

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.895 of 2016

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Ajay Thakur S/O Preman Thakur resident of Village-Bharaundha, P.s-
Risiup, District-Aurangabad.

... .. Appellant/s

Versus

Sarda Devi W/O Ajay Thakur and D/O Jageshwar Thakur, resident of village-
Kauwal, P.S-Chhatarpur, District-Palamu Jharkhand

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Rakesh Singh
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and
HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 25-09-2020

Heard learned counsel for the appellant. No one
appears on behalf of the respondent.

I.A. No. 6217 of 2016

The aforementioned Interlocutory Application was
filed for condonation of delay of 28 days in filing the present
appeal. The aforesaid I.A. was allowed by a bench of this Court
vide order dated 1.2.2019.

It appears that the notice was directed to be issued to
the sole respondent in limitation matter as well as in appeal vide
order dated 12.2.2018.

In view of the office note dated 31.1.2019 that the



sole respondent refused to receive notice issued under both process, the delay in filing the present appeal was condoned vide order dated 1.2.2019.

Present Miscellaneous appeal is directed against the judgment dated 19.05.2016 passed in Matrimonial Case No.14 of 2013 by the learned Principal Judge, Family Court, Aurangabad, whereby matrimonial case, filed for dissolution of marriage between the appellant Ajay Thakur and the respondent Sarda Devi, on the ground of adultery and desertion, has been dismissed.

The factual matrix of the case is that the appellant was married with the respondent on 18.5.1997 according to Hindu rites and rituals. The respondent stayed in the house of the appellant for about six days after the marriage and thereafter she went to the parents house. The case of the appellant is that the respondent used to live at her parent's house and never allowed the appellant to consummate the marriage. Subsequently, on enquiry, the appellant came to know that the respondent had developed illicit relation with one Jitendra Thakur, son of Banshi Thakur who happens to be the husband of the sister of the respondent (*Bahnoie*). However, the case of the appellant is that the respondent stayed for a short time at her



matrimonial house and during that period, she used to quarrel with family members of the appellant. The appellant tried to pacify the matter and waited for a period of three years so that the respondent mends her ways but she did not pay any heed to the suggestion of the appellant. The appellant was not blessed with any child, as he was neglected and deserted by the respondent. However, in pursuance to a reconciliatory proceeding, the appellant brought the respondent to the matrimonial house at village Bharaundha, P.S.-Risiyap in the month of April, 2012 where they lived together. During her stay, she remained quarrelsome and lastly on 30.05.2012, she left her matrimonial house after calling her sister and she took away all her belongings including the ornaments and thereafter she lodged a criminal case under Section 498A and other provisions of the Indian Penal Code. In the circumstances, since the life of the appellant was not safe with the respondent, as such the appellant decided not to reside with the respondent, who at the instance of said Jitendra Thakur was ready to commit any mischief. Hence, Matrimonial Case No. 14 of 2013 was filed by the appellant on 21.2.2013 for grant of a decree of divorce on the ground of adultery and cruelty.

The case of the respondent is that she appeared in the



matrimonial suit and filed written statement on 21.02.2014 to the effect that she admitted her marriage with the appellant on 18.5.1997, but claimed herself to be subjected to torture and assault for non-fulfillment of further dowry demand of Rs.50,000/- and one motorcycle and she was forced to leave the matrimonial house but a reconciliation took place and in pursuance to that, she was taken to matrimonial home but she was finally ousted from the matrimonial house on 22.7.2012. Hence, the respondent was compelled to file a Complaint Case with the accusation under Section 498A of the IPC and Sections 3 and 4 of Dowry Prohibition Act in the Court of learned Sub Divisional Judicial Magistrate, Aurangabad which is still pending. Since the appellant deserted the respondent, she could not give birth to any child. Hence she prayed for dismissal of the matrimonial suit.

The learned Principal Judge, Family Court, Aurangabad framed four issues for deciding the prayer of the appellant which read as follows:-

- (i) Whether Sharda Devi has adulterous relation with Jitendra Thakur or not?
- (ii) Whether respondent caused cruelty to the petitioner or not?
- (iii) Whether respondent has deserted the petitioner or not?



(iv) Whether petitioner is entitled for any relief as claimed for or not?

The appellant being the petitioner in the matrimonial suit, examined four witnesses, namely, AW-1 Birendra Thakur, AW-2 Chitranjan Thakur, AW-3 Ranjan Kumar Singh and AW-4 Ajay Kumar Thakur, the appellant to prove his case. However, no witness was examined on behalf of the respondent.

So far as the dissolution of marriage on the ground of adultery is concerned, AW-1 Birendra Thakur has stated that Sharda Devi had illicit relationship with Jitendra Thakur but this witness has not been cross-examined, whereas AW-2 Chitranjan Thakur, though has supported the relationship of the respondent with Jitendra Thakur, but he has admitted in his cross-examination that he has not seen Jitendra Thakur and the respondent Sarda Devi indulging in any sexual act. AW-3 Ranjan Kumar Singh has supported the case of the appellant by saying that Jitendra Thakur used to come to the house of the appellant bi-monthly. AW-4 Ajay Kumar Thakur has stated in his examination-in-chief that he got the information that Sarda Devi had illicit relationship with Jitendra Thakur but in cross-examination he has admitted that the appellant has not filed any case of adultery against Jitendra Thakur.



The learned Court below, in view of the fact that the evidence of all the A.Ws were hearsay and adulterer was not made party decided, the issue no. 1 whether the respondent was leading an adulterous relation with Jitendra Thakur, to be not proved.

So far as issue no. (ii) with regard to causing cruelty to the appellant is concerned, the cruelty is alleged to have been committed on 22.7.2012 when for the first time the issue of cruelty was raised in the plaint of the matrimonial suit on 21.2.2013, that too after filing of a criminal case by the respondent when the respondent is alleged to have left the matrimonial house in May, 2012. Hence, the learned Court below came to a definite finding that the torture was not found proved.

So far as issue no. 3 with regard to desertion is concerned, admittedly within one year of the respondent leaving the matrimonial house, the case has been filed, whereas Section 13(1)(i-b) of the Hindu Marriage Act mandates the grant of divorce on the ground of desertion if there is continuous period of desertion of not less than two years immediately preceding the presentation of the petition. However, the appellant did not take any step for restitution of conjugal rights. Since all the



three issues were not found proved by the learned Court below, hence issue no. iv with regard to entitlement of any other relief has been negatived.

It is submitted by the learned counsel for the appellant that this is not in dispute that the matrimonial case was filed basically on the ground for adultery and desertion, but the pleading of the plaint suggests that the respondent tortured the appellant and did not allow him to have physical relationship. However, learned counsel for the appellant admits that the matrimonial case was filed within one year of desertion and inadvertently, Jitendra Thakur, the alleged adulterer with whom the respondent had illicit relationship, was not made party.

Considering the submission of the learned counsel for the appellant and the materials on record, this Court finds that basically the matrimonial suit was filed for dissolution of the marriage on the ground of adultery.

Adultery, as defined in Black's law Dictionary, means "a voluntary sexual intercourse between a married person and a person other than the offender's spouse."

Adultery has not been defined in the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) but as per definition given under Section 497 of the Indian Penal Code,



which has been declared ultra vires in the case of Josheph Shine Vs. Union of India, reported in (2019) 3 SCC 39. Cruelty has also not been defined in the Act. However, the daily wear and tear cannot be treated as cruelty. Section 497 of the IPC reads as follows:

“497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

It is well settled law as has been held by the Supreme Court in the case of V. Bhagat Vs. D. Bhagat reported in (1994) 1 SCC 337 that merely because there are allegations and counter allegations, a decree of divorce cannot be followed.

Adultery may be defined as an act of married person having sexual intercourse with the opposite gender other than the wife or husband of the person. The essential ingredients of the offence of adultery are –

- (i) that there should be an act of sexual intercourse



outside the marriage;

(ii) that such intercourse should be voluntary.

The above definition reflects that the sine qua non for the adultery is sexual intercourse by a married person with a person other than spouse. The evidence on record does not prove the same as A.W. 1 has simply said that respondent had illicit relation with Jitendra Thakur. Similar is the evidence of A.W. 2 Chittaranjan Thakur. Moreover, in cross-examination, he has admitted that he has not seen Jitendra Thakur and Sharda Devi indulging into any sexual act.

The appellant in his plaint has admitted this fact that the said Jitendra Thakur is the brother in law of the respondent (sister's husband) so the said Jitendra Thakur was known to the appellant but even then he has not been made party. Order I Rule 9 of the Code of Civil Procedure stipulates that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties. The Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it, but this principle will not apply to the non-joinder of necessary party. In the case of adultery, the adulterer is a necessary party.

In the present case the appellant filed matrimonial suit



basically for the dissolution of marriage on the ground of adultery without making adulterer as party who was a necessary party.

Rule 16 of the Patna High Court Hindu Marriage Rules, 1956 (hereinafter referred to as the Rules) stipulates that adulterer is a necessary party when the dissolution of marriage or judicial separation is sought on the ground of adultery. However, on certain grounds the Court may allow the petitioner not to make adulterer as party if he is dead or if he could not know his name inspite of due diligence. Rule 16 of the Rules reads as follows:

“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said petition, unless he is excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been



committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”

Similar provision has been made under Rule 214(16) of the Civil Court Rules, which reads as follows:

“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said petition, unless he is excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he



has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”

It is not always possible to have direct evidence with regard to adultery, but the circumstantial evidence should be compelling to the extent that only irresistible conclusion of adultery can be arrived at. Like a criminal charge, adultery may not be proved in a matrimonial suit beyond the shadow of all reasonable doubt but, in the present case, as it has been held by the learned Principal Judge, Family Court, the evidence of A.Ws 1 to 4 have miserably failed to prove the charge of adultery.

So far as issue of desertion is concerned, it is the admitted case of the appellant that the respondent came to the house of the appellant in pursuance to a reconciliation in April, 2012 and left the matrimonial house on 30.5.2012, whereas the matrimonial suit was filed on 21.2.2013. Thus, the matrimonial suit came to be filed within seven months of desertion though the respondent has claimed that she was driven out from the matrimonial house on 22.7.2012. In the circumstances, it can well be appreciated that the matrimonial suit was filed within less than six months of such desertion by the respondent whereas Section 13(1)(i-b) of the Act mandates that the husband



or wife can get the marriage dissolved by a decree of divorce if the other side has deserted the petitioner for a continuous period of two years immediately preceding the presentation of the petition. Section 13(1)(i-b) of the Act reads as follows:

“13. Divorce.- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

(i)...

(i-a)....

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or”

Hence, this issue has rightly been decided.

So far as ground of cruelty is concerned, this has not been specifically pleaded by the appellant but it is claimed that since the respondent deserted the appellant and did not allow him to have cohabitation, hence the learned court below has analyzed the pleading which suggests that as per the appellant's averment in the plaint the respondent resided with the appellant for few days immediately after the marriage and little over a



month, i.e., from April, 2012 to 30th May, 2012. The specific averment has been made in paragraph 6 of the plaint which reads as follows:

“That your petitioner had brought respondent at her matrimonial home at village-Bharaundha P.S. Risi-up, District Aurangabad in the month of April, 2012 where they were living together but a few days after stayed she (respondent) persistently went on quarreling with petitioner and lastly on 30 May, 2012 she went to her Naiher after taking all her ornaments and belongings by calling her father and after some time she implicated your petitioner in false cases aforesaid and has been frequently threatening to ruin her family members and your petitioner. So now your petitioner’s life is in danger and so he is apprehending in living with her due to her malafide intention cruel nature and adulterous behaviour and hence this petition for divorce is being filed to severe marital tie with respondent which is within the territorial jurisdiction of this court.”

The specific evidence has not been led with regard to the cruelty which has been admitted by the appellant.

In view of the discussions made above, we are of the considered opinion that the appellant’s claim for dissolution of marriage on the ground of adultery and desertion was not maintainable since the appellant has not made adulterer as party respondent and the matrimonial suit has been filed within six months of the admitted date of desertion contrary to the provision of Section 13(1)(i-b) of the Act. Hence, we do not find



any error in the impugned judgment passed by the Principal Judge, Family Court, Aurangabad in Matrimonial Case No.14 of 2013.

Accordingly, this appeal is dismissed being without any merit.

(Dinesh Kumar Singh, J)

(Prabhat Kumar Singh, J)

Ashwini/-Anil/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

