RAJASTHAN H IGH COURT

Saraswati

Vs.

Gopal

C.M.A. No. 367 of 2006
(Prakash Tatia, J.)

13.09.2006

JUDGEMENT

Prakash Tatia, J.

1. Heard learned counsel for the parties.

2. This appeal is against the judgment and decree dated 19-9-1994 by which the District Judge, Bikaner in Petition No. 111/1990 allowed the respondent's application filed under Section 12 (1) (b) and Section 13 (1) (iii) of the Hindu Marriage Act, 1955 (for short 'the Act of 1955') and granted divorce decree.

3. Brief facts of the case are that the marriage of the appellant and respondent was solemnized on 12-5-1986. Out of the wedlock, a daughter was born after about 18 months. The respondent husband's allegation in the divorce petition was that the appellant was suffering from the disease - epilepsy. She was sick since before her marriage and the appellant's parents got the appellant married with the respondent by suppressing this fact. It is submitted that on the day one, when the appellant came to the house of the respondent, there was attack of epilepsy and she fell down and all symptoms of epilepsy were apparent from the body of the appellant. The respondent subsequently found that the appellant was suffering from the said disease since the age of 7 years. Be it as it may be, the respondent tried to give treatment to the appellant firstly in Ayurvedic Hospital - Dhanwantri Aushadalaya where Vaidhya Dayaldas was there. However, he could not cure the disease. Thereafter, the appellant was given treatment in the Government Hospital - P.B.M. Hospital, Bikaner. There Dr. Advani gave treatment to the appellant in the year 1987-1988 but the appellant's ailment continued and there was no possibility of the appellant's recovery, therefore, the

respondent called the appellant's father and he was apprised of all the facts and thereupon the appellant's father took the appellant with him on 16-5-1988. It is submitted by the respondent, that since 16-5-1988, the appellant is residing with her parents. The divorce petition was filed on 23-7-1990.

4. The appellant submitted reply to the divorce petition. The appellant stated that she was turned out by the respondent on 3-2-1988. She stated that neither she was sick nor she is sick. She was neither given treatment for any disease like epilepsy or insanity. She was never given treatment by Vaidhya Dayaldas in Ayurvedic Hospital. It is also pleaded that the application has been filed after inordinate delay, therefore, the application may be dismissed and the appellant is ready to live with the respondent.

5. The trial Court framed the issue whether the appellant is suffering from the disease of epilepsy and, therefore, the respondent is entitled to get the marriage declared null and void under Section 12 (1) (c) of the Act of 1955 which provides that in case of fulfillment of conditions as given under Section 5 of the Act of 1955, the marriage can be declared void. Another issue framed by the trial Court was whether the effect of epilepsy is frequent and, therefore, the respondent is entitled for decree of divorce. Issue No. 3 is on the plea of the respondent that whether from 16-5-1988, the appellant is living separately from the respondent.

6. In the trial Court, the respondent gave his statement in support of his petition and produced witness PW2 Salim who is milkman and used to go to the house of the appellant and respondent who stated that he saw the appellant suffering from epilepsy which he observed from the symptoms. PW3 Narendra Kumar Trivedi was compounder in the Hospital at Bikaner where according to the respondent, the appellant was given treatment. PW4 Narayan Das is father of the respondent who also gave his statement about the physical condition of the appellant. PW5 Hanuman Vishnoi is neighbour of the respondent, PW6 Dayaldas was Vaidhya at the relevant time who, according to the respondent, gave treatment to the appellant for treatment of epilepsy. PW7 Dr. B. Advani, who was appointed as Professor and Psychiatrist in SMS Medical College, Jaipur and at the relevant time, he was posted as Professor in PBM Hospital, Bikaner, stated that he gave treatment to the appellant for disease of epilepsy.

7. The appellant gave her statement denying allegation of disease and produced

witness NAW2 Mansukh Das who is father of the appellant, NAW3 Gopal and NAW4 Shanker Lal who both were neighbors of the appellant.

8. The trial Court held that from the evidence of PW6 Vaidhya Dayaldas, PW7 Dr. B. Advani and PW3 Narendra Kumar, compounder, and in view of the oral evidence produced by the witnesses of the respondent, it is proved that the appellant was suffering from the disease of epilepsy. The trial Court rejected the contention of the appellant that she was not sick and she even joined the service after she was turned out by the respondent. The trial Court also held that the appellant was taken away by the appellant's father and thereafter, she is residing without any objection with her parents and thereby she deserted the respondent. The trial Court's divorce decree dated 19-9-1994 is under challenge in this appeal.

9. It appears that initially, the appeal was admitted and subsequently dismissed on the ground of bar of limitation. By order of this Court dated 3-5-1996, the appellant preferred appeal against the said order of this Court, upon which the appellant's appeal being D.B. Civil Special Appeal No. 69/1996 was allowed on 13-9-2004 and the matter was remanded for deciding on merits. It appears that in place of filing Misc. appeal, regular first appeal was filed by the appellant which was got converted into Misc. appeal by leave of the Court dated 26-2-2006.

10. According to learned counsel for the appellant, the burden was upon the respondent to prove necessary ingredients for disease epilepsy. It is also submitted that even for desertion, for which, according to learned counsel for the appellant, there was no ground in the original divorce petition, the trial Court granted decree.

11. According to learned counsel for the appellant, the Hon'ble Apex Court held in the case of *Lachman Utamchand Kirpalani v. Meena, reported in* [1]that to prove desertion, the applicant is required to plead and prove the necessary facts in relation to the deserting wife/spouse with clear intention not to live with the applicant. The same view has been taken in subsequent judgments of the Hon'ble Supreme Court in the following cases relied upon by learned counsel for the appellant; (1) *R. Lakshmi Narayan v. Santhi, reported in* [2] (2) *Chetan Dass v. Kamla Devi, reported in* [3] *Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi, reported in* [4]

12. According to learned counsel for the appellant, the Hon'ble Supreme Court in the

case of Chetan Dass (supra) also held that wrongdoer cannot take benefit of his wrong in the matrimonial proceedings. According to learned counsel for the appellant, in this case, it is clear that the respondent himself turned out the appellant and even gave a notice to the appellant asking her to get herself medically examined and get the certificate of doctor that she is not sick and thereafter only she can come to the house of appellant (respondent). This clearly shows that the appellant was turned out by the respondent himself. Learned counsel for the appellant also pointed out that in the cross-examination, the respondent clearly admitted in the first instance that he turned out the appellant, however, he corrected this in the same line that he did not turned out but the appellant's father took away the appellant. It is also submitted that even for allegation of mental disorder, there is no evidence available on the record apart from the fact that there are no sufficient pleadings. In support of this contention, learned counsel for the appellant relied upon the judgment in Santhi's case, AIR 2001 Supreme Court 2110 (supra). Learned counsel for the appellant also referred oral evidence and pointed out that the evidence produced by the respondent in support of his divorce petition nowhere proves that the appellant was and is suffering from epilepsy or any such disease which can be said to be mental disease making the appellant and respondent's living together impossible. Learned counsel for the appellant pointed out that alleged Vaidhya Dayaldas in his cross-examination clearly admitted that he had no record and even then, he issued certificate Ex.5 for the treatment which according to him was given to the appellant in the year 1986 whereas the certificate was issued in the year 1992. It is pointed out that PW6 Dayaldas clearly admitted that he could not diagnose the disease of the appellant, therefore, in fact, the statement of Dayaldas is of no use so far as the alleged disease of appellant is concerned. Learned counsel for the appellant further submitted that the respondent produced witness Dr. B. Advani. He tried to prove Exhibits 1, 2, 3 and 4 and admittedly, on these prescription slips, there is a mention of name of one Saraswati but from above documents, the appellant cannot be connected. It is also submitted that the prescriptions are of the period 1987 and the doctor himself could not have remembered who was the patient. Therefore, Ex. 1 to Ex. 4 cannot be identified with the appellant. In view of the above, it is clear that the Court below committed error of fact as well as error of law in relying upon such weak evidence to declare the appellant sick and suffering from epilepsy.

13. Learned counsel for the respondent submitted that the Court below gave cogent reasons for passing the decree for divorce in a matter where marriage was solemnized

in the year 1986 and admittedly, the appellant-wife is not living with the respondent-husband since 1988. It is also submitted that the Court below decided the case on the basis of evidence and the respondent's witnesses are trustworthy as well as independent witnesses. It is also submitted that epilepsy is such type of disease which can be noticed by any person and, therefore, the respondent produced evidence to show the effect of epilepsy upon the appellant. The oral evidence is fully corroborated by the medical evidence of the doctor and the doctor's evidence finds support from the documentary evidence namely, prescription slips. It is also submitted that otherwise also, it is clear from the statement of the appellant herself that she was given notice by the respondent before filing divorce petition stating therein that she should get herself medically examined and she did not produce any medical certificate from any doctor to prove that she is not suffering from epilepsy. It is also submitted that the appellant could have controverted the medical evidence by producing the medical evidence by producing the doctor but she did not produce any medical report of her fitness nor produced any doctor. Learned counsel for the respondent also submitted that in all preponderance of probabilities, it is clear that the appellant started living separately from the respondent and there is no other allegation and any reason because of which the two parties are living separate. In these circumstances, the animus and intention of the appellant not to live with the respondent is established and the trial Court has decreed the divorce petition, therefore, the appellate Court should not interfere in such matter where the parties are living separately since last almost 20 years.

14. I considered the submissions of learned counsel for the parties and perused the record.

15. It is clear from the pleadings of the parties that there are no wild and bald allegations against each other. The only ground in the divorce petition is of sickness of the appellant and that is epilepsy. The respondent's case is that he noticed the ailment of the appellant from the day one i.e. from the date of marriage as on the same day, the appellant fell down and gave all the symptoms of epilepsy. The respondent's father also gave his statement in support of the respondent. The respondent neighbor as well as PW2 Salim who normally could have reason to go to the house of the appellant and respondent also stated that they saw the appellant suffering from epilepsy. These oral statements find support from witness Dr. B. Advani who was Professor of Psychiatry in PBM Hospital, Bikaner. Dr. Advani appears to be an independent witness and he gave his statement on the basis of medical prescriptions Ex. 1 to Ex.4. It is true that on

these prescriptions, the husband's name of said Saraswati is not mentioned. The doctor proved that these prescriptions disclose that the treatment was given for epilepsy and the person for whom these prescriptions were issued, was suffering from epilepsy since long, before the treatment was started by Dr. Advani. It appears from the medical prescriptions Ex. 1 to Ex. 4 that these medical prescriptions contain the handwriting of not only Dr. Advani but also one of the House Surgeon. The respondent's statement is in relation to these prescriptions as the respondent in his statement clearly stated that how and from whom the appellant was given treatment when the appellant was living with the respondent. The appellant cross-examined the respondent thoroughly but nothing came out from the cross- examination of the respondent which can caste any doubt on the credibility of the respondent.

16. At this juncture, it will be worthwhile to mention here that the admitted fact is that the husband and wife both are living separately since 1988 and there is no other litigation or reason for living separately as per the pleadings of both the parties. Even if the case of the appellant is examined, then according to her also, she was turned out by the husband and she did not give any reason why she was turned out by the husband when there was no dispute between both of them except allegation of appellant suffering from epilepsy. There is no allegation of demand of dowry or torture, manhandling or giving beating or even development of bad relations between the family of the appellant and respondent. This fact cannot be ignored that before filing divorce petition, the respondent gave notice to the appellant as admitted by the respondent and therein also he demanded medical examination of the appellant. Therefore, only reason of two living separately is the allegation of disease of epilepsy. In these facts, particularly not taking any defense by the appellant and there is no reason to disbelieve the respondent whose statement found support from the evidence of a doctor with a status of Professor apart from other witnesses, I do not find that the Court committed any error of law in relying upon the evidence of Dr. Advani as well as oral evidence in proof of disease of epilepsy. It is true that the evidence of Vaidhya Dayaldas is of no use as he himself admitted that he could not diagnose the disease. The evidence of the compounder of the hospital is also corroborative evidence and cannot be discarded because of any reason.

17. It will be worthwhile to consider the evidence of the appellant. In her examination-in-chief, she only state that she was not sick and she is not sick. She was confronted

with the allegations and in cross-examination, she stated that she even joined the service of teacher in the year 1992-1993 but it will be worthwhile to mention here that she did not produce any proof in support of said contention and she could not furnish any ground as to why any efforts were not made by herself or her father or other family members for sending the appellant back to the house of the respondent. Further, it will be relevant to mention here that the appellant's father also clearly stated that they made no efforts for sending the appellant to the house of the respondent in 6-7 years' period. The appellant's father stated that he had no knowledge whether the appellant received any notice from the husband for her medical examination or not. It appears that much has been suppressed by the appellant's father in his statement and he only stated in his examination-in- chief that the appellant was not sick and she is not suffering from epilepsy. The appellant herself stated that she is ready to get herself examined from the doctor but failed to give any reason as to why she did not get her medical check up and did not produce the medical certificate and did not produce any doctor. It is true that the Court can direct the parties to get himself and/or herself examined from the doctor but in a case where parties are living separately since last more than 20 years and no efforts have been made by the appellant before the trial Court for producing evidence or seeking permission from the Court to get herself medically examined. I do not find that now the appellant can be permitted to produce evidence at this stage.

18. It will be worthwhile to consider the statements of the appellant's witnesses. NAW3 Gopal stated that he is knowing the appellant since she was of the age of 10 years. In cross-examination, he stated that he did not attend the marriage of the appellant and he did not enquire why the appellant is not living with her husband. He also stated that he has no knowledge when the appellant married. Virtually he is knowing nothing about the appellant and her family. Another witness NAW 4 Shanker Lal produced by the appellant is also of the same type who stated that he is residing near the house of the appellant but in cross-examination, he admitted that he never had any talk with the appellant or her family members. He clearly admitted in his cross-examination that he did not ask what for, the case was filed. He clearly admitted that he even had no talk with the appellant's father about the allegations of epilepsy of the appellant. It appears that two witnesses were produced by the appellant only to increase the number of witnesses.

19. In view of the above, if the Court below also held that the appellant herself left the

house of the respondent, the Court below has committed any error of law.

20. It will be worthwhile to mention here that the word "epilepsy" has been deleted from Clause (c) of sub-section (ii) of Section 5 of the Act of 1955 with effect from 2-12-1999 by the Act 39 of 1999.

21. Learned counsel for the appellant tried to submit that in view of the said deletion, the ground for grant of decree does not survive. It is submitted that the appeal is continuation of suit and, therefore, in view of the judgment of the Hon'ble Apex Court delivered in the case of *Dilip v. Mohd. Azizul Haq and another, reported in* [5] it is nothing but rehearing of the suit itself and, therefore, the appellate Court is entitled to take into account facts and events which came into existence after passing of the decree appealed against. The Hon'ble Apex Court also held that if a new enactment comes into force during the pendency of the appeal, the appellate Court can mould the relief by applying the new enactment.

22. It is clear from the facts of the present case that when the divorce petition was filed by the respondent, recurrent attacks of epilepsy was a ground for getting the marriage declared void as per Clause (c) of sub-section (ii) of Section 5 read with Section 12 (1) (b) of the Act of 1955. In this case, the facts reveal that there was allegation of epilepsy against the appellant and the appellant's entire case is that she was turned out by the respondent-husband with the allegation of sickness of epilepsy and thereafter she was not allowed by the respondent to come back. Said contention of the appellant was not accepted by the Court below and this Court, therefore, it is now academic issue whether the deletion of word "epilepsy" from Clause (c) of sub-section (ii) of Section 5 of the Act of 1955 has any effect in the present case because the divorce decree has been upheld on the ground of desertion also.

23. In view of the above, it is not necessary to decide the issue whether the deletion of word "epilepsy" from Clause (c) of sub-section (ii) of Section 5 of the Act of 1955 has any effect in the present case or not.

24. Learned counsel for the appellant lastly tried to submit that the trial Court awarded maintenance to the appellant by order dated 14-1-1991. Against the said order of maintenance, the appellant has not been paid the maintenance. According to learned

counsel for the appellant, the divorce petition of the respondent should have been dismissed by the trial Court for non-payment of maintenance amount. It is not clear how much maintenance has been paid and how much has not been paid.

25. It is true that the appellant should have been paid the maintenance amount by the respondent in compliance of the order of the Court if not paid but the record reveals that since 1991, the appellant participated in the proceedings before the trial Court for three years and it is not clear that how much maintenance amount has been paid and how much has not been paid. The fact remains that even after 1994 when the trial Court decided the divorce petition and the appellant preferred appeal, she did not pray for maintenance from this Court for almost about 12 years. Despite the alleged non-payment of maintenance, the appeal was preferred. It was contested before Single Bench of this Court and thereafter before Division Bench of this Court and again after remand before the Single Bench and with the help and full assistance of the advocate. I do not find that on such vague allegation, the decree granted by the trial Court can be reversed.

26. So far as the appellant's right to maintenance is concerned, for that facts are not available on the record because of the reason that even the order dated 14-1-1991 has not been passed in the main divorce petition by the trial Court. The appellant did not claim maintenance since 1994 is an admitted position. The financial position of both the parties are not available and cannot be examined. If the appellant is entitled for more or less maintenance amount than Rs. 250/- awarded in the year 1991, the appellant can move proper application under Section 25 of the Hindu Marriage Act before the Court below so that the entire matter can be examined about entitlement of maintenance of the appellant.

27. In case, any petition is filed under Section 25 of the Hindu Marriage Act by the appellant, then the same be decided by the Court below expeditiously in view of the fact that the matter is very old one.

28. In view of the above, this appeal, having no force, is hereby dismissed.

Appeal dismissed.

Cases Referred.

1. AIR 1964 SC 40
2. AIR 2001 SC 2110
3. (2001) 4 SCC 250: AIR 2001 SC 1709
4. (2002) 1 SCC 308: AIR 2002 SC 88
5. (2000) 3 SCC 607: AIR 2000 SC 1976