
(1998) 03 MP CK 0038
In the Madhya Pradesh High Court
Case No : F.A. No. 373 of 1996

Smt. Swapna Chakrawarti	Vs	APPELLANT
Dr. Viplay Chakrawarti		RESPONDENT

Date of Decision : 30-03-1998

Acts Referred:

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

Citation : AIR 1999 MP 163 : (1999) 1 DMC 428 : (1999) ILR (MP) 760

Hon'ble Judges : V.K. Agrawal, J

Bench : Single Bench

Advocate : Sanjay Agrawal, for the Appellant; R.S. Raizada, for the Respondent

Judgement

V.K. Agrawal, J.—This Appeal is directed against the Judgment dated 8-1-1996 in Civil Suit No. 37-A/1993, filed by the respondent applicant by way of petition, u/s 13 of Hindu Marriage Act.

2. Un disputably, the appellant/non-applicant and respondent/applicant are governed by Hindu Law. They were married on 26-11-1978 according to Hindu religious rites at Allahabad. The appellant/non-applicant resided with the husband after her marriage. Out of the said wedlock, a daughter and a son were born in the year 1981 and 1985 respectively.

3. The averments of the respondent/applicant are that the appellant/non-applicant continued her studies at Benaras Hindu University after her marriage. After completion of her studies in 1980, she came to Bilaspur and was appointed as Lecturer in 1984 in C. M. D. College. The appellant/non-applicant started quarrelling with the respondent/applicant, after her return from Benaras. The appellant/non-applicant used to nurse unfounded suspicion about the character of the respondent/applicant. She used to cast aspersions on the respondent/applicant. The appellant/ non-applicant had gone to the extent of alleging that the respondent/applicant was having incestuous relations with his mother and maternal aunt. She used to remain out of the house till late in the night hours.

She stopped cooking meals and doing other domestic chores. On account of the aforementioned attitude of the non-applicant/ appellant and her misbehaviour, the life of the respondent/applicant became miserable. It is further averred that the appellant/non-applicant, after giving the birth to the son in May, 1985, refrained from performing her marital obligations and completely severed marital relations with the respondent/applicant and started sleeping in a separate room in which the respondent/applicant was not permitted to enter.

4. It was further averred by the applicant/ respondent that in April, 1987, the appellant/ non-applicant left the house of the respondent/ applicant and went to the house of respondent/ applicant's uncle, whereafter appellant's parents and sister brought back the appellant/non-applicant. In or about the month of June, 1987, the appellant/non-applicant came back to Bilaspur with her parents, rented a separate house and stayed there.

5. The case of the applicant/respondent further was that the appellant/non-applicant desired that the respondent/applicant should live with her, separately from his parents. However, since the parents of the respondent/applicant were old and he was their only son, the respondent/applicant refused to abide with the above wish of the appellant/non-applicant, upon which, she again quarrelled with the respondent/applicant. Thereafter, appellant/non-applicant reluctantly came to reside in the house of the respondent/applicant, but did not have any martial relations with the latter. It was also averred by the applicant/ respondent that on account of the maltreatment and constant quarrelling by the appellant/non-applicant, the father of the respondent/applicant suffered heart attack and expired, and his mother also started suffering from tension and heart disease. It was averred that the appellant/non-applicant has deserted the respondent/applicant for several years and the marriage between two has irreparably broken. It was therefore prayed by the applicant/respondent that the marriage between the parties be dissolved by a decree of divorce.

6. The appellant/non-applicant, in reply, denied the above allegations. She denied that she insulted or abused the respondent/applicant or stopped cooking meals and doing other domestic chores. It was also denied that she made any false allegations against the applicant/respondent. It was also denied by her that she refused to fulfil her marital obligations. According to the appellant/non-applicant she had never left the matrimonial home and she and the applicant/respondent are still living as husband and wife in the same house. It was also denied that the appellant/non-applicant desired that the respondent/applicant should live separately from his parents. She has denied matron account of her quarrel, the father of the respondent/applicant died. It was alleged that the respondent/applicant quarrelled, misbehaved and tortured the appellant/non-applicant. It has also been alleged that the respondent/ applicant is living with one Mamta Dabalgaon in a separate house since October, 1995 and the respondent/applicant is in love with the said Mamta Dabalgaon, who had conceived from the applicant and has given birth to a son. It was denied by the

appellant/non-applicant that she has deserted the respondent/applicant. It was, therefore, prayed that the petition for divorce be dismissed.

7. Learned trial Court found that the allegations of cruelty by the appellant/non-applicant against the respondent/applicant have not been proved. It was also found that the respondent/ applicant was living in adultery with Mamta Dabalgao. It was also held that there was no cohabitation between the parties for at least a period of two years, prior to the filing of the petition by the respondent/applicant. Therefore, though the learned trial Court refused to grant decree for divorce, but instead it granted a decree for judicial separation u/s 13A of the Hindu Marriage Act.

8. The learned counsel for the appellant/wife has assailed the impugned-judgment and decree of judicial separation and has urged that there was no justification for the trial Court to hold that there was no cohabitation between the parties from 1985 onwards or in any case for about 2 years from filing of the petition. In the above context, the learned counsel for the appellant has relied upon Bhallabha Das Vs. Sushila Bai, and has urged that it was the husband/respondent, who was living in adultery in a separate house with Mamta Dabalgao and thus had himself deserted the wife. Therefore, the husband/respondent could not have been granted the relief of judicial separation as has been done by the impugned-judgment.

9. As against this, the learned counsel for the respondent/husband has supported the finding of the trial Court that the parties did not have any cohabitation since 1985 or at least for about a period of two years prior to the filing of the petition. It has also been urged that the wife/ appellant, though continued to live in the same house and under the same roof with the respondent/husband, had refused to have marital relations with the husband/respondent and would, therefore, be deemed to have deserted him as she was showing wilful neglect towards him. This conduct of the appellant/wife would also amount to cruelty. It has also been urged that the marriage between the parties had irretrievably broken and, therefore, a decree for judicial separation was justifiably granted in the foregoing circumstances. Reliance has been placed on Smt. Sureshta Devi Vs. Om Prakash, , Bhavna Adwani (Smt.) v. Manohar Adwani (1992 M&P LJ 269: AIR 1992 M&P 105) and Indira Gangele v. Shailendra Kumar Gangele, 1992 MPLJ 832, 864 : (AIR 1992 Madh Pra 72). Respondent also preferred a cross-objection praying for grant of decree of divorce.

10. It is clear that the decree for divorce can only be granted on one of the grounds enumerated u/s 13(1) of the Hindu Marriage Act, 1955, which reads :

"13. Divorce.-- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(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, or has been 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.

Explanation -- In this clause -

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation -- In this sub-section, the expression "desertion" means the desertion of the petitioners by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly)."

11. As per Section 13A of Hindu Marriage Act, if the petition is not founded on Section 13(i), (ii), (vi) and (vii) thereof, instead of granting a decree for dissolution of marriage by a decree of divorce, a decree for judicial separation may be passed. In the instant case, the pleading of the respondent/husband was mainly to the effect that the appellant/wife used to quarrel and insult, and she nursed unfounded suspicion against the respondent/husband and used to behave in an unbecoming manner, and had severed matrimonial relations with him. Thus, allegations against the appellant/wife were that she treated the respondent/husband with cruelty. It was also alleged that the appellant/wife has

deserted the respondent/ husband for the past several years. Thus, on the grounds of cruelty and desertion the decree of divorce, as above, was sought by the applicant/ respondent.

12. The learned trial Court, in the impugned-judgment, found on appreciation of evidence, that the allegations of cruelty were not proved against the appellant/ wife. Moreover, it has also been found that the respondent/husband had developed illicit relations with Mamta Dabhalgaon and, in fact, he is living with her in a separate house and is thus leading a life of adultery. The above finding has not been challenged. A perusal of statement of the respondent/applicant Dr. Viplav Chakravarti (P.W. 1) would disclose that he has himself admitted that he has cordial relations with Mamta Dabhalgaon and is presently residing with her in the same house and separately from his wife, as would be clear from paras 17 and 18 of his statement. In view of the above admission and other evidence and material on record, as discussed by the trial Court, the finding as above of the trial Court that the applicant/ respondent was leading adulterous life and had illicit relations with Mamta Dabhalgaon is fully justified.

13. In view of the above finding, it is apparent that the appellant/non-applicant was justified in refusing to live with her husband the applicant-respondent and in refusing to have marital relations with him. It may further be noticed that she, after the birth of her children, used to reside in a separate room of the same house in which she was living with her husband. From Para-12 of her statement, it would also appear that even thereafter, the parties used to cohabit and have marital relations. Therefore, the finding in the impugned-judgment that the appellant/non-applicant refused to cohabit and that they did not have any marital relations since 1985 or at least two years prior to the filing of the petition, does not appear to be justified. Moreover, as has been noticed earlier, as the respondent/husband was leading a life of adultery, the appellant/wife had full justification in refusing to cohabit with the respondent/husband. Such refusal of cohabitation, in the circumstances, would not amount to either cruelty or desertion, as has been tried to be urged by the learned counsel for the respondent.

14. The learned counsel for the respondent/ husband has urged that even if the spouses are living in the same house, they would be deemed to be living separately, as they are not living like husband and wife and, therefore, it is immaterial whether the spouses are living under the same roof or in different houses, within the meaning of Section 13(ib) of the Hindu Marriage Act. Reliance, in this connection, has been placed on the case of Smt. Sureshta Devi Vs. Om Prakash, . Relying on Bhavna Adwani's case (AIR 1992 M&P 105) (supra), it has been urged that the wilful neglect on the part of the appellant/ wife amounted to desertion. It has further been urged that since the parties to the marriage have not been able to live together for a long period, the marriage should be deemed to have broken down without any reasonable possibility of reconciliation. It has been urged that in view of the above circumstances, the decree for judicial

separation was rightly granted by the impugned-judgment.

15. As noticed earlier, from the statement of the appellant, it will appear that she still continues to live with the respondent/husband as his wife, though she has started sleeping in a separate room. Therefore, there does not appear to be any intention on her part to sever the marital relationship existing between the parties. Thus, there being no intention by the wife to bring the relationship to a permanent end, desertion by her cannot be inferred, as has been held in the case of. *Indira Gangele* (AIR 1992 Madh Pra 72) (supra). Further, as already noticed earlier, the respondent/husband himself was leading a life of adultery, by living separately with another lady, Mamta Dabhalgaon. It would thus appear that desertion was on the part of respondent/husband and not on the part of appellant/wife. In the circumstances, as laid down in *Bhallabha Das Vs. Sushila Bai*, , he cannot take advantage of his own wrongful conduct as above.

16. In the above context, reference may also be made to Section 23(1)(a) of Hindu Marriage Act, according to which the Court, before granting a relief, in any proceeding under the Act, has to be satisfied that a ground for granting the relief exists and petitioner is not in any way taking advantage of his or her own wrong, for obtaining the relief. Thus, Section 23(1)(a) of the Hindu Marriage Act hold reins over Section 13(1A) of the Act and a person cannot be permitted to make capital out of his own wrong. Therefore, since the respondent/husband by living in adultery was himself guilty of wrongful conduct, was not entitled to any relief under the Hindu Marriage Act, as has been held by the trial Court, by granting him the relief and decree of judicial separation.

17. The learned counsel for the plaintiff/ respondent has also tried to support the impugned-decree for judicial separation by urging that since the marriage between the parties has irretrievably broken, relief for judicial separation could be justifiably granted. However, even if there was irretrievable break-down of marriage, since the same was occasioned and brought about by the plaintiff/ respondent, and since no ground for granting relief u/s 13 or 13A of Hindu Marriage Act was made out, he was not entitled to get relief of judicial separation. Reference in this regard may be made to *Reynold Rajamani and Another Vs. Union of India (UOI)* and *Another, , Nitu alias Asha Vs. Krishan Lal, and Uma Shanker Joshi Vs. Smt. Rajeshwari*, .

18. The learned lower Court, therefore, in the above facts and circumstances, was not justified in granting relief of judicial separation to the plaintiff/ respondent. Accordingly, this appeal of the appellant/wife deserves to be allowed and consequently the cross-objection stands dismissed.

19. The appeal, therefore, succeeds and the impugned-judgment and the decree granting judicial separation are accordingly set-aside, and the petition filed by the respondent/husband stands dismissed. The appellant shall get costs of this appeal from the respondent/ Counsel's fee, Rs. 1,000/-, if certified.