
(2007) 08 UK CK 0028
In the Uttarakhand High Court

Kamleshwar Prasad Chaukiyal	Vs	APPELLANT
Smt. Madhuri Devi Chaukiyal		RESPONDENT

Date of Decision : 14-08-2007

Acts Referred:

Evidence Act, 1872 — Section 112
Hindu Marriage Act, 1955 — Section 13

Citation : (2007) 08 UK CK 0028

Hon'ble Judges : Rajesh Tandon, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajesh Tandon, J.—Heard Sri R.P. Nautiyal counsel for the appellant and Sri Pankaj Purohit counsel for the respondent.

2. By the present appeal the appellant has challenged the judgment and decree dated 16.12.2004 passed by the District Judge, Rudraprayag dismissing the suit if the appellant for divorce.

3. Briefly stated the appellant Kamleshwar Prasad has filed a suit for a decree of divorce against Smt. Madhuri Devi. The plaint allegations are that parties are Hindu and they were married according to the Hindu religious rites in February 1994 and a female child was born from the wedlock. Respondent was employed as a teacher in Shishu Mandir, Jakhtoli. appellant was employed as a Clerk in Kanya Junior High School. In the year 1996, the appellant was terminated from his service and in his place respondent Smt. Madhuri was appointed Clerk in the school. The respondent started living separately in Chopra Bazar after taking a room on rent. Thereafter the appellant went to Karnal Haryana in search of job. Respondent has no conjugal relation with the appellant since the year 2001. He came to his house in October 2002 and thereafter in April 2003. According to the appellant, on 12.11.2003, the respondent gave birth to a male child. The appellant claimed that the issue was born due to the illicit relations of the respondent with some other person.

4. Respondent Smt. Madhuri Devi has filed the written statement and has denied the allegations made in the petition. She has stated that the appellant was unemployed and she was giving her entire salary to her in-laws. Appellant is under the influence of his Bhabhi who is instigating him for second marriage. She remained pregnant for five times but only two issues are alive. The appellant treated her with cruelty; therefore, she started living in a rented house.

5. On the pleadings of the parties following issues were framed:

1. Whether the petitioner is entitled to get a decree of divorce on the grounds alleged in the plaint?

2. To what relief, if any, is the petitioner entitled?

6. The appellant has examined himself as P.W.1 and submitted his affidavit paper No. 5-C/1. The respondent has examined herself as D.W.1 and also submitted her affidavit paper no.9-C/1.

7. On the basis of the pleadings of the parties the trial Court has held that the appellant has failed to prove his case against the respondent. He has not stated the name of the person with whom the respondent has illicit relationship. The petitioner has given application for D.N.A. Test after the evidence of the parties was closed and as such his application was rejected under Order 17 Rule 1 C.P.C. The trial Court has held that no ground for divorce is made out and accordingly dismissed the suit of the petitioner.

8. Feeling aggrieved the present appeal has been filed by the appellant.

9. The appellant has filed the suit for divorce u/s 13 of the Hindu Marriage Act. Two grounds for divorce were alleged by the appellant in this suit; firstly that the respondent has applied for the post of Clerk on which post the appellant was already working and he was terminated from that post and respondent was given job of Clerk. Thus the respondent has rendered the appellant without job. Secondly that the respondent is living in adultery and she has illicit relationship with some other person.

10. u/s 13 of the Hindu Marriage Act, the following grounds can be taken for a decree of divorce:

(i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion ; or

(iii) has been incurably of unsound mind, or has suffering continuously or

intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

11. The respondent Smt. Madhuri Devi has admitted that the appellant was temporarily employed as a Clerk in Girls Junior High School but when that post was advertised for regular appointment, she applied for that post with the consent of the appellant and she was selected for that job. Even if the allegations made by the appellant on this count are taken to be correct, no ground for divorce is made out.

12. Another ground for divorce has been taken by the appellant is that his wife is living in adultery and she gave birth to a child on 12.11.2003 while the appellant has no marital relation with the respondent since April 2001. The appellant has not disclosed the name of the person with whom the respondent has alleged illicit relationship.

13. Rule 5 (e) of the Hindu Marriage and Divorce Rules 1956 reads as under:

(e) In every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has committed adultery with any person or persons, the name, occupation, and place of residence of such person or persons so far as they can be ascertained.

14. The appellant has not disclosed the name of the person or persons with whom his wife was living in adultery. Thus mere allegation of adultery against a spouse, without any convincing and cogent evidence is amount cruelty. The above conduct of the appellant amounts to mental cruelty in the matrimonial law.

15. In the case A. Jayachandra Vs. Aneel Kaur, , the Apex Court while defining "Cruelty" has observed as under:

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law.

16. In the case Smt. Mayadevi Vs. Jagdish Prasad, , the Apex Court has held as under:

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 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.

17. In view of above, no ground for divorce is made out.

18. Counsel for the appellant has raised the question of DNA test and has vehemently argued that opportunity of DNA test has been denied to the appellant by the trial Court although he applied for the same and as such he could not be able to prove by DNA test that the child born to the respondent is not legitimate.

19. It is true that the appellant has applied for adjournment on the ground that he wants to conduct D.N.A. test of the child but the trial Court has rejected his application under Order 17 Rule 1 on the ground that appellant has already taken several adjournments. Evidence of both the parties were closed and as such no opportunity to conduct DNA test be given to the appellant.

20. As held above the appellant has not complied with the provisions made under Rule 5 of the Hindu Marriage and Divorce Rules, which is mandatory for filing a suit for divorce against the wife. Further there is conclusiveness of presumption u/s 112 of the Evidence Act. Section 112 of the Evidence Act reads as under:

112. Birth during marriage, conclusive proof of legitimacy- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when it could have been begotten.

21. Conclusiveness of presumption u/s 112 cannot be rebutted by DNA test. Proof of non-access between the parties to marriage during the relevant period is the only way to rebut that presumption, as held by the Apex Court in the case Smt. Dukhtar Jahan Vs. Mohammed Farooq, . The Apex Court has observed as under:

12. Another serious infirmity noticed in the judgment is that the learned Judge has completely lost sight of Section 112 of the Indian Evidence Act. Section 112 lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could

have been begotten. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman.

22. Apex Court further in the case of Shri Banarsi Dass Vs. Mrs. Teeku Dutta and Another, , has held that conclusiveness of presumption u/s 112 cannot be rebutted by DNA test. The Apex Court has observed as under:

10. In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim *pater is est quem nuptiae demonstrant* (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality

11. It is rebuttable presumption of law that a child born during lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

23. In the present case husband and wife were in lawful wedlock during the period when the child was born. There is evidence on record that the child was born in the house of the appellant where his parents were present and they also provided medical help to the respondent during delivery. The appellant has utterly failed to adduce evidence to prove that the parties to the marriage had no access to each other at any time when it could have been begotten.

24. In view of the above, DNA test cannot be directed in the present case. The order of the District Judge was perfectly justified and is hereby upheld.

25. The District Judge was quite justified in dismissing the suit of the appellant. The appeal lacks merit and is hereby dismissed with costs.