

(2010) 09 KL CK 0062

High Court Of Kerala

Case No: Matrimonial Appeal No. 352 of 2010

Preetha, K.

APPELLANT

Vs

N. Bhaskaran

RESPONDENT

Date of Decision: Sept. 17, 2010

Acts Referred:

- Hindu Marriage Act, 1955 - Section 13(1), 23

Citation: (2011) 1 RCR(Civil) 260

Hon'ble Judges: R. Basant, J; M.L. Joseph Francis, J

Bench: Division Bench

Advocate: Sunil Nair Palakkat, K.N. Abhilash and R. Leela, for the Appellant;

Final Decision: Allowed

Judgement

R. Basant, J.

Can impossible and anachronistic standards of cruelty--physical and mental--be insisted by a Court before directing dissolution of marriage? What is the standard of cruelty that has to be established to justify a claim for divorce on that ground? Is the court below, in the nature of the pleadings and evidence, justified in turning down the claim for divorce sought by the Appellant/wife? These questions arise for consideration in this appeal.

2. The Appellant and the Respondent were married on 28-12-1998. The spouses lived together till April, 2008. No children were born in the wedlock. The wife alleged that the husband is guilty of physical, mental and sexual cruelty of the contumacious variety. She had endured such cruelty for a period of about a decade. Unable to stand the cruelty any longer, she was constrained to leave the matrimonial home in April, 2008. Thereafter also the husband did not show any interest in getting the marriage work. He did not contact the Appellant. Her mother was sick and she was admitted in the hospital. The Respondent/husband even after he was informed did not care to enquire about her. Later her mother died. Even thereafter the husband

did not care to contact his wife. At that juncture he issued Ext. A-1 notice calling upon the wife to resume cohabitation. It was replied by the wife as per Ext. A-2, in which a detailed narration of the present case of the wife was advanced in defence. The husband did not initiate any proceedings in pursuance of Ext. A-1.

3. The petition for dissolution of marriage was filed by the wife ultimately on 26-9-2008. The husband appeared before the Family Court. The parties were referred for Counselling. The Counselling was not productive. The matter came back to the court. Thereafter the Counsel who was appearing for the Respondent/husband reported no instructions. The Respondent did not attempt to resist the claim for divorce. He was set ex parte. The claimant/wife examined herself as P.W. 1. Exts. A-1 and A-2 were marked.

4. The court below, by the impugned order, came to the conclusion that the wife's claim for divorce on the ground of cruelty has not been established. The court appears to have felt that a decree for divorce cannot be granted in view of the provisions of Section 23 of the Hindu Marriage Act. Accordingly the court below proceeded to pass the impugned order.

5. This appeal was filed along with an application for condonation of delay. There was a long delay of 366 days. According to the learned Counsel for the Appellant/wife even after the impugned order, she waited in patience for the husband to contact her and to harmoniously settle the disputes. Nothing worked and she was hence compelled to come to this Court with this appeal.

6. Notice was ordered to the Respondent. He was duly served personally. But he has not chosen to appear before the Court, The delay was condoned. The appeal was admitted. It is in these circumstances that this appeal is taken up for consideration.

7. The learned Counsel for the Appellant submits that the court below had erred perversely in not granting the relief of divorce u/s 13(1)(ia) of the Hindu Marriage Act. A holistic reading of the averments in the petition along with the oral evidence of P.W. 1 as also Exts. A-1 and A-2 must have persuaded the court below to satisfy itself that the husband was not denying cruelty and that the Appellant is at any rate entitled to a decree for divorce on the ground of alleged cruelty. The learned Counsel for the Appellant points out that the courts should not hesitate to draw appropriate inference from the conduct of the Respondent not being interested to salvage the marriage. Either before the court below or before this Court the Respondent did not show any interest in saving and preserving the marriage. That speaks volumes for the attitude of the Respondent, argues the learned Counsel.

8. We are in ready agreement with the learned Counsel for the Appellant that the inference is irresistible that the Respondent is callous to the marriage and has no interest whatsoever in denying the allegations raised against him or in ensuring that the matrimony continues. That attitude of the Respondent must certainly inform us when we consider the pleadings and evidence in this case. This is not to say that an

ex parte decree for divorce can be granted by a Court without satisfying itself about the grounds of divorce. But certainly while considering the grounds of contest the absence of denial of allegations and want of interest on the part of the Respondent/spouse to continue the matrimony is significantly relevant.

9. Marriage is admitted. Joint residence for a period of 10 years, i.e. from 28-12-1998 to April, 2008 is also admitted. According to the wife, the tale of woes commenced from the date of the marriage. According to her from that date onwards she was subjected to cruelty of the contumacious variety. Assault and beatings, according to her, were daily occurrences. The husband behaved with such cruelty that he used to frequently splash chilly water on her face. He had no respect for her personality. He used to assault her physically and mentally. On many days, according to her, she was pushed out to the veranda, where she was compelled to spend the night all alone.

10. According to her, she endured this torture under the impression that the conduct of the husband will improve. The husband had claimed that he was an educated person. But actually he had not mastered the three Rs. He had no employment worth the name and she had to work and support him. When she was married in 1998 she had no employment, but she had later secured employment as a Nurse. She had invested her amounts in the matrimony. She had purchased a plot adjacent to the husband's family property. She had expanded the matrimonial house, all in the expectation that she can live with her husband harmoniously. But the husband continued his cruel behaviour. The matrimony did not come to fruition. No child was born in the wedlock. The Appellant asserted that it was the defect of the husband. According to her, he used to accuse her, insult her and assault her for there being no issues in the matrimony. Long later, in April, 2008, she found it impossible to endure the insult and assault heaped on her and she left the matrimonial home. Even thereafter he continued his cruel behaviour. He did not enquire about her. He did not visit her even when he knew that her mother was terminally ill. She later expired. Even thereafter he did not care to go and visit his wife.

11. Averments to the above effect are clearly raised in the petition for divorce. They are not denied or controverted. It is a case where the husband was aware of the proceedings. He had appeared before the court below and participated in the Counselling. The court below, even in the absence of a counter statement of the Respondent, appears to have looked into the report of the Counsellor. Most unsatisfactorily, the Counsellor appears to have spoken about the merits of the case in the report submitted and the court below appears to have founded findings on such contents of the report of the Counsellor. Counselling is a process, which is and ought to be absolutely confidential and it is impermissible for the court to rely on the contents of the report to found any findings of fact. That gross error has been committed by the Counsellor and the court below.

12. The acts of physical cruelty alleged--assaults, splashing of chilly water on her face, pushing her out of the house during night etc., have not been controverted. A reading of the uncontroverted pleadings and unchallenged evidence, according to us, eminently and eloquently establishes the claim for divorce on the ground of cruelty. Following the judicial pronouncement in [Naveen Kohli Vs. Neelu Kohli](#), it appears to be beyond controversy that the crucial test--whether the wife was unable to live with the husband on the ground of the cruel conduct indulged in by him during the currency of the matrimony, must be answered in favour of the wife. In any view of the matter, we are of the opinion that the evidence sufficiently establishes matrimonial cruelty as a ground for divorce u/s 13(1)(ia) of the Hindu Marriage Act.

13. Irretrievable break down of marriage is certainly not a recognised ground for divorce under the Hindu Marriage Act. But it is not as though irretrievable break down is an irrelevant factor/input for the court while considering the ground of cruelty. Wilful absence of the husband to contest the proceedings, in the light of the nature of the pleadings and evidence clearly indicates irretrievable break down of the matrimony and the absence of interest on his part to salvage the marriage. The wife's evidence clearly shows that there was irretrievable break down of the matrimony. She is not able to live with her husband and it is the cruel conduct on his part that makes it impossible for her to live with him. This much is evident and that exactly is the requirement to be proved in a claim for divorce on the ground of cruelty in the light of Kohli's case (supra).

14. Section 23 of the Hindu Marriage Act can have no application in the facts. The husband has no case that the wife was guilty of any "wrong". The court below appears to have assumed that the conduct of the wife living with the husband for about a decade and complaining later about the cruelty shows "wrong" on her side. The court below without any materials appears to have assumed that the improved financial position of the wife--she was unemployed when she entered matrimony but subsequently entered Government service as a Nurse, was prompting her to claim divorce. Both, according to us, this assumption is not justified and cannot be reckoned as "wrongs" for the purpose of Section 23 to turn down relief u/s 13(1)(ia). It would be anachronistic to reject the evidence of cruelty on the ground that the wife had suffered such conduct without demur for a long time. In the Indian context the woman is culturally resigned to endure and tolerate inconvenience and impropriety in matrimony of her spouse to the extent possible. If after a decade she asserts that she is not able to live with such a spouse any longer, that cannot be reckoned by a compassionate Court as "wrong". The mere evidence/admission for enduring cruelty cannot be reckoned as condonation u/s 23 also. Economic dependence may be compelling many a wife to endure matrimonial cruelty of the contumacious variety without demur. That she makes the claim for divorce on the ground of cruelty after she has attained economic independence cannot by itself be held to be sufficient to dub her conduct as "wrong" or "condonation" u/s 23. We

remind ourselves of the fact that the husband has no case that she is at fault or has committed any wrong or condoned alleged acts of cruelty. Section 23 cannot at all justify the rejection of the claim for divorce in this case.

15. The challenge raised in this appeal must in these circumstances succeed.

16. In the result:

(a) This appeal is allowed.

(b) The impugned order is set aside.

(c) O.P. 252 of 2008 on the file of the Family Court, Kasargode is allowed and the marriage between the Appellant and the Respondent solemnized on 28-12-1998 is hereby dissolved u/s 13(1)(ia) of the Hindu Marriage Act with effect from this date.