

# RAJASTHAN HIGH COURT

Pawan Kumar

Vs.

Smt. Mukesh Kumari

Civil Misc. Appeal No. 1747 of 1999

(J.C. Verma, J.)

31.07.2000

## ORDER

**J.C. Verma, J.**

1. This Civil Misc. Appeal is directed by the husband Pawan Kumar against the respondent Smt. Mukesh Kumari against the order dated 15.12.1999 whereby the application of divorce filed under Section 12(1)(d) of the Hindu Marriage Act for declaring the marriage to be null and void has been rejected by the Additional District Judge, Bayana (Bharatpur).

2. The facts are that the marriage between the parties had taken place in accordance with the Hindu rites on 3.6.1990 and after two days of the marriage, the respondent wife left for her parents' house. It is the allegation that after 4-1/2 months of the marriage on 19.11.1990, a male child was born to the respondent and, therefore, the appellant alleged that at the time of marriage the respondent was pregnant from some other person with whom she must have had the sexual relations. On being asked of the fact, the respondent is said to have admitted that she was pregnant at the time of marriage from some other person but she refused to tell the name. The petition was filed on the ground that the marriage had been effected with fraud knowing well that the respondent was pregnant at the time of marriage with 4-1/2 months pregnancy and had this fact been made known to the appellant husband, he would not have married such lady and that the husband and his family had been let down in the society. The families of both the parties had met and discussed this issue. It is stated that the mistake was accepted and also apology was tendered in writing. The parents of the respondents took away the respondent along with newly born child, jewellery and all other cloths etc. on 22.11.1990 i.e. after three days of the birth of the child and ever

since neither the parties nor the families had any relation. It was further alleged that because of such conduct of the respondent the appellant had suffered the mental agony, social humiliation which is still continuing.

3. The allegations as stated were denied in to. On the pleadings of the parties, as many as seven issues were framed. The first issue related to the factum of marriage on 30.6.1990. The second issue related to the birth of the child on 19.11.1990. The third issue related to the fact whether the marriage had been performed by fraud. The 4th issue related to the fact whether the respondent and her father had given in writing on 22.11.1990 and taken away the respondent and the child and the material and other articles. The 5th issue related whether the respondent is staying separately from the appellant since 22.11.1990. The 6th issue related to the fact whether the mental agony and social humiliation has been caused and still continued to the appellant.

4. An objection was raised by the respondent that the application has not been made within time and, therefore, was likely to be dismissed which was framed as issue No. 6-A. The trial Court on evidence had come to a finding that the marriage had been performed as alleged on 30.6.1990. On issue No. 2 after going through the medical record of the hospital i.e. the discharge slip of the General Hospital, Bharatpur, it was found that the child was born on 19.11.1990 and the respondent was discharged on 21.11.1990. A writing between the parties Ex. P1 also throws light of the statement immediately after the birth of the child.

5. After going through the evidence of the appellant AW-1, Chandan Singh AW- 2, Puran Singh AW-3, Nanga Ram AW-4, Mahesh Chand AW-5, Basant Ram AW-6 and the statement of the respondent Smt. Mukesh Kumari NAD-1, Mool Chand NAD-2 a relative of Mukesh Kumari and other evidence on record, issue Nos. 1 and 6 were decided in favor of the appellant husband. On issue No. 6 on the point of limitation, there is a statutory provision that if the wife is pregnant at the time of marriage, the application is maintainable only within one year of the marriage. Despite the fact that all other material issues were decided in favor of the appellant, but because of the reason that the application itself was moved on 31.1.1997 instead of within one year, the trial court had dismissed the application as non-maintainable for the reason that the application was not filed within one year of the marriage as required under Section 12. Being aggrieved the husband had filed the present civil misc. appeal.

6. The view as taken by the trial Court is confirmed also in the case of *Nanikaram Gellaram v. Smt. Drupadiben*,<sup>1</sup>

7. Notice was issued and despite the notice having been served on 22.2.2000 the respondent had not chosen to appear or defend the case.

8. So far the legal position is concerned, no doubt there is a statutory limitation to entertain the application for annulment of marriage if the application is not presented within a period of one year from the date of marriage, but the counsel for the appellant states that in view of peculiar circumstances of the case and in view of the fact that they had hardly lived together for a day or two as per the finding and also as per the finding the respondent was pregnant at the time of marriage and the parties had settled between themselves to live together and writing to this effect was also effected and also in view of the fact that if a fresh petition is filed on the same grounds, the similar evidence will have to be led by the parties, the divorce application be converted under Section 13 of the Hindu Marriage Act on cruelty.

9. In my opinion, in the circumstances of the case and also for the reason that the defendant has not chosen in the High Court to defend the case and for the established circumstances as mentioned below:

- (1) that the marriage was performed as per the Hindu rites on 30.6.1990;
- (2) a male child was born just after 4-1/2 months in the Government Hospital;
- (3) within three days of the birth of the child, the wife had gone to her parents along with the child in November, 1990;
- (4) that ever since the parties are not living together for last 10 years and have no contacts;
- (5) at the time of leaving the husband's house a writing was also made between the parties which has been exhibited on record to this effect that the marriage has broken almost immediately after the marriage and it is not possible for the parties to live together and that in view of the age of husband, it shall be appropriate that instead of annulling the marriage as void in not having been filed within the stipulated period, it shall be appropriate for both the parties that the marriage be dissolved by way of decree of divorce on the point of cruelty and the mental agony the appellant must have undergone in the circumstances as mentioned above.

10. For the reasons mentioned above I accept the misc. appeal and convert the decree into Section 13 of the Hindu Marriage Act and dissolve the marriage by way of divorce under Section 23 of the HM Act. No order as to costs.

Appeal allowed.

Cases Referred.

1. AIR 1974 Guj 111