**(1983) 05 AHC CK 0045**

**Allahabad High Court**

**Case No:** Second Appeal No. 2918 of 1982

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| Smt. Azad Kumari | | APPELLANT |
| | Vs | |
| Satya Prakash | | RESPONDENT |

**Date of Decision:** May 24, 1983

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 10 Rule 1, Order 10 Rule 2, Order 41 Rule 11
- Evidence Act, 1872 - Section 112, 4
- Hindu Marriage Act, 1955 - Section 12(1), 13, 14, 21
- Hindu Marriage and Divorce Rules, 1956 - Rule 6

**Hon'ble Judges:** Deoki Nandan, J

**Bench:** Single Bench

**Advocate:** Raghunath pd. Agarwal, for the Appellant; Sudhir Narain Agarwal and S.K. Kulshrestha, for the Respondent

**Final Decision:** Disposed Of

**Judgement**

Deoki Nandan, J.

This is a wife''s second appeal from a decree of divorce passed against her by the Court of the Civil Judge, Etah, on the 4th July, 1980, on the petition of the husband, who is the Respondent here, which was confirmed on first appeal by the judgment dt. 11th Aug. 1982 of the Court of the Second Additional District Judge, Etah.

2. The parties were married in 1969, According to the Petitioner-husband, the Appellant-wife lived with him for two months after the marriage, but came away thereafter to her maternal home with her ornaments and clothes and has not returned to him ever since; that the Appellant-wife had thus deserted the Petitioner-husband without any cause and had acted very cruelly by not performing her marital obligations and by not cohabiting with him. This is followed by the allegations that the Appellant-wife had never regarded the Petitioner as her husband nor did she ever conduct herself as his wife; that the Petitioner-husband

had come to know that the Appellant had illicit connections with another man since before the marriage and this fact was concealed from him, and the Petitioner''s consent to the marriage was thus procured by fraud inasmuch as he would have never consented to his marriage with the Appellant if he had known this fact The petition proceeds on to allege that even after marriage the Appellant was maintaining her illicit connection with that man. It was then alleged that about three years ago the Appellant gave birth to a child and only a few months ago she had her second child aborted; that she was living in adultery and had sexual intercourse with a third person, and that the Petitioner was entitled to a decree of divorce against her. The further allegations made in the petition are that the Petitioner did not beget any child on the Appellant; that the petition was not collusive; that the Petitioner had not condoned the Appellant''s acts; that the parties had no joint property and that the cause of action for the suit arose on the 16th Feb. 1977 which was the date of Appellant''s last refusal; and that the cause of action arose at Etah where the parties last resided together. The subject-matter of the suit was valued at Rs. 1,000/-. The alleged adulterer was, however; ''not'' named and not made a co-Respondent with the wife, nor did the Petitioner apply for being excused from doing so under Rule 6 of the Hindu Marriage and Divorce Rules, 1956.

3. The defence was a complete denial of the Petitioner''s case except for the fact of marriage. The additional pleas raised were that after the marriage in May, 1969, the Appellant returned with her brother in the customary way after living with the Petitioner for ten days, and it was in May, 1970 that the Petitioner took the Appellant back to his place after the customary second marriage; and thereafter the Appellant returned to her maternal place in the month of Sawan of the year 1970 with her brother and after staying there for 2-3 days for Raksha Bandhan she again returned with the Petitioner to his place. The Appellant again went to her maternal home during the month of Sawan of the year 1971 with her brother and thereafter she returned with the Petitioner after Janmasthmi with all her ornaments and clothes. The Appellant stayed with the Petitioner at Etah and duly performed her marital Obligations. It was added that the Petitioner was addicted to gambling and also drinks; that on the occasion of Deothan Ekadashi during the month of Kartik of the year 1970, the Petitioner asked for the Appellant''s jewellery for gambling. This led to an altercation, whereupon the Appellant''s mother-in-law took the jewellery saying that she would keep it with her lest the Petitioner might take away the same from the Appellant by force, and kept the jewellery and the good clothes of the Appellant with her. It is then alleged that. thereafter the Petitioner started drinking more, and also beating the Appellant, saying that she had given the jewellery to his mother and should, therefore, get him Rs. 1,000/- from her mother''s place. The Appellant did not agree to do that, and suffered beating. She became pregnant during this period and because of the beatings her mother-in-law also became annoyed with the Appellant and turned her out after beating in June 1972, when she came to her maternal home without any of her jewellery. There she gave birth to a

daughter on the 18th Aug. 1972, whose name is Parveen Kumari and who was aged five and a quarter years, the date of the written statement being the 27th Sept. 1977. The Appellant as serted that after giving birth to Parveen Kumari she did not become pregnant again and never had any abortion nor did she have sexual intercourse with any person other than her husband nor did she lead an adulterous life, nor was she living in adultery. It was then said that when the Appellant''s father asked the Petitioner to keep her with him he demanded Rs. 5,000/-. The Petitioner was said to be a prosperous person having a share in joint family property and'' an income of Rs. 1,000/- per month. Lastly, it was pleaded that the Petitioner had consented to the marriage after making due enquiries and finding out every thing about the Appellant.

4. The following were the issues on which the parties went to trial:

1. Whether the Defendant deserted the Petitioner

2. Whether the Defendant committed fraud as alleged in para 7 of petition?

3. Whether the Defendant has committed adultery as alleged?

4. Whether the Petitioner has committed cruelty as alleged?

5. Relief?

5. The trial Court found on the third issue that the Appellant was guilty of adultery, that is to say, she has had sexual intercourse after the marriage with a person other than her husband. On issue No. 1, the trial Court found that the Appellant had not deserted the Petitioner. On issue No. 2, it found that the Appellant was living in adultery since before the marriage and the Petitioner was defrauded but such a fraud was not a ground for divorce u/s 13, and therefore, the finding had no effect on the case. On issue No. 4, the trial Court found that the Petitioner had not treated the Appellant with cruelty; and finding, on issue No. 5, that the Petitioner was entitled to the relief claimed, decreed the suit for divorce.

6. On appeal by the wife, the first question formulated by the lower appellate Court for its consideration was whether she was having sexual intercourse with others after her marriage with the Petitioner.

7. The first piece of evidence produced by the Petitioner in support of his charge of adultery against the Appellant consisted of four letters, alleged to have been written by her to the person with whom she was supposed to have been carrying on illicit intercourse. These letters were produced by the Petitioner himself explaining that he had found them in the Appellant''s box, when he had opened it, as he needed some money. The handwriting of those letters was compared and expert evidence was led to prove that they are in the Appellant''s handwriting. The lower appellate Court held that these letters had not come from proper custody. They were addressed to a third person and if they were sent by her, they could not have

remained in the box of the Appellant. The lower appellate Court had some doubts, on this account, but brushed the matter aside observing that it was difficult to hold that they were not written by the Appellant simply because they were not coming from proper custody, and in the same breath it proceeded to observe that "these letters should not be given undue importance simply because one was written after the marriage." The "important question", according to the lower appellate Court, was whether the Appellant had sexual intercourse with a person other than her husband after the marriage and to determine that question the points which arose for its consideration were:

1. When was the daughter born to her?

2. When she left her husband''s house and did not come back to him?

On these questions, the lower appellate Court found that the date of birth of the child, as given by the Appellant in her written statement, was the 18th Aug. 1972 and that she, according to her own admission, had left her husband''s home in the beginning of the year 1971. The lower appellate Court reasoned that she could not have, therefore, given birth to the child without having sexual intercourse with someone other than her husband because she also admitted that she did not meet her husband after having started living separately.

8. The lower appellate Court then considered the questions of condonation of adultery, and delay that were raised on behalf of the Respondent, but found against her on these points also. In the result, it dismissed the appeal and confirmed, the, decree of divorce.

9. The question on, which notice of this second appeal was issued after hearing under Order 41, Rule 11 of the CPC was whether the finding that the Appellant had sexual intercourse outside wedlock is vitiated in law.

10. Haying perused the record of this case and haying heard learned Counsel for the parties, I am sorry to say that neither of the two Courts below, nor any of the counsel for the parties would seem to have been acquainted with the special procedure prescribed by law for the adjudication of matrimonial cases. They seem to have been completely oblivious of the Hindu Marriage and Divorce Rules, 1956 framed by this Court in exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955; and that Rule 6 thereof prescribes that in every petition for divorce or judicial separation on the ground that the Respondent is living in adultery or has committed adultery with any person, the Petitioner, must make the alleged adulterer or adulteress a co-Respondent to the petition unless he or she is excused by the Court from doing so on any of the following grounds:

(i) that the name of such person is unknown to the Petitioner although he has, made due efforts for discovery;

(ii) that such person is dead;

(iii) that the Respondent if a woman is leading the life of a prostitute and that the Petitioner knows of no person with whom adultery has been committed; or

(iv) any other reason that, the Court considers sufficient.

It was not alleged in the petition that the name of the person with whom the Respondent was supposed to have been carrying on illicit intercourse was unknown to the Petitioner, nor was it alleged that such person is dead; nor that the Appellant was leading the life of a prostitute, and that the Petitioner knew of no person with whom adultery had been committed. No application was made by the Petitioner to the trial Court for being excused from naming the person with whom the Appellant was supposed to be carrying on illicit intercourse, as a co-Respondent, nor was any reason suggested why the Petitioner may be excused from doing so. The result was that a necessary party has not been impleaded in the case and the parentage of a child of tender years has been, put into jeopardy. The child''s entire future has been marred by the finding that she is a bastard without even telling any one as to who her father is.

11. That apart my greatest regret in this case has been that neither of the two Courts below, nor even the learned Counsel for either of the parties, cared to read any of the four letters, supposed to have been written by the Appellant to her lover, with whom she was supposed to have been carrying on illicit intercourse, and on the basis of which so much has been said in the judgment of the trial Court which has been paraphrased by the lower appellate Court.

12. The original letters were reported to have been stolen from the safe of the Court where they were kept under sealed cover but before that happened, the letters were photographed by the expert examined by the Petitioner and had been copied out word by word by the Appellant on the orders of the Court for giving a specimen of her handwriting for the purposes of comparison, I have seen the photographs and also the copies so made by the Appellant. The letter referred to by the lower appellate Court as the one written after the marriage is the letter dated 30th Nov. 1970, which purports to have been written by the Appellant, not to her lover, but, to the Petitioner, her husband. That letter is signed by the Appellant in English and most of the comparison of the handwriting is based on the genuineness of that letter. The mistakes of spelling etc., are those committed in it and repeated in the specimen copy. That letter does appear to be genuine and one may accept the finding without hesitation that it was written by the Appellant to the Petitioner, but that gives the clue to the whole case. Firstly it corroborates the Appellant''s ease that there was some altercation between the parties about the time of Deothan Ekadashi in the year 1970 inasmuch as the date of this letter is 30th Nov. 1970 which must have been some time at that time, and secondly it explains how the other letters must have come into being. This letter must have of course been in the possession of the Petitioner inasmuch as it was addressed to him and was sent by the Appellant from her maternal home at Kotla to the Petitioner''s place at Etah. Having had a look

at the other three letters, which are undated and the way they have been written, and having read their contents and compared their writing with that of the letter dt. 30th Nov. 1970, I have no manner of doubt in my mind that the three letters are forged and appear to have been prepared by the Petitioner for the purpose of creating false evidence for his case. The general style of the handwriting of these letters does not tally with that of the letter dt. 20th Nov. 1970. The expert also paid all his attention to the letter dt. 30th Nov. 1970, a photograph of which has been marked Ext. 3, by him and compared it in detail with the specimens. His opinion that the letter dt. 30th Nov. 1970, Ext. 3, was in the handwriting of the Appellant does appear to be correct but that does not mean that the three other letters the h photographs of which have been marked Ext. I, and Ext. II, and the last one of them has not been exhibited at all, but bears the marks Q-3 and Q-4, given by the expert, are also in the handwriting of the Appellant. In my opinon they are not in the handwriting of the Appellant at all and are clearly forged. Their contents are most unnatural and clearly appear to be the result of the inventive faculty of the Petitioner in search of direct evidence for his case. They are obnoxious and vulgar, and I have accordingly avoided quoting them in this judgment. The existence of the letter dt. 30th Nov. 1970 in the possession of the Appellant gave him the opportunity and fee idea of supporting his case by fabricating false evidence in the form of three letters, which if true would have shown that the Appellant was carrying on an illicit intercourse with a stranger. The strangest part of the whole thing is that these letters are undated and they have been attributed to a time before the marriage. One of the letters even speaks of pregnancy and abortion another speaks of the Appellant having been caught by her mother in a sexual act with a stranger and having been beaten. The other contents of the letters do show that they purport to have been written at a time before the Appellant''s marriage. If that were so and if these letters were in the Petitioner''s possession, when he filed this petition for divorce and he had read them, he ought to have known that the Appellant had been pregnant and had an abortion before marriage. That has nowhere been alleged. Instead what has been alleged is that she had a second pregnancy which was aborted. The marriage took place in May, 1969. The first child was born on 18th Aug. 1972. The second pregnancy could not have been earlier than the year 1976 according to the petition, but as if that was not enough the Petitioner stated on oath that when he went to fetch the Appellant in the year 1970 and had Stayed at her maternal place for about 2 or 3 days, he had been told by the people there that she has had an abortion, but since it was a long time ago, he could not name those persons. Another interesting feature of the Petitioner''s statement is that according to him the marriage was never consummated and even at the time of Sohagrat the Appellant had told him that she did not recognise him as her husband and that she had connections with another person. When asked further he said he did not feel offended at that and did not beat her but only tried to correct her and did complain about it to his friend, but the Appellant did not understand or correct herself. Even so the Petitioner stated on oath that he went to fetch the Appellant in

the year 1970 twice. Re did state that the Sohagrat did not take place when the Appellant came after marriage but its date was fixed after three days. According to the petition, the marriage took place in May, 1969 and the Appellant stayed with the Petitioner for two months thereafter and left for her maternal home with all her jewellery and clothes etc., never to come back again. It follows that in spite of the alleged disclosure of her illicit connections, the Petitioner did not feel offended and went to fetch the Appellant a year later in the year 1970. That corroborates the Appellant''s case that the second marriage took place in May, 1970 and she went and stayed with the Petitioner from May, 1970 up to Sawan of the year 1970. The letter dt. 30th Nov. 1970 also fits in this context although it is inconsistent with the Appellant''s allegation that she went back to the Petitioner''s place after Raksha Bandhan in 1970 and stayed there till after Sawan of the year 1970 because the letter dt. 30th Nov. 1970 appears to have been written by her from her maternal place, but I think the discrepancy has duly been explained by the Appellant in another context. That context was her statement under Order 10, Rule 2 recorded on 6th Mar. 1978 when after stating that she had been living separately from her husband for 6 years, she stated that she was living separately from 1971 and then again said from the beginning of 1971, followed by the statement that she had one daughter whose age was five and a half years and that she was born on 18th Aug. 1972, and lastly that she had not met her husband ever since, she had separated from him. In her statement on oath, which was recorded on 25th Apr. 1980, she stated that she had a daughter aged five and a half years, She explained that her statement under Order 10, Rule 2 that she was living separately from her husband from the beginning of the year 1971 was given under some misunderstanding followed by the statement that ever since she had been turned out, her mind did not work properly. I must also add that the statement was one made under Rule 2 of Order 10 and not under Rule 1. It could, therefore, be withdrawn or explained. See Balmiki Singh Vs. Mathura Prasad and Others, .

13. It appears clear to me that the story of the second pregnancy and its abortion, which was set up in the petition was a hoax and the story of abortion in the year 1970 said to have been admitted in the three letters and repeated in the Petitioner''s statement on oath was a worse hoax. If the Appellant has had sexual intercourse with a person other than the Petitioner before her marriage with him and the Petitioner''s consent for the marriage had been obtained by fraud, that may have been a ground for the annulment of the marriage under Clause (c) of Sub-section (1) of Section 12 of the Hindu Marriage Act but a petition for that could not have been presented more than one year after the fraud had been discovered. On the Petitioner''s own .statement, he came to know of the abortion in the year 1970. No petition for nullity was ever filed. Even the present petition for divorce was filed in the year 1977.

14. I may add that if the Appellant had carried away all her jewellery and clothes, when she left the Petitioner''s home two months after the marriage in the year 1969,

she could not have left any box in which the Petitioner might have found the letters in question when looking for money. No date of the discovery of these letters is given. Obviously the Petitioner''s entire case is concocted and false and deliberately so. I regreat to say that the two Courts below never applied their minds to the contents of the evidence in the light of the pleadings. If only they had done so It would not have been my painful duty to set aside their findings on a matter like this in second appeal.

15. I may as well add the legal objections to the findings arrived at by the two Courts below. Apart from the fact that the finding was arrived at by not reading the evidence which on the fasts of this case amounts to misreading, particularly the fact that the letter dated 30th Nov., 1970, which alone was genuine, was addressed not to the supposed lover of the Appellant but to her husband, the Petitioner himself; the two Courts below have in arriving at the inference that the child Parveen Kumari was begotten by a stranger and not by the Petitioner, completely perverted the burden of proof and relied mainly on the statement made by the Appellant under Order 10, Rule 2 of the CPC that she left the Petitioner in the early part of the year 1971 and never met him thereafter. As noticed above, that statement was withdrawn by the Appellant''s statement on oath. It was explained that her mind was not working properly and the fact that in her statement on oath recorded on 25th April, 1980 also she gave the age of her child to be five and a half years although born on 18th Aug., 1972 only proves the disturbed state of the Appellant''s mind. Section 112 of the Evidence Act ordains:

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 he could have been begotten.

According to Section 4 of the Evidence Act "when one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it." The question was not whether the parties had in fact met at the time when the child could have been begotten. The question was whether the parties had no access to each other at any time when she could have been begotten. Apart from the fact that the Appellant''s case appears on the evidence to be true, it was for the Petitioner to prove that he had no access to the Appellant at any time when the child could have been begotten. The parties were husband and wife. Etah and Kotla are not far away. It has not been shown and no evidence has been led to show that the Petitioner had no access to the Appellant that is to say, that the Petitioner could not have possibly met the Appellant. No other evidence was admissible. There is no escape from the conclusive presumption which Section 112 of the Evidence Act

requires to be raised that the child Parveen Kumari is the legitimate child of the parties. No other inference could possibly be arrived at.

16. In the result, I allow the appeal with costs and set aside the judgments and decree of the two Courts below and dismiss the Petitioner-husband''s suit for divorce with costs throughout.