and her parents and thereafter promised to behave properly. However, the petitioner states that the 1st respondent continued her dealings with the 2nd respondent even at Bomminampadu. On 13-6-1981, according to the petitioner, the wife addressed a letter- to the Taluk Magistrate, Kaikalur for protection to her and her husband, who has been pestering them by his constant visits from time to time. It is also stated that the 1st respondent was openly found to be associating with the 2nd respondent on 4-9-1981 from 12-00 Noon till 4-00 p.m. in a Donka. When she was questioned about her misconduct, she deserted the house of the petitioner at Bomminampadu in his absence on 9-9-1981 and eversince then she has been residing with her parents and daughter at Pandhahavillur. It seems, the son, Satishkumar, refused to accompany the mother and stayed with his father. The petitioner issued a registered notice dated 21-9-1981 through his advocate to the 1st respondent and her father and a reply was sent through their advocate on 28-9-1981 denying the allegations made against her and making further allegations against the petitioner himself. It is under these circumstances that the petitioner filed the Original Petition under S. 13(1) of the Hindu Marriage Act for dissolution of the marriage on the ground that after the solemnization of the marriage the wife had voluntary sexual intercourse with the 2nd respondent.

3. In the counter filed by the 1st respondent all the allegations levelled against her were denied and she alleged that the husband himself has been having illicit affairs with other women, viz., Seetha and another nurse by name Vijayakumari whom he had engaged at one time as nurse to work in his clinic. It is further alleged that the husband is leading a wayward life and has frittered away all his properties to fulfil his own desires.

4. The petitioner examined himself as P. W. 1 and two other witnesses, P.Ws. and 3. P.W. 3 happens to be his own son, Satish Kumar, whose testimony will be referred to later in this judgment.

5. It is in the evidence of P.W. 1 that his wife has committed adultery with the 2nd respondent. When she was questioned about the same, she promised to mend her behaviour and be of good conduct. On the strength of this assurance the petitioner took her to Bomminampadu but even at Bomminampadu the association of the 1st respondent with the 2nd respondent continued and the 2nd respondent went to the extent of threatening the petitioner for his life. The 1st respondent wife then addressed a letter dated 13-6-1981 to the petitioner-husband with a copy to the Taluk Magistrate, Kaikaluru admitting her illicit intimacy with the 2nd respondent and seeking protection from the hands of the

2nd respondent. We have seen a photo-stat copy of this letter which is in the hand writing of the wife. In the letter it is stated by way of a statement that the 1st respondent has developed illicit intimacy with the 2nd respondent and that she is afraid that the 2nd respondent may pick up some quarrel with the petitioner thus endangering security of the wife and husband. Therefore, she claims protection from the Taluk Magistrate for herself and her husband and family members. The other details emerging from the testimony of P.W. 1 are that he first came to know of the illicit intimacy between his wife and the 2nd respondent through his milk vendor Dasari John Swbbarao, who was not examined. P.W. 1 further stated that Ex. A.1 was written voluntarily by the wife and that he has not brought any force on her to address such a letter. A reading of the above letter leaves room for doubt as to whether any woman will put it down in writing in such a candid fashion that she is having illicit intimacy with another person unless she is compelled to do so. Further more, it is evident from the style of the writing of the letter that it is in the nature of a statement which seems to have been extracted from the wife and its main object seems to be to bring home the guilt of the wife that she is living in sin with the 2nd respondent. It is significant to note that the petitioner in his evidence has stated that in spite of the fact that he came to know of the illicit intimacy between his wife and the 2nd respondent and even after writing of the letter Ex. A. 1 he was prepared to continue the marital life with the 1st respondent. So much so, he says that he pardoned her mistake and lived with her for some time even after Ex. A. 1 dated 13-6-1981 was written by the wife. There is also a reference in the evidence of P.W.1 to an incident that on 25-11-1979, which happened to be his birthday, he went to Vijayawada and returned back home at 11-00 p.m. When he came back he found respondents 1 and 2 together on the same cot. But this fact of the wife and her paramour being surprised on the same cot has not been referred to in the petition. Moreover, it is only in the cross-examination that this fact has been mentioned by the petitioner.

6. P.W. 2, Sammete Ramalakshmana Rao is a resident of Bomminampadu and he knows the parties. It is in his evidence that he knows the 2nd respondent who has been running a fancy shop at Kaikalur. He says that the petitioner came along with the 1st respondent to Bomminampadu in the year 1980 when he was working as a Basic Health Worker in Malariya Department. P.W. 2 deposed in his evidence that he saw the 2nd respondent visiting the house of the petitioner at least twice or thrice in the absence of the petitioner. On one occasion he saw respondents 1 and 2 by the side of a Donka leading from Singarayapalem Korulollu Road to Bomminampadu at about 12-00 noon. On seeing P.W. 2 coming nearer to them, respondents 1 and 2 got up and went away. On the same day at about 4.00 p.m. when he was going to his lands again he saw respondents 1 and 2 at the same place. He accordingly informed P.W. 1 about the behaviour of his wife. This incident seems to have happened on 4-9-1981. He has stood his stand in the cross-examination as well. It is evident that P.W. 2 has no axe to grind against anyone. He is an independent witness who has testified to a fact of which

he happens to be an eye witness. The court below for some reason or other has not believed the evidence of P.W. 2 mainly on the technical ground that his name has not been mentioned in the petition filed by the husband. We are of the opinion that in a matter of this nature the testimony of a person has to be judged in the light of the surrounding circumstances of the case. A lapse on the part of the husband or to be more precise on the part of his advocate not to mention the name of P.W. 2, an important witness, should not go to the extent of discrediting his testimony completely and disbelieving the specific allegation made by him against the wife.

7. Coming to the evidence of P.W. 3 Satish Kumar, who was aged about 12 years at the time when he gave the evidence and happens to be the son of the parties, there are certain revealing circumstances which have come to light. The boy has clearly stated in his examination in chief that his father used to go for work at 7-00 in the morning and sometimes used to stay away from the house for three or four days continuously. He never used to come before 4.00 p.m. P.W. 3 states categorically that the 2nd respondent was coming to their house quite often and whenever he was visiting the house he used to give biscuits to the boy and to his sister, asking them to go out and play outside. The children used to go out for sometime and when they returned they invariably found the door locked from inside. The children used to tap on the door asking the mother to open it. On the opening of the door P.W. 3 found the 2nd respondent on the cot and the mother standing after opening the door aside. This happened a number of times. It is no doubt quite true that the son seems to be very much attached to his father as he refused to live with his mother when she left the house to go over to her father's place Pandithavillur. When questioned about his love and affection for his mother, the boy said that he has got all the love and affection for her and there is no reason to doubt his statement. The second aspect of the evidence of P.W. 3, which needs careful analysis, is the statement with regard to his coming back home from his paternal aunt's place Mudinepalli during Dasarah vacations. He deposed that during Dasarah holidays he stayed with his paternal aunt for a week at Mudinepalli and then came to Bomminampadu. During his week days stay at Bomminampadu with his mother, the 2nd respondent came four times to the house. It is obvious that the boy did not like the unwarranted visits of the 2nd respondent to his mother and so he reported the same to his father. This is the sum and substance of the evidence adduced on behalf of the petitioner-husband.

8. The 1st respondent Smt. G. Nagamani, wife of the petitioner has. examined herself as R.W.1. In her evidence she made a wholesale denial of her association with the 2nd respondent. She says that she no doubt knows the 2nd respondent who is running a fancy shop at Kaikaluru but beyond that there is nothing between them. She further states that Ex. A. 1 was obtained from her by force and that she had not voluntarily written the same. She further deposes that she brought her daughter Hemalakshimi with her to her parents house at Pandithavillur and ever since they are living there. By way of counter allegation

she accuses the husband of having illicit connections with several women Whose names are given in her evidence. The further allegation of the wife against the husband is that the husband has squandered away all his money and has been pressing her to dispose of her property to carry on his wavered style of life.

9. Mr. C. Sadasiva Reddy, learned counsel appearing for the appellant-wife in this appeal has mainly concentrated on the aspect of condonation of adultery by the husband and submitted that in view of the condonation so made, there is no warrant to pass a decree for divorce as has been done by the lower court. He also submits that there is no evidence to establish the fact of adultery against the wife. In so far as the evidence of P.W.1 is concerned, the learned counsel is of the view that it is a self-serving statement made by him. He attacks the evidence of P.W. 2 mainly on the ground that it does not have a ring of truth and that it has been disbelieved by the lower court itself. With regard to the evidence of P.W. 3, the learned counsel has submitted that he is after all a child witness whose evidence cannot be accepted without the corroboration. His further submission is that in so far as P.W. 3 is concerned, he has been induced to make irresponsible statements about his own mother at the instance of his father for whom he has got immense love and affection.

10. We would like to examine the first submission made by the learned counsel for the appellant with regard to condonation of the lapses, committed by the wife by the husband. It is no doubt quite true that the husband in his own evidence has stated that he pardoned the mistakes committed by the wife after Ex.A.1 letter dated 13-6-1981 was written by her. It is also in his evidence that he went to his father-in-law's place sometime in the middle of September 1981 asking his parents-in-law to send his wife back home. The question to be considered is whether this attempt for reconciliation really amounts to condonation of the immoral behaviour committed by the wife. In so far as the question of condonation in a case of adultery is concerned it would be in the fitness of things to reproduce the relevant part of S. 23 of the Hindu Marriage Act dealing with this aspect of the matter. S. 23(1)(b) reads as follows :--

"23.(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that -

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(B) where the ground of the petition is the ground specified in clause (i) of sub-sec. (1) of S. 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty,

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then, and in such a case, but not otherwise, the court shall decree such relief accordingly."

It is a well-settled proposition of law that the term "condonation" used in this

connection consists of two parts. Firstly, what it amounts is that there should be forgiveness on the part of the other party who has been at wrong by sexual lapse and the second aspect of the matter is that after such forgiveness there should be reinstatement of the parties together in their marital life. The view expressed in Henderson v. Henderson (1944) AC 49 with regard to the implications of the condonation is as follows :--

"Condonation involves forgiveness confirmed or made effective by reinstatement. The essence of the matter is -- taking the case where it is the wife who has been guilty of matrimonial offence -- that the husband with knowledge of the wife's offence should confirm his forgiveness by reinstating her as his wife,"

A similar view has been expressed by the Supreme Court in Dr. N.G. Dastane Vs. Mrs. S. Dastane, with regard to "condonation" which is in the following terms:--

"Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration."

11. Now, applying the above principle to the facts of this case and taking a liberal view of things, all that can be said is that the husband has made an effort for reconciliation between himself and his wife. He has expressed his willingness to take his wife back and to lead normal marital life. This offer made by the husband has been spoken to by the wife. On the contrary several charges have been hurled against the husband imputing immoral conduct to him and alleging that he is having illegal intimacy with several other women. Hence, we are of the view that there is question of any condonation of the marital lapses committed by the wife, by the husband. In any case, it is obvious that any sexual lapses alleged to have been committed by the wife after 13-6-1981 have not been condoned by the husband in any manner. So much so, the husband himself says that after he came to know that his wife has been seen for four hours with the 2nd respondent in a Donka on 4-9-1981 he has made up his mind to divorce her and not to accept her as a partner in life. This discards the theory of condonation putforward by the learned counsel for the appellant, and we hold accordingly.

12. The next question raised by the learned counsel for the appellant is with regard to the evidence establishing the fact of adultery on the part of the wife. It need not be repeated here that in cases of adultery it would be almost impossible to prove it in the same manner as a fact is proved in a criminal court. The degree of proof in all these cases rests upon the concept of preponderance of probabilities existing in a particular case. The evidence of P.W. 1 himself goes to show that on several occasions he has been informed by persons who are not interested in the matter in any manner that his wife is leading an immoral life with the 2nd respondent. The consistent factor emerging from the evidence of P.Ws. 1, 2 and 3 is that the 2nd respondent has been a frequent visitor to the house of the petitioner in his absence. In so far as the evidence of P.W. 2 is

concerned, we do not see any reason to disbelieve the same as he appears to be an independent witness who has reported the matter of his seeing respondents 1 and 2 together in a Donka on 4-9-1981 to the petitioner. It is also to be noted that the incident on 4-9-1981 had happened more or less three months after the writing of Ex. A. 1 letter dated 13-6-1981. We have already held that already held that by no stretch of imagination it could be said that the incident after 13-6-1981 has been condoned by the petitioner. The evidence of P.W. 3, who happens to be an innocent boy is to be given the weight in this case. First of all, we are inclined to take view that a son, who is aged about 11 years, will not go to the extent of testifying falsely against his own mother regarding her sexual lapses unless there are good reasons to do so. Secondly it appears that the boy has given the evidence in a free and natural manner and cited the incidents in the sequence in which they have occurred. On a reading of the whole evidence of P.Ws. 1, 2 and 3, one fact which emerges very clearly is that the wife has committed adultery with the 2nd respondent. The only factor which could have been considered is whether there is condonation on the part of husband of the conduct of the wife. We have held that the husband seems to have condoned the attitude of the wife upto 13-6-1981 i.e., the date of Ex. A. 1 but the sexual lapses thereafter on the part of the wife have not been condoned by the husband and there is no evidence to suggest the same on the part of any one.

13. Considering all the facts and circumstances of the case, we do not see any reason to interfere with the order and decree dated 21-8-1987 passed by the learned Subordinate Judge.

14. The C.M.A. is, therefore, dismissed, but, in the circumstances of the case, there will be no order as to costs.

15. Appeal dismissed.