

Smt. Rohini Kumari

Vs

Narendra Singh

Civil Appeal No. 35 of 1971

(K.S. Hegde, A.N. Grover JJ)

02.12.1971

JUDGMENT

GROVER, J. -

1. This is an appeal from the Judgment of the Allahabad High Court wherein special leave was granted limited to the question of law as to the interpretation of Section 10(1)(a) read with the Explanation of the Hindu Marriage Act, 1955, hereinafter called the 'Act'.
2. The undisputed facts are that the parties got married in 1945 and in February, 1947, the wife went to Alirajpur her parental home. She never returned thereafter. In 1953 the husband, who was a member of the Indian Foreign Service met a Dutch Lady - Countess Rita - while he was posted abroad. He married her only a day before the Act came into force. In August, 1955, the husband filed a petition in the Court of a Munsif for judicial separation under Section 10 of the Act on the ground of the wife's desertion. An ex parte decree was passed against the wife which was later on set aside. The wife also raised an objection that the Munsif had no jurisdiction to grant the decree. That objection was accepted and the plaint was returned for being presented to the proper court. In 1959 the husband divorced Countess Rita. The Trial Court delivered its judgment in July, 1964, allowing the husband's petition for judicial separation and granting a decree for that relief. The matter was taken in appeal to the first appellate court which affirmed the decision of the Trial Court. A second appeal was filed to the High Court by the wife which was heard by a learned single judge but he referred the same to a division bench. The division bench dismissed the appeal but directed the husband to pay Rs. 150/- per month to the wife by way of maintenance.
3. The concurrent findings of the Trial Court and the first appellate Court which were not questioned before the High Court were these :
  - (1) During her stay at Sarela (husband's home) the wife was provided with decent accommodation, wholesome food and all such amenities which were available at Sarela.
  - (2) It was wrong that she was given inhuman treatment at Sarela during her stay there and that she had developed heart trouble as a result of it as alleged by the wife.
  - (3) The wife had left Sarela for her parental home (Alirajpur) with the intention of permanently giving up her marital relation with the husband and not to return to Sarela or to her husband.
  - (4) The wife left her matrimonial home without any reasonable cause and without the consent of the husband and with the intention of bringing cohabitation to an end.

(5) The marriage of the husband with Countess Rita did not have any such impact on the mind of the wife that it caused her to continue to live apart and to continue the desertion.

4. Under Section 10(1)(a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner 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. The argument raised on behalf of the wife is that the husband had contracted a second marriage on May 17, 1955. The petition for judicial separation was filed on August 8, 1955, under the Act which came into force on May 18, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife has deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edition, Page 223 with regard to the elements of desertion. According to that statement for the offence of desertion there must be two elements present on the side of the deserting spouse, namely, the factum, i.e., physical separation and the animus deserendi, i.e. the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion" is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him.

5. In *Lachman Utamchand Kirpalani v. Meena alias Mota*, [(1964) 4 SCR 331 : AIR 1964 SC 40 : 66 Bom LR 297 : (1965) 1 SCA 310.] this Court had occasion to consider the true meaning and ambit of Section 10(1)(a) of the Act read with the Explanation. Reference was made in the majority judgment to the earlier decision in *Bipin Chander Jaisingbhai Shah v. Prabhawati*, [1956 SCR 838 : AIR 1957 SC 176.] in which all the English decisions as also the statement contained in authoritative text books were considered. After referring to the two essential conditions, namely, the factum of physical separation and the animus deserendi which meant the intention to bring the cohabitation permanently to an end as also the two elements so far as the deserted spouse was concerned i.e. (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the intention aforesaid, it was observed while examining how desertion might come to an end :

"In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial

home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse."

6. Now the sole question in the present case is whether during the statutory period of two years in terms of Section 10(1)(a) the husband had, by word or conduct, provided a just cause to his wife to desist from making any attempt at reconciliation or resuming cohabitation. Ordinarily the fact that he had married Countess Rita on May 17, 1955, would have furnished a just cause to the wife to desist from making any attempt at reconciliation or resuming cohabitation but this is subject to a very important condition, namely, that the second marriage should have had such an impact on the mind of the wife so as to cause her to continue to live apart and continue the desertion. If the conduct of the husband has had no such effect on her mind it cannot be said that the desertion on her part terminated by reason of the conduct of the husband. The finding of the courts including the High Court is that the marriage of the husband with Countess Rita did not have any such impact on the mind of the wife as is contemplated by law. This finding together with the other findings would conclude the matter because it is quite clear that within the meaning of the Explanation to Section 10(1)(a) the desertion by the wife had been proved without reasonable cause and without the consent or against the wish of the husband.

7. Although it is not necessary to go into the facts but we may recapitulate what has been proved, established or admitted. It was the wife who left her husband's home in 1947 and thereafter consistently refused to return to the husband notwithstanding the fact that she had been treated properly when she lived with him. The husband had been making persistent efforts to persuade the wife to return. After the husband joined the Foreign Service in August 1948 he was sent for training abroad to Cambridge where he remained till 1949. It is in evidence that while at Cambridge he wrote to his wife asking her to join him in England. In September, 1951 he was posted as Second Secretary to the Indian Embassy at the Hague in Holland. Even then the husband made efforts to persuade her to return to him. The husband sent a letter to the wife in October, 1953 saying that the existing state of affairs could not continue indefinitely and that she should resume cohabitation. She was asked to disclose the reasons for her persistent refusal to come and live with the husband. The wife sent a reply on April 17, 1954, through an Advocate. Amongst other things she wrote that despite everything she wished him happiness. She expressed a desire for her Stridhan including her household effects, jewellery and presents of the value of Rs. 90,000/- which had been left at Sarela to be returned to her and for arrangements to be made for her separate maintenance and residence. The High Court has pointed out that although by that time the wife was aware of the friendship between her husband and Countess Rita she never referred to that fact in her reply as a factor which would stand in her way to return to him. We have no doubt, therefore, that the High Court came to the correct conclusion that the subsequent marriage of the husband with Countess Rita in 1955 had no impact on the wife and she had left originally with the object of bringing cohabitation to an end and the desertion on her part continued throughout without any reasonable cause. As a matter of fact during the pendency of the petition for grant of certificate to appeal to this court filed by the wife an effort was made by the husband, who had divorced Countess Rita by that time, to receive the wife back provided she was willing to live with him. Her counsel informed the court that she was not agreeable to living with him as his wife.

8. Before the High Court reliance was placed on certain decisions of the Andhra Pradesh High Court in support of the contention that owing to the provisions contained in the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 as well as the Hindu Adoption and Maintenance Act, 1956 desertion could not be described as one without reasonable cause if the husband had married again since that marriage afforded justifiable cause to the wife to live apart from the husband.

9. In *Sirigiri Pullaiah v. Sirigiri Rushingamma*, [AIR 1963 AP 323 1962 Andh WR 452.] it was held that the effect of the two aforesaid Acts was that a wife was entitled to claim separate maintenance and residence from her husband if he should marry again. If the wife could claim maintenance on the ground that the husband had remarried it could not be said that she had deserted her husband without reasonable cause within the meaning of Section 10(1)(a) of the Act. In that case a petition had been filed for judicial separation under Section 10(1)(a) of the Act. The husband had taken a second wife and she was entitled to live separately and claim maintenance. The husband, therefore, could not claim judicial separation on the ground of desertion. The husband had taken second wife several years before starting proceedings under the Act and some times after the wife had obtained a decree for maintenance. The High Court was of the view that the second marriage of the husband was a good ground for the first wife to live separately and that was a justifiable reason for doing so. There would thus be no scope for the argument that desertion was without reasonable cause within the meaning of Section 10(1)(a) of the Act. The Madras High Court, however, in *A. Annamalai Mudaliar v. Perumayee Ammal and Others*, [AIR 1965 Mad 139 : ILR (1964) 1 Mad 845 : 77 MAD LW 548 : (1965) 1 Mad LJ 122.] expressed the opinion that the right to live separately from the husband given to the wife under Section 18(2)(d) of the Hindu Adoptions and Maintenance Act, 1956 could not be the same as a right of judicial separation under Section 10(2) of the Act. The true principle behind Section 18(2) was that it should be open to the wife to claim to live separately from her husband in case he had got another wife living when the wife did not want to seek divorce or judicial separation. In the judgment under appeal it has been pointed out that desertion within the meaning of Section 10(1)(a) of the Act read with the Explanation does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Without animus deserendi there can be no desertion within the meaning of Section 10(1)(a). The consideration that in case the husband remarries, the wife is entitled to separate residence and maintenance under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 or any other enactment could not be utilised as a reason for coming to the conclusion that the fact of the remarriage of the husband must necessarily afford a reasonable cause for desertion.

10. In our judgment the view of the Allahabad High Court in the present case must be upheld. The preamble of the Act describes it as one to amend and codify the law relating to marriage among Hindus. It is well known that when a particular branch of law is codified it is intended and the object essentially is that on any matter specifically dealt with by that law it should be sought for in the codified enactment alone when any question arises relating to that matter. Ordinarily when it has been expressly stated that an enactment is meant for codifying the law the court is not at liberty to look to any other law. The Act not only amends but also codifies the law of marriage and it has made fundamental and material changes in the prior law. Section 4 of the Act gives overriding effect to its provisions. Therefore unless in any other enactment there is a provision which abrogates any provision of the Act or repeals it expressly or by necessary implication the provisions of the Act alone will be applicable to matters dealt with or covered by the same. Sections 9 and 10 of the Act provide for restitution of conjugal rights and judicial separation. Section 10 deals with judicial separation and once a decree for judicial separation has been granted a decree for dissolution of

marriage can be passed under Section 13(1-A) provided there has been no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of the decree for judicial separation. It may be mentioned that Section 13 gives several grounds for dissolution of marriage by a decree of divorce and one of the grounds is the one contained in sub-section (1-A) of that section. The Hindu Adoptions and Maintenance Act, 1956, hereinafter called the 'Maintenance Act' also amended and codified the law relating to adoptions and maintenance among Hindus. Section 18(2) provides, inter alia, that the Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or of wilfully neglecting her or if he has any other wife living. Indeed the last clause (g) of Section 18(2) is very general, i.e. if there is any other cause justifying her living separately. Section 10 of the Act and Section 18 of the Maintenance Act are quite distinct and one cannot be said to control the other. The former provision deals with the matrimonial offences by either spouse which would justify the grant of a decree for judicial separation. Section 18 provides for grant of maintenance to wife alone. Sub-section (1) says that a Hindu wife shall be entitled to be maintained by her husband during her lifetime. Sub-section (2) gives her a right to live separately from her husband without forfeiting her claim to maintenance provided any of the conditions mentioned in clauses (a) to (g) exist or are specified. The essential ingredient of desertion, animus deserendi i.e. intention on the part of the deserting spouse to remain separated permanently or to bring cohabitation to an end for ever need not exist in case of a wife who has been given the right to live separately in certain circumstances without forfeiting her claim to maintenance. The Act and Maintenance Act provide different remedies to a wife whose husband has been guilty of desertion. Under the Act she can sue for judicial separation if the conditions laid down in Section 10(1)(a) of the Act read with the Explanation are satisfied. She can without resorting to that remedy choose to live separately from her husband who would be bound to maintain her if it is provided that he has been guilty of desertion and the other conditions laid down in Section 10(2)(a) are satisfied. It is significant that under Section 13(2) of the Act a wife may present a petition for dissolution of marriage by a decree of divorce on the ground that the husband had married again before the commencement of the Act or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner. But this can be done only if the marriage with the petitioner was also solemnized before the commencement of the Act. For instance in the present case the wife could have asked for dissolution of her marriage under the aforesaid provisions because the marriage of the husband with Countess Rita was performed before the Act came into force. If she, however, did not choose to resort to that remedy she could decide to live separately under Section 18(2)(d) of the Maintenance Act. This shows the sharp contrast in the provisions of the two enactments. When the wife chooses to live separately under Section 18(2)(d) in the circumstances mentioned before she would be entitled to maintenance from the husband. He could not compel her to return to him so long as his marriage with the other wife is not dissolved but if that marriage is dissolved the husband can call upon the wife to return to him and if she does not return it is very doubtful if she can still claim maintenance from him under Section 18 of the Maintenance Act. However, this is a matter on which we need express no final opinion. All that we concerned with, in the present case, is whether the provisions of Section 18(2) of the Maintenance Act can affect the matters provided for by Section 10 of the Act. It is quite obvious that Section 18 of the Maintenance Act does not amend or abrogate the provisions of Section 10 of the Act which alone must be looked at for the purpose of disposing of the appeal before us. We have no hesitation, therefore, in upholding the view of the High Court with the result that the appeal fails and it is dismissed. The parties are left to bear their own costs in this Court.

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