

ANDHRA PRADESH HIGH COURT

Sirigiri Pullaiah

Vs

Sirigiri Rushingamma

(P Chandra Reddy, Kumarayya)

15.02.1962

JUDGMENT

P. Chandra Reddy, C.J.

1. This is an appeal against the order of the Additional District Judge, Anantapur, dismissing a husband's petition under Section 13 (1) (i) and Section 10 (1) (a) of the Hindu Marriage Act for dissolution of marriage between the appellant and the respondent, or In the alternative for a decree for judicial separation.

2. The appellant, who was the petitioner In the lower Court, and the respondent were married in or about the year 1943. They lived happily, for three years. It appears from the petition that, subsequently, the wife deserted the petitioner to lead a life of immorality and that, in fact, she had been living in adultery with one Sivayya: Originally, the petition was one under Section 13 (1) (i). But after the trial of the case had begun and three witnesses were examined, the appellant sought the permission of the Court to amend the petition claiming relief of judicial separation under Section 10 (1) (a) of the Hindu Marriage Act. It was alleged in the petition for amendment that the respondent left the appellant three years after the marriage and that, in spite of several notices, she refused to go back to him. The appellant was allowed to amend the petition as prayed for.

3. The petition was resisted by the wife on several grounds, the chief of which was that as the appellant had taken a second wife she was entitled to live separately from him and to claim separate maintenance and that the husband could not claim judicial separation on the ground of desertion. She also refuted the charge of immorality.

4. The Trial Court dismissed the petition expressing the opinion that the appellant had not proved either that the respondent had lived in adultery at any time with any on# or much less that she was living in adultery on the date of the petition and that, secondly, as the husband had married again, the wife was entitled to live separately from her husband and therefore, she could not be

said to have deserted her husband.

5. The aggrieved husband has preferred this appeal. The only contention urged in support of this appeal by Sri Rajeswara Rao, learned counsel for the appellant is that as the second marriage took place in year 1954, which the first wife deserted him in or about 1948, the period of two years contemplated by Section 10 (1) (a) was completed and consequently, it was not open to the wife to plead the second marriage in defence to a petition for judicial separation or for dissolution of marriage. We do not think that effect can be given to this argument. Undisputably, a wife is entitled to claim separate residence and maintenance from her husband, if he should marry again. This is the effect of the Hindu Married Women's Right to Separate Residence and Maintenance Act (Act 19 of 1946) as also the Hindu Adoptions and Maintenance Act, 1956. In fact, in this case, the wife presented a petition for maintenance on the strength of the Hindu Married Women's Right to Separate Residence and Maintenance Act and we are told that a decree was granted for maintenance.

6. Now, if the wife could claim maintenance on the ground of the husband having taken a second wife, could it be posited that she had deserted her husband without reasonable cause within the ambit of Section 10 (1) (a) of the Act? Obviously, desertion could not be described as one without reasonable cause, if the husband had married again, since that marriage would afford a justifiable cause to the wife to live away from her husband.

7. First of all, it has not been established that the second marriage took place more than two years after the wife had left off her husband. There is no cogent and definite evidence as to the time of desertion or as to the time of the second marriage. Assuming that the desertion took place in or about the year 1948, is there any positive testimony to the date when the appellant took the second wife. While the appellant asserted in the witness-box that he married a second wife five years before, P.W. 5 stated that the appellant married another wife about ten years before he gave evidence. If this statement of P.W. 5 is correct, the second marriage dates back to 1949 and that will be within two years of alleged desertion. If that were so, the appellant cannot put forward a plea that the wife was not entitled to plead Section 18 of the Hindu Adoptions and Maintenance Act in bar of the petition for judicial separation or for divorce. Even otherwise, we are not satisfied that the contention of the appellant is substantial. It should be borne in mind that it is open to the deserting spouse to take advantage of *Locus Poenitentiae* provided by law and to resolve to go back to her husband within two years of desertion or even after the expiry of two years, unless proceedings for divorce or for judicial separation have been initiated. In this context, we may usefully extract the observations of Sinha, J. (as he then was) in *Bipin Chander Jaisinghbhai Shah v. Prabhavati*, . His Lordship observed at p. 852 (of SCR): (at p. 184 of AIR) thus:

"Hence, if a deserting spouse takes advantage of the Locus Pcenitentiae thus provided by law and decides to come back to the deserted spouse by a Bona Fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former."

8. in this case, the appellant had taken a second wife several years before starting proceedings, under the Hindu Marriage Act and sometime after the respondent Obtained a decree for maintenance. It is interesting to note that even in the evidence given by him in these proceedings, he stated that he was willing to live with his wife notwithstanding her having lived as the concubine of Siddayya, thereby Indicating that his one anxiety was to avoid payment of maintenance. Be that as it may, the appellant's second marriage has enabled his first wife to live separately from her husband without forfeiting her claim to maintenance. In other words, there is a justifiable ground for her to live separately from her husband and claim maintenance. If that were the legal position, there would be no scope for the argument that desertion was without reasonable cause within the meaning of Section 10 (1) (a) of the Act.

9. This view of ours is reinforced by a judgment of this Court in Veeraiali v. Nagaiah, (FB). It was laid down by the Full Bench that the second marriage of the husband could entitle the wife to resist the claim for restitution of conjugal rights on the ground that the husband had married another wife before the Act. The principle of that ruling applies with full vigour to the instant case. The fact that in the cited case the claim of the husband was for restitution of conjugal rights does not make much difference, since the principle is the same, namely, the wife could claim separate residence and maintenance from the husband If he should marry again. If it were conceded that she could do it, then that would afford a ground for her to leave her husband without clothing the husband with a right to claim judicial separation on the basis of desertion. For these reasons, we are in agreement with the conclusion of the Trial Court that the appellant could not maintain a petition either under Section 13 or under Section 10 of the Hindu Marriage Act

10. In the result, the appeal is dismissed with costs.

