

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.128 of 2011

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Vijay Bahadur Sharma, son of Gaya Sharma, resident of village Bukanaor, P.S. Sanjhauli, District Rohtash

.... Appellant

Versus

Lalita Devi, wife of Vijay Bahadur Sharma, D/o late Jatan Sharma, resident of village Pesour, P.S. Charpokhari, District Bhojpur

.... Respondents

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Appearance :

For the Appellant/s : Mr. Prashant Kashyap, Adv.

For the Respondent/s : Mr. Dineshwar Mishra, Adv.

Mr. Surendra Mishra, Adv.

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA)

Date: 26-11-2015

Heard learned counsel for the appellant.

2. This appeal is directed against the judgment dated 26.4.2008 and decree dated 7.5.2008 passed by the Principal Judge, Family Court, Bhojpur at Arrah in Matrimonial Case No. 33 of 2005/204 of 2005 whereby and whereunder the application for divorce filed by the appellant has been dismissed.

3. The case of the appellant in brief is that his marriage with the Respondent was performed on 04.03.1985 and Gauna was also given on 02.03.1987 whereafter the Respondent came to his village home at Boknao. The appellant has however alleged that the Respondent was a quarrelsome lady and did not treat his parents with respect and thus he in order to ensure peace had shifted to Patna along

with Respondent in the year 1987 itself and lived together with her in Mohalla Jakkanpur till October 1988.

4. That the further case of the appellant is that the behaviour of Respondent wife even during stay at Mohalla Jakkanpur did not make any improvement and she had ultimately on her own gone to her naihar in villager Pausar in October 1988 whereafter she did not return back despite repeated request though made by the appellant and in the meantime she had given birth to his daughter in 1990. The appellant has also alleged that the Respondent had filed a case for maintenance in 1994 and the learned magistrate had passed an ex-parte order under Section 125 Cr.P.C. in 1996 whose knowledge was acquired by the appellant only in May 2002 and thereafter he had filed an application for its recall on 15.05.2002 by taking a specific plea that he always was/is ready to keep respondent as his duly wedded wife with all respect but the Respondent remained adamant in staying separately at her Naihar with her mother and as such he was compelled to file the suit for divorce on 03.06.2005 on the ground of both cruelty and desertion.

5. Per contra, the case of the Respondent wife, on the other hand, is that after her marriage in 1985 and gauna in 1987 she had gone to her Sasural and lived together with her husband till 1990 during which she was also occasionally visiting her naihar but in 1990

after she had given birth to a daughter the appellant at her naihar, the appellant had deserted her and had got married to one Pushpa Kumari sometime in the year 1991.

6. The further case of the Respondent wife is that when the appellant did not take care of her and their daughter for next four years, she had filed a case for maintenance under Section 125 Cr.P.C. on 17.01.1994 in which despite service of notice and summon the appellant did not appear and eventually the learned magistrate had passed an order on 24.08.1996 granting maintenance of Rs. 750/- per month (Rs. 500 for the Respondent and Rs. 250/- for the daughter) but the appellant did not comply even the aforesaid order of the court and only when a distress warrant was issued against him in May 2002 that he had filed an application for recall of the order of maintenance on 15.05.2002 which however was rejected by the concerned court on 07.06.2005. Thus according the Respondent wife, it was initially the appellant himself who had deserted her and having married one Pushpa Kumar, had filed the suit for divorce on 3.6.2005 only to get her rid of her as well as the liability of payment of maintenance as directed by learned magistrate u/s 125 Cr.P. C.

7. The respondent in fact has also come out to assert that on 2.7.2005 the appellant had filed another petition in the court of the Principal Judge, Family Court, Bhojpur to recall the order of



maintenance wherein he had alleged adultery on the part of the respondent- wife of living with one Hagrid Singh, who was none else but own uncle of the respondent-wife. The further case of the respondent- wife is that the application filed by the appellant for recall of the order of maintenance was also rejected by the Principal Judge, Family Court, Bhojpur, whereafter he had filed a Cr. Revision No. 653/2005 on 07.09.2005 before this Court assailing the order dated 07.06.2005 passed by the learned magistrate granting maintenance of 750/- per month which, however, was also dismissed by this Court an order dated 22.9.2006 with a direction to the appellant to pay Rs.40,000/- forthwith to the respondent- wife through a Bank draft.

8. It was at this stage that the hearing of the divorce case filed by the appellant was taken up and the Family Court had framed the following issues:

- (i) Is the suit as framed maintainable?
- (ii) Has the respondent treated the petitioner with cruelty?
- (iii) Has the respondent deserted the petitioner without any reasonable cause for more than two years for the presentation of the petition?
- (iv) Is the petitioner entitled for decree of divorce, if so on what condition?

9. The appellant in fact had examined five witnesses, namely, P.W.1 Radheshyam Singh, P.W.2 Lalita Devi, P.W.3 Surendra Sharma, P.W.4 Jangi Singh and P.W.5 Vijay Bahadur Sharma (appellant himself).

10. The respondent- wife also had examined five witnesses, namely, R.W.1 Sheolal Sharma, R.W.2 Narayan Sharma, R.W.3 Munshi Sharma, R.W.4 Udrai Sharma and R.W.5 Lalita Devi (the respondent herself).

11. The Family Court on the basis of the evidence adduced by the parties had come to, particularly in view of admission of P.W.1 himself that the appellant had married a lady, namely, Pushpa Devi, D/o Ramlakhan Sharma of village Nib Diliya, District Rohtas and had also children from the said marriage, a specific finding that the plea of both of cruelty and desertion as alleged by the appellant had not been proven. As a matter of fact the Family Court had found nothing in the oral evidence of P.W.1, P.W.2, P.W.3 and P.W.4 to support his allegation of cruelty or desertion on the part of the respondent- wife. The solitary evidence of the appellant himself regarding cruelty and desertion on the part of the respondent wife was also not found worth reliance by the Family Court in the impugned judgment.

12. The Principal Judge of the Family Court in fact had also



gone to hold that suit for divorce filed by the appellant after 17 years of the alleged desertion by the respondent- wife in 1988 was in fact a ploy for resisting the order of maintenance passed by the competent court on 24.08.1996, on an application of the respondent-wife. The Principal Judge, Family Court, Bhojpur having discussed the evidence adduced by both the parties in the impugned judgment had also recorded a finding that the appellant had miserably failed to prove the allegation of cruelty and desertion by the respondent wife and also gone to hold that it was in fact the appellant who had created a situation by getting married again to Pushpa Devi in the year 1991 on account of which alone the respondent- wife had been left with no other option but to stay separately with her daughter at her Naihar.

13. Based on aforesaid consideration the Principal Judge, Family Court, Bhojpur had held that the appellant had no cause of action and was not entitled for a decree of divorce and consequently had dismissed the suit.

14. Learned counsel for the appellant while assailing the impugned judgment has basically concentrated on the aspect that the court below had miserably failed to take into account that the respondent- wife had led no evidence on the issue of second marriage of the appellant and that whatever was relied by the court below for recording a finding regarding second marriage of the appellant was



based on evidence of P.W.1, who himself was a rustic person. He had also submitted that in any event when the respondent herself had also shown her inclination to get the divorce from the appellant on certain conditions including payment of certain amount, this Court should make an effort for reconciliation between the appellant and the respondent. According to the learned counsel for the appellant, such recourse can be taken by this Court in exercise of its inherent power.

15. Per contra, learned counsel for the respondent- wife has submitted that well merited findings recorded by the court below in the impugned judgment would require no interference, especially when all the aspects, which are now being raised before this Court, were also gone into at length in the impugned judgment. He has in this regard also defended the finding of the court below with regard to second marriage of the appellant with one Pushpa Devi by explaining that in the written statement filed by the respondent- wife she had specifically alleged that in the year 1991 the appellant having entered into second marriage in her life time had himself created a situation in which no well respecting woman could have lived together. Learned counsel for the respondent has also explained that the plea of reconciliation/settlement is also wholly uncalled for because not only in the written statement the respondent- wife had categorically resisted the claim of divorce of the appellant but in her own

deposition she had stated that she did not want divorce as it could cause slur on the future prospect of her marriageable daughter that she had from the marriage with the appellant.

16. In the considered opinion of this Court there would be no question of any reconciliation because the appellant wants divorce, whereas the respondent- wife had and has still resisted such prayer of divorce made by the appellant. Reconciliation in such cases could have only been possible if there was no marriage of the appellant but then it is an admitted fact, even conceded by the learned counsel for the appellant, that in the year 1991 he had got married to Pushpa Devi when the respondent-wife had allegedly deserted him. Thus, this Court is of the view that reconciliation in this case is absolutely impossible only on account of irreversible situation of second marriage created by the appellant. If the appellant in the name of reconciliation wants divorce by making some payment despite its being opposed by the respondent- wife that is not possible or permissible within the frame work of Section 13 of the Hindu Marriages Act.

17. This Court, therefore, in this appeal will keep itself confined to the consideration of the sole question as to whether the impugned judgment of Family Court dismissing the suit for divorce is factually correct and legally sustainable and further whether on the

evidence on record the appellant was entitled for a decree of divorce on the ground of cruelty and/or desertion?

18. From reading of the plaint that was filed by the appellant before the Family Court it would become very clear that the allegation of cruelty against Respondent was not only vague but only unspecific. All that was said therein was that the respondent- wife is a quarrelsome lady and had always quarreled with the appellant and his parents on petty matters. This part of the allegation of cruelty in fact could not be proved by the appellant, inasmuch as the court below has recorded that P.W.1 to P.W.4 had not said a word in support of such allegation of cruelty. As noted above, this Court also had given an opportunity to the appellant to produce any evidence which in his opinion was misconstrued by way of non-consideration or wrong consideration by the Principal Judge, Family Court but the appellant has not produced any such evidence which in turn would amount to his giving up the ground of non-consideration of his evidence by the Principal Judge, Family Court.

19. The next question would be that of desertion and in this regard it is the case of the appellant that the respondent- wife had resided with the appellant for a period of one year in 1987-88 and she had gone to her Naihar during Dussahara festival in the year 1988, whereafter she had never returned. In this regard the appellant had

also sought to make out a case that he had gone to his Sasural and had requested his mother-in-law to send his wife, the respondent, but the wife- respondent herself had flatly refused to go back alongwith the petitioner.

20. The court below however again had examined this aspect of desertion at length in the light of the evidence adduced by the parties and had come to a specific finding that such story of desertion by the respondent in the year 1988 itself was not proved because the respondent- wife had given a birth to a female child out of the marriage with the appellant in the year 1990. In fact all that came in evidence adduced by the appellant was that both the appellant and the respondent were residing separately since 1990, after respondents had given birth to the daughter of appellant in 1990 but then the reason of such separation was revealed by P.W.1 Radheyshyam Singh who in paragraph no.5 of his deposition had stated that the appellant had solemnized his second marriage with Pushpa Devi and was having children from the said marriage.

21. Let it be kept in mind that this appeal was filed on 18.5.2009 and in course of hearing on 22.6.2012 a Division Bench of this Court had recorded as follows:

“Prima facie, the views of the learned Principal Judge for refusing the prayer of the petitioner for divorce appear to be sound. If appellant wants to show that the court below has



misread evidence of any witness, copy of the deposition of the witnesses should be produced on the next date. This Court may consider the prayer for making effort for reconciliation and amicable settlement of dispute if by the next date, the appellant files an affidavit disclosing amount of maintenance paid by him pursuant to orders passed in maintenance case of 1994.”

22. Pursuant to the aforementioned order though a supplementary affidavit was filed on behalf of the appellant wherein though he had annexed the order of the maintenance case and has also given detail of payment of Rs.40,000/- made on 29.3.2006 in terms of the order dated 22.9.2005 passed by this Court in Cr.Revision No. 653/2005 as also further detail of payment of Rs.10,500/- in monthly instalment in compliance of the order of maintenance but he did not enclose any of the evidence adduced before the Family Court in such supplementary affidavit.

23. The respondent- wife however having appeared in this case had filed a counter affidavit on 2.9.2013 wherein while supporting the findings of the impugned judgment passed by the Principal Judge, Family Court she has come out to say that the appellant himself had not only committed adultery by also getting married to a lady, namely, Pushpa Devi in the year 1991 but had also made baseless allegations in the memo of appeal against her (respondent- wife) that she was living in adultery with her own uncle



though this ground was never taken by him in the application filed by him for divorce before family court. She has also enclosed documents to show that not only the appellant was a man of means having huge income from the landed property, house rent but even the father of the appellant being a retired Government servant is well placed whereas she with her daughter aged about 23 years as on 2.9.2013 was having no means to support herself or get her daughter married. In this regard she has also stated there is only 90 decimals of ancestral land in the joint family of his father having two more brothers which was wholly insufficient for upkeep and maintenance of the respondent- wife and her daughter.

24. It is here that this Court would find that the case of the respondent duly supported by her own oral evidence becomes strong, inasmuch as it was her case both in the written statement as well as in her deposition before the court that the appellant was having an extra marital affair with Pushpa Devi and when she had objected to such relationship she was even physically assaulted. Thus, when P.W.1 being the witness of Appellant himself had supported marriage of the appellant with another lady, namely, Pushpa Devi in 1991 and also having children from that marriage nothing would remain for speculation that the respondent- wife was literally coerced and forced to live separately on account of physical and mental torture caused to

her by the appellant on account of his such marriage with Pushpa Devi.

25. By-now the law is well settled that two important elements are essential to constitute desertion, firstly, the fact of separation, and secondly, the intention to bring cohabitation to an end permanently. Further the intention to bring cohabitation to end permanently consists of two aspects, firstly, absence of consent or against the wish of the petitioner and secondly, conduct giving scope to a reasonable cause to the spouse leaving the matrimonial home with the intention of bringing the cohabitation permanently to an end.

26. This aspect of the matter in fact was directly gone into by the Apex Court in the case of Savitri Pandey v. Prem Chandra Pandey, reported in (2002)2 SCC 73, wherein it was held as follows:

“13. In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the Court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.

17. The marriage between the parties cannot be dissolved



only on the averments made by one of the parties that as the marriage between them has broken down, no willful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in *V.Bhagat v. D. Bhagat* (AIR 1994 SC 710) held that irretrievable break-down of the marriage is not a ground by itself to dissolve it.

18. As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage.”

27. The aforesaid law laid down by the Apex Court in the case of *Savitri Pandey* (supra) was also followed in somewhat exactly similar case by Madhya Pradesh High Court in the case of *Mst. Butti v. Gulab Chand Pandey*, reported in AIR 2002 Madhya Pradesh 123, wherein it was held as follows:

“9. It would appear from the pleadings of the husband/respondent’s petition, that his main plank for seeking divorce was desertion by the appellant- wife. Elaborating on



the meaning and purport of desertion, the Supreme Court in a recent decision in Savitri Pandey v. Prem Chandra Pandey, 2000 AIR SCW 182: (AIR 2002 SC 591), referred to its earlier decisions in Bipinchandra Jaishingbhai Shah v. Prabhavati Chandra Jaishingbhai Shah, AIR 1957 SC 176 and Lachman Utamchand Kripalani v. Meena @ Mota, AIR 1964 SC 40, wherein it was laid down that in essence desertion means the international permanent forsaking and abandonment of one spouse by the other without the other's consent, and without reasonable cause. It was laid down therein that for the offence of desertion so far as deserting spouse is concerned, two essential conditions must be there (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly the elements are essential so far as the deserted spouse is concerned (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.

10. It may be noticed in the above context that the statement of Butti Bai (NAW/1) supported by the statement of her father Bhawandas (NAW/2) and brother Badri Prasad (NAW/3), indicates that the respondent/ husband married another woman Guddi, during the subsistence of his marriage with the appellant/ wife. It also appears from birth certificate (Ext.D/1) that a son was also born, from the said second marriage. It is also noticed that the averments as above by the appellant/ wife have not been controverted by the respondent/ husband in his pleadings. In view of the

above, the statements of the respondent/ husband and his father denying the fact of second marriage cannot be accepted in preference to the oral and documentary evidence of the appellant/ wife.

11. The appellant's evidence also discloses that after learning about the second marriage by the respondent/ husband, she went to her matrimonial home. However, she was maltreated and beaten by the respondent/ husband and his relatives, and was thus forced to leave her matrimonial home. She therefore lodged report of the incident with police Uchetra. The evidence as above clearly establishes the defence of the appellant/ wife that as the respondent/ husband and his family members used to maltreat her, therefore she was forced to leave her matrimonial home. In the above circumstances, there was sufficient and reasonable cause for the appellant/ wife to live separately from the respondent/ husband. She could not be blamed for living with her father as she could not be expected to continue to live with the respondent/ husband, in the foregoing circumstances. There was reasonable cause for the appellant/ wife to leave the matrimonial home, in view of maltreatment by the respondent/ husband and his family members and he having married another woman. Therefore, the finding of the learned trial Court that the ground of desertion by the appellant/ wife is not established, is wholly justified."

28. This Court, however, would find absence of both the elements to constitute desertion on the part of the Respondent wife,



inasmuch as the said separation in the year 1988 was never proved because of birth of the female child in the year 1990. Then comes the question of the appellant getting married to Pushpa Devi in the year 1991 and if on account of the marriage of the appellant with Pushpa Devi the respondent- wife was forced by the conduct of the appellant to live separately, she cannot be said to have deserted the appellant.

29. Thus, both on the facts of this case as also in the light of the settled principle of law it has to be held that the appellant himself was a wrong doer and could not have taken advantage of his own wrong. It was he who being a Hindu, during subsistence of the marriage with the respondent and also having a child from the respondent had got married to another lady, namely, Pushpa Devi and thus had created a situation in which no self respecting lady could live with him especially when it has come in evidence that she was also physically assaulted by the appellant on a protest made by her as with regard to extra marital relationship of the appellant with Pushpa Devi.

30. Judged in this background the plea of desertion made by the appellant after 17 years by way of filing the suit for divorce in 2005 obviously smacks of malafide on the part of the appellant, inasmuch it becomes clear that after the order of maintenance dated 24.8.1996 under Section 125 Cr.P.C. at the instance of respondent wife became final and the processes under section 83 Cr.P.C. by way

of distress warrant was issued against the appellant for realization of the amount in 2002 that the present application for divorce was filed by the appellant on 03.06.2005.

31. Learned counsel for the appellant infact was also not in a position to assail the impugned judgment on any other ground but then he was quite emphatic that since the respondent- wife herself in some statement before the court below had made a prayer for grant of divorce on certain conditions, the Family Court keeping in view of the finding arrived of the marriage of the appellant with Pushpa Devi and also having children ought to have passed a decree of divorce on account of irretrievable break down of the marriage.

32. This Court however would not find even this ground to be sustainable for more than one reason. Firstly, as noted in the case of Savitri Pandey (supra) the Apex Court having regard to the law laid down in the case of V. Bhagat v. Mrs. D. Bhagat, reported in AIR 1994 SC 710, had held that irretrievable break down of the marriage is not a ground by itself to dissolve it. Secondly, whatever was given in pleading in the written statement has to be read as a whole. In such written statement followed by the contest by the respondent-wife by adducing evidence of five witnesses including herself she had resisted grant of divorce to the appellant at a belated stage of her life when she was to support his marriageable daughter. In fact in her own

deposition she had also explained that she was not ready for the divorce and thus, this Court would not find any error in the impugned judgment wherein the prayer of divorce has been rejected on the ground that either of the two grounds of cruelty or desertion having been not proved by the appellant he was not entitled for a decree of divorce.

33. Thus, for the reasons indicated above, we find no ground to interfere with the finding of the trial court. In consequence it is only necessary to affirm the finding of the trial court and dismiss this appeal. We accordingly confirm the decision of the trial court and dismiss this appeal. There would be, however, no order as to costs.

(Mihir Kumar Jha, J)

Ramesh Kumar Datta,J. I agree.

(Ramesh Kumar Datta, J)

Patna High Court
The 26th November, 2015
AFR/ Surendra.

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