

16 & 17.

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Date of Decision: 13.08.2012

% FAO 335/2012 and FAO 336/2012

SUMAN SINGH Appellant
Through: Mr. D.S. Dalal & Ms. Sunita,
Advocates, along with the
appellant in person.

versus

VINOD KUMAR Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (Oral)

C.M. Nos. 13744/2012 & 13746/2012 (for exemption)

Exemptions allowed, subject to all just exceptions.

C.M. Nos. 13743/2012 & 13745/2012 (for delay)

In view of the averments made in the present applications, the same are allowed and the delay of two days in filing the appeals is condoned.

The applications stand disposed of.

FAO Nos. 335-336/2012

1. These two appeals arise from similar orders dated 24.04.2012 passed by Shri Kamlesh Kumar, Additional Principal Judge (hereinafter referred as APJ), Family Court, Rohini, Delhi in H.M.A.

No.856/2010, preferred by the appellant under Section 9 of the Hindu Marriage Act, 1955 to seek restitution of conjugal rights, and case No.481/10 also preferred by the appellant, being a petition under Section 125 Cr.P.C. to claim maintenance from the respondent – whom she claims to be her legally wedded husband. The learned APJ has dismissed both these petitions with the finding that the appellant has failed to establish her marriage with the respondent.

2. The case of the appellant is that she was married to the respondent on 05.06.1997 according to Hindu rites and ceremonies at Old Kalkaji Temple, New Delhi. At the time of her marriage, she was a widow having two daughters from her previous husband, who expired on 29.11.1996. She claimed that she lived with the respondent – who was working as an electrician, for a period of two months prior to their marriage. She further claimed that the respondent belongs to village Rithala. The family of the respondent was not happy with the marriage of the parties and did not accept her in their home. She claimed that she conceived three times while living with the respondent but had to abort her pregnancy under pressure from the respondent. She decided to live in a separate accommodation owned by her in Budh Vihar Phase-II, New Delhi. It is claimed that the parties shifted to Gujarat in the year 2006 to avoid disturbance/interference from the family members of the respondent in their marital life. She claimed that the

respondent started consuming alcohol and other narcotic drugs. While in Gujarat, she purchased a house in her own name from her own source of income. She claimed that the respondent was annoyed with her and left her society and returned to Delhi with all her valuable articles and jewellery. The respondent started running taxi of a call centre drawing a monthly salary of Rs.20,000/-. The appellant decided to return to Delhi in November 2009. She learnt that he was residing with a woman and has two children from her. The appellant claims that she was pacified by the respondent, and thereafter she took a rented accommodation in Krishan Vihar, Delhi and started living there with the respondent. She claimed that the attitude of the respondent towards her and the minor children changed. He picked up quarrel with the appellant in July 2010 and left her company without any rhyme or reason. She claimed that the respondent had withdrawn from her society without any reasonable cause since July 2010. The efforts made by her for reconciliation with the respondent proved futile. She claimed that the respondent had deserted her and has made no provision for her maintenance. She claimed that the respondent was morally and legally obliged to maintain her. Further averments with regard to the respondent's rental income were also made by the appellant.

3. The respondent contested the two petitions stating that he had no relations with the appellant and that the petitions have been filed on the basis of forged and fabricated documents. He

emphatically denied having married the appellant. He claimed that the appellant got acquainted with him as a widow lady, while he was working as an electrician in the area where she resided, i.e. in Budh Vihar, Delhi. Out of sympathy, he sometimes helped her. He claimed that he was married to Smt. Pushpa and has two children from the wedlock. He denied having ever lived with the appellant in village Rithala or anywhere else. He even denied that the appellant has conceived as a result of any alleged relationship between the parties. He also denied that the appellant has ever been in contact with his parents, or that he is working as a driver with a call centre drawing a salary of Rs.20,000/- per month. He stated that he was working as an electrician earning around Rs.3,000/- to Rs.3,500/- per month. The respondent denied that he shifted to Gujarat with the appellant in the year 2006 or lived with the appellant as her husband. The documents relied upon by the appellant were claimed to have been forged, and prepared to implicate and trap the respondent. The respondent stated that the appellant had obtained his signatures on some papers and photographs on the pretext of getting a loan long time back, and had misused the same.

4. The Trial Court examined the witnesses of the parties in the two cases. The primary issue which arose for consideration before the Trial Court was whether the appellant was the legally wedded wife of the respondent, and whether he had deserted the appellant. The learned APJ marshalled the evidence of the parties. While

examining the aforesaid issue, he notes that the appellant admitted that no receipt was given by the temple authorities for performing the alleged marriage. She admitted that she had not taken any proof of marriage from the Pandit, who performed the marriage. The marriage had not been got registered. She could not tell the name of the Pandit, who solemnized the marriage. PW-2 Smt. Renu James claimed to have attended the marriage, but could not tell the name of any person who was present along with her at the time of the alleged marriage. Though she stated that a photographer was present, she did not have his particulars. She also stated that no document was prepared by the Priest/Pandit in the temple with regard to the marriage. She had not witnessed the execution of any document. PW-3 Shri Shiv Saran Singh, brother of the appellant, testified that except him, none from his family and relatives had attended the alleged marriage. He also testified that photographs had been taken at the time of marriage but did not know as to who has taken the photographs. He could not testify as to why the appellant had not invited her parents to the alleged marriage.

5. The learned APJ has observed and, in our view rightly so, that this being the second alleged marriage of the appellant, she would have definitely informed and invited her parents and other family members and there is no explanation as to why she did not deem it fit to have the presence of her family members and other relatives

on such an important occasion, if there was truth in her claim of marriage with the respondent.

6. The learned APJ takes note of the fact that neither the appellant nor the witnesses could disclose the name of any person from the side of the respondent, who attended the alleged marriage, which gives support to the case of the respondent that no marriage ceremony was ever performed. Even though the appellant's witnesses claimed that a photographer was present when the marriage was solemnised, the appellant had failed to bring on record particulars of either the photographer; the person who arranged the photographer; and, the photographs allegedly taken on the occasion. The learned APJ also takes note of the fact that the appellant was a mature lady with two daughters from the first marriage. She would have definitely collected the documents and photographs, if not for preserving proof, at least for fond memories.

7. Pertinently, the appellant did not produce any independent witness from the Old Kalkaji Temple in support of her claim that she was married to the respondent in the said temple on 05.06.1997. The learned APJ also takes note of the respondent's case that he had signed certain blank papers, as the appellant desired that he stands surety for some loan to be obtained by her. According to the respondent, the said blank papers have been misused by the appellant to forge documents relied upon by her, namely the ration card stated to have been got prepared in Gujarat Ex. PW-1/C, which

shows the respondent as the head of the appellant's family and the two daughters of the appellant as the other two members of the family.

8. The learned APJ then proceeds to decide the case on the principle of preponderance of probabilities. On the one hand, the failure of the appellant to produce any worthwhile evidence in relation to the marriage is taken note of by him. He also takes note of the appellant claims that the respondent withdrew from her company in the year 2007 – taking away all her valuable articles and jewellery, and doubts the same as she did not raise a grievance or make a complaint in relation thereto. She allegedly came to Delhi only after two years searching for him. When she came to Delhi, she took an accommodation on rent leaving her two minor school going daughters to live independently on their own in her house, while she claims that her brother lives in another house five kilometres away. This story is doubted as it appears even to us highly impalatable that a lady would come to Delhi only to search her alleged husband after two years of separation; she would take a house on rent and settle down there, leaving her two minor daughters to fund for themselves a house, all alone.

9. The strange story of the appellant does not stop there. Even though she claims that she found the respondent residing with a woman Smt. Pushpa with two children born out of their wedlock, she states that the respondent started living with her once again in the

year 2009 only to leave her again in the year 2010. So, if the appellant is to be believed, the respondent – without any resistance, either from himself or from his wife Pushpa simply started living with the appellant once again as her husband. Neither the appellant lodged any complaint with the police regarding his marriage with Smt. Pushpa when she came to know of it, nor Smt. Pushpa took any action despite her husband, i.e. the respondent allegedly leaving her and living with the appellant. The learned APJ finds this story as highly improbable and difficult to believe and, in our view, rightly so. The appellant claimed that she again conceived when the respondent was living with her between 2009-2010. However, when the baby girl was born, she did not disclose the name of the father as that of the respondent in the hospital records. Looking to the nature of the appellant's statement made during her cross-examination, the learned APJ finds the testimony of the appellant to be untrustworthy. The learned APJ also observes that the appellant has held back evidence which she could have produced, namely her neighbours in Gujarat and in Delhi to prove that the respondent was residing with her as her husband. However, she has failed to lead any such evidence, and this was also viewed adversely against the appellant.

10. The submission of learned counsel for the appellant before us is primarily based on the documents Ex. PW-1/C, i.e. the APL-1 Card prepared in Gujarat; Ex. PW-1/D, i.e the bank passbook issued in the

name of the parties jointly by Kotak Mahindra Bank in Gujarat, and; PW-1/B, i.e. the appellant's own election card prepared in Gujarat, which shows the respondent's name as her husband; to submit that these documents prove the factum of the marriage of the parties.

11. We are unable to agree with the aforesaid submission of learned counsel for the appellant. These documents only establish the factum that ration card was prepared in Gujarat showing the name of the respondent as head of the family of which the appellant and her two daughters were members. Similarly, the bank account passbook Ex. PW-1/D merely shows that a joint account was opened in the name of the two parties. Same is the case with the election identity card Ex. PW-1/B. The stand of the respondent that he had executed blank documents to enable the appellant to obtain loan appears to be as unbelievable as is the appellant's own case of her having married the respondent. However, that by itself is not sufficient to prove the marriage of the parties. At the highest, what the appellant can claim by relying upon these documents, even if they are believed to be genuine, is that the parties did live together for some time in Gujarat. Even if it were to be accepted that the respondent did live with the appellant in Gujarat for some time when the said documents were prepared, the same does not lead to the inference that they were legally married. The appellant miserably failed to establish the factum of marriage, which allegedly took place in the Old Kalkaji Temple on 05.06.1997. Neither any

photograph, nor the records of the said mandir, nor any independent witness from the temple – such as the Pujari or the photographs were produced. The failure of the appellant to produce evidence of her neighbours where she allegedly lived with the respondent as his wife, either in Gujarat or in Delhi, also adversely impinges on the appellant's case. In our view, the learned Trial Court has adopted the correct approach while marshalling the evidence lead before him and he has rightly concluded upon preponderance of probabilities that the parties never got married legally.

12. We may at this stage also note another submission of learned counsel for the appellant that the respondent did not agree to undergo *Deoxyribonucleic Acid* (DNA) test to establish that he was not the biological father of the baby girl born after the filing of the aforesaid petitions. The same, at best, may lead to the drawing of an adverse inference against the respondent that he is the biological father of the baby girl. However, that by itself does not establish the existence of a marriage between the parties. Pertinently, the appellant did not seek any maintenance for the baby girl and she only prayed for maintenance for herself in Case No.481/2010 under Section 125 Cr.P.C.

13. Since the appellant failed to prove her marriage with the respondent, she obviously could not have been granted restitution

of conjugal rights or maintenance for herself under Section 125 Cr.P.C.

14. For the aforesaid reasons, we find no merit in these appeals and dismiss the same.

VIPIN SANGHI, J

SANJAY KISHAN KAUL, J

AUGUST 13, 2012

'BSR'