

(1998) 07 AHC CK 0038
In the Allahabad High Court
Case No : First Appeal No. 97 of 1997

Smt. Sunita Singh

APPELLANT

Vs

Raj Bahadur Singh and another

RESPONDENT

Date of Decision : 28-07-1998

Acts Referred:

Evidence Act, 1872 — Section 114, 3
Family Courts Act, 1984 — Section 19
Hindu Marriage Act, 1955 — Section 13, 25(3), 27

Citation : AIR 1999 All 69 : (1998) 4 AWC 386 : (1998) AWC 386 : (1998) 2 DMC 496

Hon'ble Judges : R.K. Mahajan, J;B.K. Roy, J

Bench : Division Bench

Advocate : Ram Niwas Singh and V.K. Chandel, for the Appellant; Smt. Poonam Srivastava and Smt. C.L. Satsangi, for the Respondent

Judgement

R.K. Mahajan, J.—This is an appeal u/s 19 of the Family Court Act, 1984 (hereinafter referred to as the Act] challenging the judgment and -decree dated 20.1.1997 passed by Shri B. D. S. Srivastava. Family Court Judge, Varanasi, allowing Family Court Petition No. 348 of 1995 (filed u/s 13 of the Hindu Marriage Act) and for dismissing the aforesaid Divorce Petition with costs.

2. This is an unfortunate matrimonial case. The marriage was solemnized according to Hindu rites and ceremonies on 18.5.1994. The appellant-wife immediately went to her matrimonial house and according to her case, she returned on 21.5.1994 to her parental home where she stayed for some time and again went back on 7.12.1994 to her matrimonial house. There is an allegation that thereafter the husband and members of the family of the husband started torturing her demanding more dowry and they sent the appellant-wife to the parental home on 12.12.1994.

3. The version of the husband-respondent, however, on the other hand is as follows : After solemnization of the marriage on 18.5.1994, his wife went back

for a short time and came for the second time after "Gauna" on 7.12.1994. She told him that she has to appear in Library Science examination, which is to be held on 12.12.1994 at Agrasen Mahavidyalaya, Varanasi. He believed her and accompanied her to the college, where the centre of examination was situated- He dropped her at about 7.00 a.m. His wife told him that he could come at 11.00 a.m. to fake her back. When he went there, he found his wife missing. He informed her mother- in -law who in turn informed that she had eloped with one Sidhant, who happened to be her neighbourer. Consequently, a F.I.R., for missing of his wife, was lodged on 16.12.1994 at police station Kotwali, district Varanasi. Later on, she was found at the house of Rekha Gupta, who was her friend and again a report to that effect was lodged on 3.1.1995. He further alleged that she is mad in love with Sidhant before solemnization of the marriage. In paragraph No. 6 of the plaint, he submitted that : "Aaj Raj Bahadur aaye the, nahin chahate hue bhi sab ho gaya, lekin mera dil ua mera pyar mere paas he hai. Sidhant vo sir/ balatkar hi samajhana", He made reference to the statements made in a letter of his wife addressed to Sidhant that inter-course with the husband amounts to rape which according to him meant that Raj Bahadur came on that day and he had sexual relations with his wife. With reference to another letter, marked as paper No. 20-C-I, of his wife addressed to Sidhant, he stated in paragraph 7 of the plaint is as follows : "Men Kismat Dekha Sidhant ki turn mujhe purva pati ke roop me prapt ho, Lekin Main....."

In nutshell, the plea of the husband is that his wife is mad in love with Siddhant with whom she had also sexual relations. He filed the petition for divorce on the grounds of cruelty and that she had sexual relations even after solemnization of their marriage with Siddhant.

4. The version of the appellant-wife is that she is an obedient wife and she has been performing her duties in that capacity during her stay with husband. She further stated that there was demand of T.V., V.C.R. and gold ornaments which could not be immediately fulfilled but her father gave assurance to fulfill the demand soon. It has been further stated that she had no relations with Siddhant. The letters were written under pressure by making misrepresentation that they are to be produced in some judicial proceedings and have come later on in evidence and she believing to be so did it. It is further averred that Siddhant is a neighbourer and his house is at 10 paces from her house and had she any relation with him, the appellant's parents would have come to know. She further described that her husband is in the company of bad women and as a consequence of that, the petition has been filed. It is further averred that at the time of marriage Rs. 30,000 cash and Rs. 20,000 for purchase of scooter was given to the respondent-husband.

5. The lower court after perusing the pleadings, the evidence and the circumstances recorded following findings : (i) the wife was living in adultery and (ii) she has treated her husband with cruelty. The lower court also believed the letters written by the wife, the language of which is mentioned in detail in the

judgment.

6. The lower court also granted alimony of Rs. 300 per month but did not feel it appropriate to pass an order for return of the articles given at the time of marriage as there was no application u/s 27 of the Marriage Act.

7. Sri Ram Niwas Singh, learned counsel for the appellant submits as follows : (a) there is no evidence worth the name to show that the letters were written by the wife, (b) Origin of the letters has not been traced out in the sense that how they came in the possession of the husband? (c) admission, if any, made is of no value as the same were got written under pressure, (d) Siddhant has not been co-adulterator and the lodging of the F.I.R. has been managed, (e) the petition was filed just to harass the poor lady as in fact the father of the appellant-wife could not satisfy the demand of dowry and she was thrown out from the matrimonial home, (f) the finding regarding permanent alimony is erroneous (g) the articles presented at the marriage should have been returned to the appellant, (h) the appellant-wife could not get proper litigation expenses and as such could not pursue the case.

8. Smt. Poonam Srivastava, learned counsel for the respondent-husband, on the other hand supported the findings of the lower court and contended that there is no merit in the submissions of Mr. Singh. Even no ground has been taken in the Memorandum of Appeal in regard to return of the alleged articles.

9. The crucial questions for our consideration is whether the findings of the lower court are erroneous? Whether its view in regard to the genuineness of the letters is correct, being based on evidence? and whether the impugned judgment can be sustained?

10. The respondent-husband has relied upon letters being paper Nos. 20-C-1, 20-C-2, 20-C-3, 20-C-4 and 20-C-5. Reliance has also been placed on paper No. 21-C-1 certificate issued by Pradhan Madhuadih. Varanasi. He has also relied upon paper No. 22-C-2, i.e., copy of police report dated 16.12.1994 and paper No. 22-C-2, i.e., police report dated 29.12.1994 regarding return of his wife. He has also placed reliance on the statement of following persons :

(a) Rajbahadur Singh, P.W. 1.

(b) Sacchidanand, P.W. 2.

(c) Murari Mishra. P.W. 3.

(d) Santosh Rai. P.W. 4.

(e) Pramod Kumar Mishra, P.W. 5.

(f) Raj Kishore Singh, P.W. 6.

11. The appellant-wife placed on record the following evidence :

(a) Statement of Sunita Singh, D.W. 1.

(b) Statement of Chandra Shekhar Singh. D.W. 2 (father of appellant-wife).

(c) She also brought on record copy of Vakalatnama which Murari Misra, P.W. 3 has filed showing that he has engaged her husband as counsel and he is interested witness.

(d) She has also relied upon certificate of Gram Panchayat showing that Santosh Kumar Rai is running a shop in his wife's name.

12. It is not essential that the factum of adultery or an occasion to have an illicit intercourse should be proved beyond reasonable doubt. This controversy has been set at rest in *Dr. N.G. Dastane Vs. Mrs. S. Dastane*, wherein it was observed thus :

The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved."

13. As proceedings in matrimonial cases are of civil nature, the standard to prove as required under criminal offence is ruled out.

14. Now to prove adultery or to have sex relations with others, it is not required that there should be direct evidence and the circumstances may be sufficient. In *Passingham on Law and Practice of Matrimonial Causes*. 3rd Edition, pages 15-16, it has been state as follows :

"In the nature of things, the direct evidence of eye-witness is seldom available, and reliance must be placed upon circumstantial evidence. This should be directed to showing both intention or inclination and the opportunity to gratify it and proof will be required of the actual adultery alleged in the petition, though evidence of adultery, or undue familiarity falling short of adultery, between the same parties on other occasions, is admissible as indicating what inference the Court should draw from the evidence concerning the occasions to which the petition refers. The inference of adultery will normally be drawn from the fact that the parties concerned have spent the night together in the same bedroom. But it is not an inference which must be drawn, and the Court will sometimes accept evidence of some other and innocent explanation such as the fitness of one of the parties or might reach the conclusion that no intercourse had in fact

taken place but an attempt had been made to fabricate evidence in an effort to expedite the dissolution of the marriage. Despite the changes in the law, there will still be some temptation to do this rather than to accept the delay occasioned by awaiting the completion of, for example, two years separation u/s 1(2)(d)."

15. Similarly, in Halsbury's Laws of England (4th Edition. Vol.13. Para" 564. page 278), it has been stated as follows :

"The fact of adultery is proved by confession or is inferred from circumstances which by fair and necessary inference lead to that conclusion. This view has been followed in a long line of Indian decisions."

16. Now we refer the oral evidence of the parties.

It is revealed from the statement of P.W. I (the husband) that his wife came to his house on 18.5.1994 after marriage ; that his wife was recovered from the house of Rekha ; that he took his wife of Agrasen Mahila Vidyalaya to take her examination on 12.12.1994 and thereafter she was found missing. There is detail reference of his statement in paragraph 3 of the judgment. P.W. 2 Sachidanand has stated that he saw in the morning on the relevant date the respondent-husband taking his wife to the examination centre. He further stated that he was also present in the panchayat in which articles given at the time of marriage were returned back to the parties and that there was no written compromise. P.W. 3 Murari Misra stated that he saw Smt. Sunita Singh in the balcony of Sri Santosh Kumar Rai P.W. 4 ; that he happens to visit Hazipur in connection with repairing of electric fans ; that on enquiry from Santosh Kumar Rai he came to know that Smt. Sunita Singh is the wife of his friend Siddhant. This witness has been rightly criticised by the learned counsel of the appellant as of untrustworthy nature. He has deposed to the extent that he committed sexual intercourse with the appellant when she was staying thereafter loosening her blouse. In our opinion, his statement is highly exaggerated and not reliable and is also not expected from the conduct of an ordinary human being specially when he says that he is a friend of Siddhant. We are also of the view that Court should have cautioned when such questions were asked and should not have become a silent spectator. P.W. 5 Pramod Kumar's statement is in regard to the fact that father of the appellant and Sri Bahadur Singh were searching the appellant and they were having their photograph with them.

P.W. 6 Raj Kishore Singh has stated to the effect that he was present along with Sri Raj Bahadur Singh when report dated 16.12.1994 was lodged at the police station.

17. We advert to the statement of Srnt. Sunita Singh. the appellant. She has in toto supported the defence version as averred in the written statement. She has totally denied that she appeared in the examination on 12.12.1994. She further stated that letters were written under pressure on the pretext that her husband is to prepare a case. The veracity of the letters would be referred to in the latter part of the judgment.

18. Learned counsel for the appellant Smt. Sunita Singh has criticised the statements of all the P.Ws. and has levelled them unreliable. We are of the view that the statement of all the witnesses cannot be totally brushed aside it taken in a broad perspective. We are further of the view that there may be exaggerated statements but coupled with other circumstances, i.e.. writing of letters, lodging of the report in the police station and recovery of the appellant from the house of Rekha and about these circumstances reference would be made in the latter part of the judgment.

19. Brief facts have to be given though not in detail to fathom, the preponderance of probabilities of the version and facts mentioned in the letters and that they could have been written by the appellant-wife Smt. Sunita Singh. The letters are full of emotions and expressing love and affection but at the same time there is incoherence, may be on account of lack of expression or otherwise. We need not quote the letters in detail and only brief reference is being given, as carved out from the judgment of the lower court. For example in Ext. 20-A1 the appellant-wife expressed that she is faithful to Siddhant and her love is just life and permanent thing and her love is true and she wants to live with Siddhant. This letter was written at 5.30 a.m. and she had further stated therein that she could not sleep in the night.

In the letter (Ext. 20-C-2). she expressed the feelings of love and affection. She further wrote that he should make a request to his boss to have a mercy on them. She expresses her apprehension that her boss must be knowing her affairs.

In the letter (Ext. 20-C-3). she wrote to Siddhant that he should approach to Rekha who in turn would approach to "papa" so that he will send her to "papa" so that he will send her to Bhabhi's house. She expressed in the letter that she does not want to live with her husband and she has come to know that her "Bida" date is 8th December, 1994.

She expresses in letter (Ext. 20-C-4) that he can only see her but should refrain to talk to her. She further asked him that he should appear on the roof of the house so that she can see him or he can approach to her Bhabhi.

In the letter (Ext. 20-C-5) she expressed her feelings of regret that she cannot attend the marriage of the sister of Siddhant but she will see from her roof.

The explanation offered by the husband is that he found the letters when he accompanied his father-in-law when her wife was brought from the house of Rekha on 25.12.1994 and thereafter, he went to the village Kapsethi and found a brief case containing love letters besides other belongings. The only doubt which remains in mind that why she could not drop the letters. It is just possible that she went on writing letters and did not find opportunity to deliver through different sources. The fact remains that she was having love affair with Siddhant. This fact is further corroborated from lodging of the report at the police station and recovery from Rekha's house. There is reference in the letter regarding request to meet Siddhant at examination centre. The submission of the learned

counsel for the appellant is that this story is concocted one. It is difficult to believe his submission as the letters seem to have been written on different occasions and F.I.R. was also lodged later on for missing of the appellant wife. It is also not possible to accept the submission of the learned counsel for the appellant that they were written under duress or misconception of facts. The appellant-wife is an educated lady and if the letters had been written under duress, she could have brought the same to the knowledge of her father which we find missing. It has been further submitted that the name of Siddhant was not written in the F.I.R. It usually happens in Indian Society that in order to avoid dishonour to a lady or other consequences, name is not being given. It is not essential to give a name while lodging of F.I.R. and in the facts and circumstances of the case, missing report was enough.

It is stated by appellant-wife that letters which were relied upon by the respondent-husband were prepared on 1.12.1996. It is not possible that all the emotions should be expressed in different sequences in one night.

20. So in this case, the following circumstances lead to the conclusion that the appellant-wife had an opportunity to commit an intercourse in the normal course of nature of things :

(i) They had an opportunity and occasion to meet.

(ii) It is also a fact that the appellant ran away and stayed at the house of Santosh Rai and later on she was recovered from the house of Rekha Gupta. Even if the version of Shri Rai that he had also intercourse with appellant-wife is disbelieved, the fact is not obliterated, if running away with Siddhant and stayed at some places and later on recovery from the Rekha's house. During this interval Siddhant had enough opportunity and similarly Smt. Sunita Singh indulging in amorous affairs.

(iii) The writing of letters also admitted by her indicates that she was madly in love with Siddhant.

(iv) u/s 114 of the Evidence Act, the Court can also draw a presumption from the circumstances and human conduct regarding the love affair of the appellant with Siddhant. Section 114 of the Evidence Act is quoted below with an advantage :

"114. Court may presume existence of certain facts.--The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

21. We are of the view that writing of letters, running away with Siddhant and staying with him at some places is also cruel act on the part of the wife as no husband would like to tolerate the infidelity or defection from the normal rectitude in character which is required from his wife. The cruelty can be mental and the circumstances which have been narrated above are worst form of cruelty for the husband considering the nature of the society which they belong. We thus

uphold the findings of the lower court.

22. We are unable to accept the submission of the learned counsel for the appellant. We are of the considered view that the appellant after solemnization of the marriage has voluntarily sexual intercourse with a person other than her husband, i.e.. Siddhant as there was enough opportunity.

23. We are also of the view that there was a Panchayat in which it was resolved that mutual divorce be obtained from Court. A divorce petition was filed but later on it was withdrawn.

24. We reject the plea of the counsel for the appellant that the Judge has not applied his mind while preparing his judgment.

25. Regarding permanent alimony, we are of the view that respondent-husband is a young lawyer and he does not pay income-tax. We are of the considered view that the wife is not entitled for permanent alimony as we have given a finding that she had illicit relations with one Siddhant and there is prohibition u/s 25(3) of Act of 1955 which is quoted below with advantage :

"25 (3), if the Court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

26. We are of the view that in view of the return of the articles before the Panchayat, the appellant did not file an application before the lower court. It has been argued that the articles have not been returned but there is a mention in the judgment and evidence that the articles were returned before the Panchayat. So in these circumstances, she did not think proper to do so. The fact remains that she did not file an application u/s 27 of the Act of 1955 before the lower court.

27. It has been submitted by the learned counsel for the appellant that the appellant was not given proper litigation expenses for prosecuting the case. Under the circumstances, we do not consider that the appellant was entitled to litigation expenses or any maintenance expenses.

28. We do not find such an infirmity in the impugned judgment which requires correction by us.

29. In the result we dismiss this appeal but without any order as to cost.