
(1984) 10 AHC CK 0015

Allahabad High Court

Case No: Second Appeal No. 453 of 1983

Devendra Kumar
Verma

APPELLANT

Vs

Smt. Chand Rani

RESPONDENT

Date of Decision: Oct. 19, 1984

Acts Referred:

- Hindu Marriage Act, 1955 - Section 12, 13, 28

Citation: AIR 1985 All 155

Hon'ble Judges: M. Wahajuddin, J

Bench: Single Bench

Advocate: Vinai Singh, for the Appellant; P.S. Tripathi and G.D. Srivastava, for the Respondent

Final Decision: Dismissed

Judgement

M. Wahajuddin, J.

The petitioner appellant brought a petition for annulment of the marriage with opposite party and in any case for dissolution of marriage with opposite party. The main stand of the petitioner was that the opposite party was divorcee, having married to one Yogesh Kumar earlier and this fact was suppressed from the petitioner and his parents, and had it been known to them they would have not gone for marriage and there has been a fraud. According to the petitioner, he first came to know of this earlier marriage and divorce in April 1979. It would appear that the couple later parted and respondent ceased to live with the petitioner. The case of the appellant is that this happened near about 4-9-1979. The case of the respondent is that she lived with the petitioner up to 15-9-1979. Respondent's further stand was that as there was marriage in petitioner's family invitation card was sent and the husband also rang the wife and even after institution of the suit, which had been filed on 18-12-1979, the respondent again returned back to the petitioner on 3-3-1980 and cohabited and lived with him up to 27-6-1980. The petitioner of course denies this. The petitioner's further stand was that the wife went to picture with his servant of the house and the petitioner suspected immoral relations between them and

the servant also later ran away with certain cash.

2. The trial court decreed the petitioner's claim u/s 12 of the Hindu Marriage Act that is for annulment. The first appellate court reversed that decree and dismissed the petition.

3. The husband feeling aggrieved from the finding and judgment of the first appellate court has preferred this second appeal. The first appellate court has concurred with the findings of the trial court that the matter of earlier marriage of the present respondent and divorce was suppressed and the fraud was practised upon the petitioner and his father in that regard. The two courts below also found that wife went with the servant to Cinema and the first appellate court held that this may amount to cruelty. The first appellate court, however, found that there has been condonation on the part of the husband and when that is the position neither a decree for annulment, can be passed nor a decree for dissolution of marriage can be granted. I may proceed to consider the aspect of condonation which is most vital for the decision of this appeal.

4. u/s 12 of the Hindu Marriage Act voidable marriages have been considered providing for annulment of marriage including on ground of fraud and then Section 12(2)(ii) of the Act provides that the petition in annulling the marriage on ground of fraud as provided u/s 12(1)(c) of the Act, shall not be entertained if the petitioner has with his or her full consent lived with the other party to the marriage as husband or, wife after.... the fraud had been discovered. The first appellate court held that this provision was attracted hence the marriage could not be annulled. Learned counsel for the appellant urged that condonation must mean complete and actual reconciliation. In that connection reliance has been placed upon the case of [Dr. N.G. Dastane Vs. Mrs. S. Dastane](#), and two English cases, (1) Mackrell v. Mackrell (1948) 2 All ER 858 and (2) Burch v. Burch (1958) 1 All ER 848. So far as the two English cases are concerned, I may, at the outset, observe that the Western conception concerning sanctity of the ties differ from Indian conception. In fact, in Western countries divorce can be claimed also on any very petty ground which would be considered flimsy by the Indian Society and in the matter of annulment of marriage and divorce the provisions under the Hindu Marriage Act are not so liberal and wide as under the English law. Still to touch upon the English cases I may observe that principle laid down in the case of Mackrell (supra) is that reconciliation being the test of condonation and the fact that parties continued to live in the same house or the fact that the guilty party is reinstated in his or her former position is indeed, evidence from which reconciliation may be inferred, but it is by no means conclusive. The principle laid down in the case of Burch (supra) is concerning inference. It has been laid down in that case that the circumstances were not such that the husband had taken back the wife regardless of whether she had or had not been guilty of adultery. The observation simply deals with the factual position that before the wife's confession to the husband the latter was not aware of any facts which may lead to a belief in wife's adultery. I may now consider the principles laid down in the Supreme Court case of Dastane v. Dastane (supra). In para 55 the Supreme Court observed that 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. In para 56 the Supreme Court further observed that the evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. It was also observed that intercourse is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and/has been received back into the position previously occupied in the home. There is a further observation that intercourse in particular circumstances would also give rise to a strong inference of condonation with dual requirements, forgiveness and restoration.

5. The law is always to be applied to the facts of the case, including inference in the circumstances of the particular case so I have simply laid down the ratio of this pronouncement to be borne in mind. There is another reported case of the Supreme Court, relied upon by the respondent's counsel, namely, Chandra Mohini v. Avinash Prasad AIR 1967 SC 581. In that case as per Head Note C and para 13 it was held that the fact that the husband cohabited with the wife even after knowledge that she had been guilty of cohabiting with another person would be sufficient to constitute condonation. This may mean laying stress on cohabitation with the wife as a circumstance for inference on condonation. In fact, this observation is in no way inconsistent with any observation in the case of Dastane (supra). What has been laid down in that case is that cohabitation is not sine qua non for any inference regarding condonation and in the case of Chandra . Mohini (supra) the reverse position has been considered observing that if any cohabitation has also taken place that may weigh as an important factor for strong inference concerning condonation.

6. It has been laid down in the case of [R. Ramachandran Ayyar Vs. Ramalingam Chettiar](#), that High Court in second appeal cannot interfere with finding of fact and appreciation of evidence unless it is in a position to say that it amounts to no evidence. In the case of D. Pattabirama Swamy v. Hanymayya AIR 1959 SC 57 it has been laid down that second appeal cannot be entertained on erroneous finding of fact and in the case of [Bhojai Vs. Salim Ullah and Others](#), it has been held that inference from basic fact is finding of fact and cannot be interfered with. The first appellate court held that the petitioner himself pleads that fraud was discovered in the month of April 1979 and still the parties did live together till 4th Sept. 1979. The respondent's case was that even later between March and June 1980 the respondent lived with the petitioner. Her stand is that the marriage of Narendra Kumar, brother of the petitioner, was to take place and on 3-1-1980, the lady has given birth to a female child and on 3-3-1980 a telephonic message from petitioner was received asking her to come in the marriage and saying that he would not repeat any mistake. According to her, she then proceeded and again resided I with the appellant up to some date in June 1980. The petitioner's father admitted in course of evidence that he has sent a letter to respondent's father. The Invitation Card. regarding marriage of petitioner's brother has also been filed. The first appellate court has concluded that if in

these circumstances the respondent took it as gesture of reconciliation and went to live with husband, it would be natural of her to do so. This is again a finding of fact. The first appellate court further relying upon this and the earlier continued stay of the wife at petitioner's place in Sept. 1979 concluded that it amounts to condonation and the bar concerning condonation under Sections 12 and 23 of the Hindu Marriage Act is attracted. As observed earlier not only a finding of fact, the inference drawn from basic fact is also not open to question in the second appeal and the Court cannot interfere. Learned counsel for the appellant urged that in the very case of [Dr. N.G. Dastane Vs. Mrs. S. Dastane](#), the Supreme Court interfered with the finding of fact under Article 136 of the Constitution. Head Note B of the aforesaid pronouncement is significant. It would appear that in an appeal before the High Court the High Court proceeded to determine the questions of fact exercising powers of appreciation of evidence. The Supreme Court held that the limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court meaning thereby that the same rule governs both. The Supreme Court further observed that while appreciating evidence, inference may and have to be drawn but courts of fact have to remind themselves of the line that divides an inference from guess work. The Supreme Court came to the conclusion that the High Court has drawn inference on a guess work and on error concerning the facts on record and it was in this context and background that in the special circumstances of that case the Supreme Court interfered. It has in no way differed with the principles laid down in the case of Bhojai v. Salimullah (supra) and the principles laid down in that case do hold good. Reliance was placed by the learned counsel for the appellant upon two more cases, namely, [Raj Kumar and Another Vs. Gopi Nath Varman](#), and [Sonawati and Others Vs. Sri Ram and Another](#), . In the first case it was held that if the lower court misinterprets the pleadings interference is possible and in the second case it was held that if the lower court ignores important evidence on record interference is possible. It was urged that the observation of the first appellate court that there is no allegation in the plaint that petitioner ceased to live with the respondent after coming to know after (about?) fraud is wrong. I was referred to para 12 of the plaint. It is noteworthy that the averment was very vague, namely, that since fraud was discovered concerning spouse being divorcee the petitioner had no connection with the respondent. Actually this does not amount to saying that the petitioner ceased to live with the respondent after coming to know of the fraud. On the contrary in the very plaint it was admitted that the very fraud was discovered in April 1979 and at least till 4th Sept. 1979 the couple continued to live together in the very house. There was no further explanation in the plaint for such conduct as to why husband still continued to live in the house. The wife has stated that the husband even cohabited with her. When that is the position and the observation by the first appellate court has been made in the context of the aforesaid other facts referred to I am not prepared to hold that the first appellate court has misinterpreted the pleadings.

7. As regards the observations in the Supreme Court case of Sonawati v. Sri Ram (supra) I do not find it to be a case in which the first appellate court in arriving at its conclusion

has ignored any important evidence. on record. What is being urged is that story of the respondent having again returned to the house of the appellant in March 1980 and having stayed up to June 1980 is entirely improbable when the suit for dissolution has already been instituted. The first appellate court has given cogent reasons for the view taken by it. There were circumstances. There was marriage of the petitioner's brother in the family, A daughter in the wedlock of the petitioner was born to the respondent in Jan. 1980. The petitioner in such background and context may develop a feeling of reconciliation as to call the wife by way of reconciliation and in any case such a view taken by the first appellate court based on appreciation of evidence cannot, be considered as perverse nor can it call for any interference by this Court in Second Appeal.

8. The English authority relied upon by the petitioner will not be helpful. Actually if the evidence of the respondent is believed as has been done by the first appellate court concerning this aspect, it will be a clear case of reconciliation between husband and wife and condonation by the husband. I, therefore, do not find it a fit case for interference in the judgment and decree of the first appellate court and this appeal has no force. It is dismissed with costs.