Chandra Mohini Srivastava

Vs

Avinash Prasad Srivastava & Anr.

Civil Appeal No. 138 of 1966

(G. K. Mitter, K. N. Wanchoo JJ)

18.10.1966

JUDGMENT

WANCHOO, J.

This is an appeal by special leave against the judgment of the Allahabad High Court and arises in the following circumstances. A suit was brought by the first respondent, Avinash Prasad Srivastava, against the appellant for dissolution of his marriage with her and the grant of a decree of divorce. In the alternative the first respondent prayed for a decree of judicial separation. His case was that he was married to the appellant on May 27, 1955, and the appellant lived with him for four years and a half. The parties last resided together and cohabited at Bareilly. A number of allegations of all kinds were made in the petition by the first respondent against the appellant; but it is unnecessary to refer to them, for the first respondent had to bring his case under one or other clause of s. 13 of the Hindu Marriage Act, No. 25 of 1955, (hereinafter referred to as the Act) if he wanted a decree of divorce, and under one or other clause of s. 10 if he wanted a decree of judicial separation. It is enough to say that the first respondent's case so far as the prayer for divorce was concerned was based upon cl. (i) of s. 13(1), namely, that the appellant was living in adultery, and in the alternative, on cl. (viii) of s. 13(1) read with s. 2 of the Hindu Marriage (Uttar Pradesh Sanshodhan) Adhiniyam No. XIII of 1962. As to judicial separation, the case apparently was based on cl. (b) of s. 10(1), namely, that the first respondent had been treated with cruelty within the meaning of that section, and also on cl. (f) of s. 10(1).

The appellant denied that she had been living in adultery. She also denied that she ever had sexual intercourse with Chandra Prakash Srivastava, who was made a co-respondent in the petition. She also denied that she was guilty of any cruelty as alleged. On these pleadings, two main issues arose, namely - (i) Whether the appellant had been living in adultery or had sexual intercourse with Chandra Prakash Srivastava after her marriage, and (ii) whether she had treated the first respondent with such cruelty as to bring the case within cl. (b) of s. 10(1). There were other issues as to jurisdiction and as to some property the return of which the first respondent was claiming, but we are not concerned with them now.

The trial court held that the appellant was not living in adultery. It also held that it was not proved beyond doubt that there was any sexual intercourse between the appellant and Chandra Prakash Srivastava at any time. It further held that even if there had been any sexual intercourse it had been condoned. Finally it held that no such cruelty as came within the meaning of s. 10(1)(b) had been proved. In consequence the petition was dismissed and the prayer for dissolution of marriage or in the alternative, for judicial separation, was refused.

The first respondent then went in appeal to the High Court. The High Court held that it had not been proved that the appellant had been living in adultery within the meaning of s. 13(1)(i) of the Act. An attempt was made by the first respondent to prove illicit intimacy between the appellant and Chandra Prakash Srivastava in May or June 1958, but that was not believed either by the trial court or by the High Court. But the High Court relying on two letters alleged to have been written by Chandra Prakash Srivastava to the appellant held that there had been sexual intercourse between the appellant and Chandra Prakash Srivastava in 1955. The High Court also held that there was no condonation by the first respondent of this adulterous intercourse. It was therefore of opinion that the first respondent would be entitled to claim judicial separation under s. 10(1)(f) of the Act. However, using the U.P. amendment to s. 13(1)(viii), the High Court held that this was a case where dissolution of marriage was necessary. The appeal therefore was allowed and dissolution of marriage was granted by the High Court. It may be added that on the question of cruelty, the High Court held that there was no such cruelty as might come within the meaning of s. 10(1)(b). Thereupon the appellant obtained special leave, and this is how the matter has come up before us.

Before we deal with the merits of the appeal, we may refer to an application (CMP No. 2935 of 1966) filed on behalf of the first respondent, in which he prays that the special leave granted to the appellant be revoked. The grounds taken for revocation of special leave are that the High Court granted divorce to the first respondent and ordered that its decree should take effect forthwith, with the result that the marriage between the appellant and the first respondent stood dissolved on January 7, 1964, when the High Court allowed the appeal. The special leave petition was presented in this Court on April 7, 1964 and the appellant did not convey to the first respondent that she was intending to challenge the decision of the High Court. She also did not pray for the stay of operation of the order of the High Court. The first respondent therefore believed that she had submitted to the order of the High Court and married another woman on July 2, 1964. Special leave was granted to the appellant by this Court on August 25, 1964, and it was only on September 9, 1964 when the first respondent got notice of the grant of special leave that he came to know that the judgment of the High Court was under appeal in this Court. In the meantime he had already married another woman and a son was born to that woman on May 20, 1965. The first respondent therefore contended that because of the negligence of the appellant in not informing him that she was applying to this Court for special leave, he had married again and his new wife had given birth to a son, and in consequence this Court should now revoke the special leave that was granted so that the new child might not become illegitimate.

The application has been opposed on behalf of the appellant and it is contended that it was no part of her duty to inform the first respondent that she was intending to apply to this Court for special leave. It was also contended that it was for the first respondent to make sure before marrying that no further steps had been taken by the appellant after the judgment of the High Court, and in this connection she relied on ss. 15 and 28 of the Act. In any case it is urged that the fact that the first respondent took the risk of marrying without making sure whether any further steps had been taken by the appellant was no ground for revocation of special leave. It was also pointed out that though the first respondent had been served as far back as September 9, 1964, he made the application for revocation of special leave only on September 15, 1966, when the appeal was ready for hearing.

We are of opinion that special leave cannot be revoked on grounds put forward on behalf of the first respondent. Section 28 of the Act inter alia provides that all decrees and orders made by the court in any proceedings under the Act may be appealed from under any law for the time being in force, as if they were decrees and orders of the court made in the exercise of its original civil jurisdiction. Section 15 provides that "when a marriage has been dissolved by a decree of divorce and there is no

right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again." These two sections make it clear that where a marriage has been dissolved, either party to the marriage can lawfully marry only when there is no right of appeal against the decree dissolving the marriage or, if there is such a right of appeal, the time for filing appeal has expired without an appeal having been presented, or if an appeal has been presented it has been dismissed. It is true that s. 15 does not in terms apply to a case of an application for special leave to this Court. Even so, we are of opinion that the party who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's decree take away from the losing party the chance of presenting an application for special leave. Even though s. 15 may not apply in terms and it may not have been unlawful for the first respondent to have married immediately after the High Court's decree, for no appeal as of right lies from the decree of the High Court to this Court in this matter, we still think that it was for the first respondent to make sure whether an application for special leave had been filed in this Court and he could not by marrying immediately after the High Court's decree deprive the appellant of the chance to present a special leave petition to this Court. If a person does so, he takes a risk and cannot ask this Court to revoke the special leave on this ground. We need not consider the question as to whether the child born to the new wife on May 20, 1965 would be legitimate or not, except to say that in such a situation s. 16 of the Act may come to the aid of the new child. We cannot therefore revoke the special leave on the grounds put forward on behalf of the first respondent and hereby dismiss his application for revocation of special leave.

Turning now to the merits of the appeal, we have already indicated that the High Court as well as the trial court are agreed that the appellant was not living in adultery at the time when the petition was filed. They are also agreed that there was no such cruelty as would bring the case within the meaning of s. 10(1)(b) of the Act. But the High Court found that there had been adultery between the appellant and Chandra Prakash in 1955 and the evidence for that consisted of two letters said to have been written by Chandra Prakash to the appellant. We cannot agree with this conclusion of the High Court. Chandra Prakash was married to a cousin of the appellant. He was therefore not a stranger to the appellant and his writing letters to her would not therefore be a matter of any surprise. We cannot also forgot that the appellant in her statement has denied on oath that she ever had illicit connection with Chandra Prakash. There is also no doubt that the attempt of the first respondent to prove that there had been illicit intimacy between the appellant and Chandra Prakash in May /June 1958 has failed and both the courts have disbelieved the evidence in this behalf. It is in this background that we have to examine the two letters on which reliance has been placed by the High Court, that being the only evidence in proof of adultery in 1955.

It is true that the appellant has denied receiving those letters and has also denied that she ever sent any letters to Chandra Prakash. One can understand this denial in the case of a person like the appellant who was facing a petition for divorce on the ground of adultery. But assuming that those two letters were received by the appellant, that does not in our opinion prove that there was any adultery between the appellant and Chandra Prakash in 1955. We have read those letters and we must say that they are most improper and should not have been written by a person like Chandra Prakash who was married to the cousin of the appellant. But the first thing that strikes us is that the mere fact that some male relation writes such letters to a married woman, does not necessarily prove that there was any illicit relationship between the writer of the letters and the married woman who received them. The matter may have been different if any letters of the appellant written to Chandra Prakash had been proved. Further there is intrinsic evidence in the letters themselves which shows that whatever might have been the feelings of Chandra Prakash towards the appellant, they were not

necessarily reciprocated by the appellant. In Ex. 2, Chandra Prakash wrote to the appellant, "You love me as you love others and this is why my share is very small. You writ me letters to satisfy your anger". This seems to suggest as if Chandra Prakash was getting no response from the appellant. Again in Ex. 3, Chandra Prakash wrote, "I know that you would be angry with me, but what can I do." This again suggests that Chandra Prakash was getting no response from the appellant. Further in both these letters Chandra Prakash conveyed his respects to the appellant's husband, and on the whole we are not satisfied that these letters indicate that there must have been sexual intercourse between the appellant and Chandra Prakash in 1955, which was the time when these letters were written. When we have the clear denial of the appellant to the effect that she never had any sexual intercourse with Chandra Prakash, we have no hesitation in accepting that denial, for there is nothing in these letters which would even suggest that the denial was false. Nor does the evidence of the first respondent, once the incident of May/June 1958 has been disbelieved, show anything from which it can be inferred that there was any illicit relation between the appellant and Chandra Prakash in 1955 or at any other time. We are therefore in agreement with the trial court that these letters do not show that there was any illicit relationship between the appellant and Chandra Prakash in 1955.

We are further of opinion that even assuming that these letters indicate that there was some illicit intimacy between the appellant and Chandra Prakash, the High Court was still in error in granting divorce under s. 13(1)(viii) as amended by the U.P. amendment. By the U.P. amendment, the following clause was substituted for cl. (viii) in the Act and was deemed always to have been substituted :-

> "(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and -
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> (a) a period of two years has elapsed since the passing of such decree, or
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> (b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party";

As we read this provision, it is clear that before a decree for divorce can be granted thereunder, there must first be a decree for judicial separation and thereafter under the amendment a decree for divorce will follow if one of two conditions is satisfied, namely that (i) a period of two years has elapsed, or (ii) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party. Sub-clause (b) in our opinion is not independent. That sub-clause only comes into operation after a decree of judicial separation has been passed. We cannot accept the contention that it is open to a court under the amended provision to grant a decree of divorce on the ground of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party, even without a decree of judicial separation having been first made. Sub-clause (b) can only apply after a decree for judicial separation has been passed and it is not open to a court to apply that clause and give a divorce forthwith as has been done in this case on the assumption that a decree of judicial separation could have been passed on the ground mentioned in s. 10(1)(f). We are clearly of opinion that the amended clause [namely, cl. (viii) of s. 13(1)] still requires first a decree of judicial separation and thereafter a decree of divorce may follow under cl. (b) without waiting for two years, which is the necessary period for the application of cl. (a). The High Court therefore was not right in passing the decree of divorce in this case forthwith under sub-cl. (b) of s. 13(1)(viii) as amended in U.P.

It has however been urged on behalf of the first respondent that we may now pass a decree of judicial separation instead of a decree of divorce passed by the High Court. We are of opinion that even that cannot be done in the present case. The only ground on which the decree of judicial separation can now be asked for is that mentioned in s. 10(1)(f), namely that the appellant had sexual inter-course with any person other than her husband after the marriage. The only allegation in that respect was that the appellant had sexual intercourse with Chandra Prakash in 1955, and that is sought to be proved by the two letters to which we have referred already. We have held that those letters do not prove that there was any sexual intercourse between the appellant and Chandra Prakash in 1955. Therefore, there is no ground even for a decree of judicial separation in favour of the first respondent.

Besides even if we were of opinion that there had been sexual intercourse between the appellant and Chandra Prakash in 1955 (which we have no doubt is not true) this would be a case of condonation under s. 23(1)(b) of the Act. Under that provision a decree of judicial separation cannot be passed under s. 10(1)(b), if it appears to the court that the petitioner has in any manner been accessory to or connived at or condoned the act or acts complained of. In his statement under O. X. r. 2 of the Code of Civil Procedure, the first respondent stated that it was in the month of June or July 1955 or 1956 that illicit relations of the appellant with Chandra Prakash were confirmed to him. According to that statement the first respondent knew even in 1955 or 1956 that there had been adultery between the appellant and Chandra Prakash. Even so, the first respondent continued to live with the appellant and a son was born to them in 1957. In his evidence the first respondent tried to resile from his statement made under O. X r. 2 and said that what he meant was that in 1955/1956 he entertained suspicion only. This explanation is of course untrue, for the words used in the statement under O. X r. 2 were that illicit relations between the appellant and Chandra Prakash were confirmed to him. Even in his evidence the first respondent stated that he was definite in May/June 1958 that there was illicit connection between the appellant and Chandra Prakash. It was admitted by the first respondent that he had sexual relations with the appellant right upto October 1958. It is only in February 1959 when the appellant came finally to live with the first respondent that he said that he had no sexual relations with her during her stay of fifteen days. He also admitted that even after May/June 1958 he was willing to keep the appellant at the instance of his friends.

Reliance in this connection is placed on Perry v. Perry ([1952] 1 All E.R. 1076.) as to the content of condonation, which involves forgiveness confirmed or made effective by reinstatement. That was however a case of desertion. It is urged that in order that forgiveness may be confirmed or made effective, something more than stray acts of cohabitation between husband and wife have to be proved. But where as in this case, judicial separation is being claimed on the ground of s. 10(1)(f), the fact that the husband cohabited with the wife even after the knowledge that she had been guilty of cohabiting with another person would in our opinion be sufficient to constitute condonation, particularly, as in this case, the first respondent knew of the alleged adultery in May/June 1958 and still continued to cohabit with the appellant thereafter upto October 1958. Further the statement of the first respondent to the effect that he kept his wife after May/June 1958 at the instance of his friends is a clear indication of condonation even in the sense of forgiveness confirmed or made effective by reinstatement. We are therefore of opinion that the first respondent is not even entitled to a decree of judicial separation.

We therefore allow the appeal, set aside the order of the High Court and restore that of the trial court rejecting the petition of the first respondent. The appellant will get her costs throughout from the first respondent.

V.P.S.

Appeal allowed.

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