
**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO No.M-51 of 2003

Date of decision: May 01, 2019

Rajesh Devi

...Appellant

Versus

Jai Prakash

...Respondent

**Coram: Hon'ble Mr. Justice Rakesh Kumar Jain
Hon'ble Mr. Justice Harnaresh Singh Gill**

Present: Mr. N.S.Shekhawat, Advocate,
for the appellant.

Ms. Pratibha Yadav, Advocate,
for respondent no.1(i).

Rakesh Kumar Jain, J.

The appellant-wife is aggrieved against the judgment and decree dated 20.12.2002 passed by the Family Court, by which her marriage with the respondent (since deceased) was dissolved on the ground of cruelty.

The brief facts of the case are that the marriage of the appellant with the respondent was solemnized on 14.02.1982 as per Hindu rites and ceremonies at village Gokalgarh, Tehsil and District Rewari. At the time of marriage, the respondent was a widower as his earlier wife, namely, Ramawati died and out of the said wedlock, he had a son, namely, Ravinder Kumar, whereas the appellant was a spinster. It was pleaded by the respondent-husband that two sons, namely, Dipender and Yogender were born out of the said wedlock and when he was in service at Gujrat police at Ahmedabad, the

appellant developed relations with some other person of her village Gokalgarh. It was also pleaded that the appellant had admitted the act of adultery in her letters by referring herself to be a bad woman. It was further averred in the pleadings that the appellant used to call him an eunuch (Hijra) and had refused to do the household work. It is categorically pleaded in para no.9 of the petition that in the month of August 1995, when she was at village Nimoth, her two friends came to his house on a scooter and in his presence, they talked to the appellant in a closed room and Master Mukesh kissed her in his presence. The appellant and her friend consumed liquor in his house and did sexual act in his presence, therefore, it is an act of cruelty. It is further averred that he was in service and did not come to his village from August 1995 to 15.10.1997 and during this period, the appellant was having pregnancy of 5-6 months and aborted the same on 18.10.1997 in a private hospital at Rewari. The respondent-husband has, thus, sought the decree of divorce by filing the petition on 20.10.1997 on the ground of cruelty caused by the appellant to him by living an adulterous life.

All the allegations made by the respondent-husband were denied by the appellant in her written statement rather she has made allegations that her husband was an alcoholic from the very beginning and used to spend all his income to pursue his bad habits instead of maintaining her and the children and used to beat her whenever she made a complaint about his bad habits.

On the pleadings of the parties, two issues were framed by the Family Court on 27.03.1998, namely, “(1) whether the petitioner is entitled to seek divorce from the respondent on the ground of cruelty as well as adultery?OPP.” and “(2) Relief”.

The respondent-husband had examined himself as PW1, his brother Jaswant Singh as PW2, Ajit Singh, Record Keeper of Kalawati Hospital, as PW3 and Sarpanch Rameshwar as PW4, whereas the appellant had examined Chander Parkash, Record Keeper of Uma Bharti Senior Secondary School, Rewari as RW1, herself as RW2, Raj Kumar as RW3 and Ram Avtar as RW4. The learned Court below, after taking into consideration oral as well as documentary evidence led by the respondent, concluded that the appellant had been living an adulterous life which constitute cruelty and, therefore, granted the decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as the "Act").

The appellant-wife has challenged the said decree by way of present appeal, which was admitted on 07.10.2003. Thereafter, it came on record that the respondent-husband had died on 18.11.2013 and before his death, he had executed a registered Will dated 25.03.2008, bequeathing his property in favour of Ravinder Kumar, son of his previous wife. The appellant had also filed an application bearing CM No.21703-CII of 2015 under Order 22 Rule 4 read with Section 151 CPC for impleading the legal representatives of the respondent. The said application was allowed on 23.07.2016, with the following order:-

“This is an application filed under Order 22 Rule 4 read with Section 151 CPC to implead the legal representative of respondent-husband.

Respondents No.ii and iii are none other than the children of the appellant born out of the wedlock of the appellant with the deceased-respondent, namely, Jai Parkash. In our considered view, respondent No.ii and iii are only proforma parties. Respondent i- Ravidner Kumar, the son born out of the first wedlock of deceased- Jai Parkash, is found to be a necessary party to the present appeal

filed by Rajesh Devi challenging the decree of divorce granted in favour of deceased-Jai Parkash. Therefore, the application is allowed. Amended memo of parties is taken on record.

Mr. Jatinder K. Sehrawat, Advocate files vakalatnama for respondents No.ii and iii.”

At the outset, counsel for the respondent has raised an issue regarding maintainability of the present appeal after the death of the respondent-husband on the ground that the divorce is a personal remedy which cannot be pursued after the death of the husband. In this regard, she has relied upon a decision of the Supreme Court rendered in the case of **Smt. Yallawwa vs. Smt. Shantavva**, 1997(11) SCC 159.

On the other hand, counsel for the appellant has submitted that the present appeal is still maintainable even after the death of the husband because the decree obtained by the husband is effective in law and determines status of the appellant as a wife and also the decree has been obtained by the respondent on the false grounds of adultery which attaches a stigma to the appellant. In this regard, he has relied upon a decision of the Supreme Court rendered in the case of **R. Lakshmi vs. K. Saraswathi Ammal**, 1996(6) SCC 371. He has also referred to a decision of this Court rendered in the case of **Balwinder Kaur vs. Gurmukh Singh**, 2007(2) PLR 22.

The question, thus, arises as to whether the appeal at the instance of a spouse, challenging the decree passed against him/her of divorce, is maintainable even if the other spouse dies during the pendency of the appeal?

The law in this regard has been settled by the Supreme Court in **R. Lakshmi's case (supra)**, in which it has been held that even though the husband is dead, yet the decree obtained by him is effective in law and determines status of appellant as a wife. Apart from determining her status as a

wife, it also determines her rights in the properties of her deceased husband, which gives her sufficient *locus standi* and right to contest the divorce proceedings even after the death of her husband. Similar is the view taken by this Court in **Balwinder Kaur's case (supra)** after referring to the judgment relied upon by the respondent in **Smt. Yallawwa's case (supra)**.

Thus, we are of the considered opinion that the present appeal is maintainable even after the death of the husband during pendency of the present appeal as the decree of divorce passed in his favour during his lifetime on the ground of adultery would determine her status as wife of the respondent (deceased husband) and also going to effect her right to succeed to his property as his wife.

On merits, counsel for the appellant has submitted that the respondent has failed to prove the alleged act of cruelty based upon the act of adultery by the appellant. However, before referring to the evidence which has been allegedly misread by the Family Court, he has submitted that the respondent had not impleaded the said adulterer as a co-respondent in his petition though he has specifically named him in para no.9 of his petition, which is contrary to the provisions of the Hindu Marriage (Punjab) Rules, 1956 (hereinafter referred to as the "Rules") and in this regard, he has particularly referred to Rule 10 of the Rules. There is no dispute that in para no.9 of the divorce petition, the appellant has averred as under:-

"9. That in the month of August 1995 when she was at village Nimoth two friends of respondent one name xxxx xxxx Village Gokalgarh come to petitioner's house on scooter and in the presence of petitioner they talked with respondent in a closed room and master Mukesh Kiss her in the presence and respondent her friend used liquor in house and sexually enjoy in petitioner's house.

Hence its cruelty with petitioner.”

Learned counsel for the appellant has, thus, submitted that in view of the failure on the part of the respondent in impleading the said adulterer as a co-respondent in the divorce petition, the plea of adultery cannot be accepted and in this regard, he has relied upon a judgment of this Court rendered in the case of **Dr. Ashok Kumar Aggarwal vs. Smt. Anju Raje**, 2011(6) RCR (Criminal) 1639.

Learned counsel for the respondent has not referred to any other rule or provisions of law to counter the argument of the counsel for the appellant in the above regard nor has referred to any decision in her support.

Thus, the question which arises for consideration is as to whether the petition filed for seeking a divorce on the ground of adultery without impleading the adulterer as a co-respondent, though having knowledge of the person with whom the spouse is having sexual relations and also mentioning about the same in the petition, is maintainable in view of Rule 10 of the Rules?

In order to answer this question, it would be relevant to refer to the definition of adultery, which has been taken from the Concise Oxford Dictionary and means “*voluntary sexual intercourse between a married person and a person who is not their spouse*”. Sections 14 and 21 of the Act empower the High Court to frame the Rules and in pursuance thereof, the Rules have been framed in which Rules 6, 10, 11 and 14 are relevant, which are reproduced as under:-

“6. Full facts of adultery to be given.-- 6.In any petition for divorce the petitioner shall be required to give particulars as nearly as he can of the acts of adultery alleged to have been committed by the respondent or respondents, as the case may be.

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10. Petition on ground of adultery : Adulterer to be impleaded as party. -- Upon a petition presented by a husband for divorce on the ground of adultery, the petitioner shall make the alleged adulterer a co-respondent. The petitioner may, however, be excused from so doing on any of the following grounds with the permission of the Court :—

- (a) That the respondent is leading the life of a prostitute and that the petitioner knows of no particular person with whom the adultery has been committed;
- (b) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover the same;
- (c) that the alleged adulterer is dead.

11. True copy of pleadings to be served on adulterers.-- Where a husband is charged with adultery with a named person, a true copy of the pleadings, containing such charge shall unless the Court for good cause shown otherwise directs, be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled, within the time therein specified, to apply for leave to intervene in the cause.

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14. Adulterer to pay whole or part of costs. -- Whenever in any petition presented by a husband, the alleged adulterer has been made a corespondent and the adultery has been established the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings; Provided that the co-respondent shall not be ordered to pay the petitioner's costs- (i) if the respondent was, at the time of the adultery living apart from her husband and was leading the life of a prostitute, or (ii) if the co-respondent had not, at the time of the adultery, reason to believe the respondent to be a married woman.”

Section 13(1)(ia) of the Act deals with the ground of cruelty but Section 13(1)(i) of the Act deals with the ground of adultery. In the present case, the decree has been granted to the respondent on the alleged act of adultery by the appellant without impleading the adulterer who has been specifically named in para no.9 of the petition. Rule 6 of the Rules provides

that if a petition for divorce is filed on the ground of adultery, then the particulars of the adulterer have to be given as early as possible. Rule 10 of the Rules provides that it is incumbent upon the petitioner husband or wife to implead the adulterer as a co-respondent but for three exceptions which are provided therein. Rule 11 further says that copy of the pleadings is to be served upon the said adulterer and Rule 14 further says that if the adultery is established, the Court may order the adulterer to pay the whole or pay part of the costs of the proceedings except for two exceptions provided in the Rules.

Thus, from the aforesaid Rules, it is apparent that the spouse alleging adultery, has to implead the alleged adulterer as a party and in the absence of the said adulterer as a co-respondent, the plea of adultery cannot be accepted.

Although in the absence of the adulterer, whose name has been mentioned in para no.9 of the petition filed by the respondent-husband, the petition itself was not maintainable before the Family Court but we would also refer to the evidence led by the respondent which has been misread by the Family Court while holding that the appellant was living an adulterous life.

Learned counsel for the appellant has submitted that the respondent has set up a case that after the birth of his children from the appellant in the years 1985 and 1987, he underwent vasectomy operation and was not capable of causing a pregnancy. However, it is submitted that in the year 1992, when he came home in vacations, his family members told him that the appellant was pregnant and had an abortion in a private hospital at Rewari. It is also alleged by him that in 1997, he came to know that the appellant had another abortion after consuming some medicine and had kept the foetus in a

sac in the fodder room. He had allegedly reported the matter to the police by way of DDR but no action was taken as the abortion was not found to be a crime.

Counsel for the appellant has submitted that the respondent had not pleaded a word about the vasectomy operation in the year 1987 in his petition and, therefore, the evidence in this regard led by him should not have been taken into consideration by the Family Court. It is further submitted that the Family Court had just relied upon the suggestion given to the appellant while appearing as a witness to treat the same as admission though it has been held by the Division Bench of the Rajasthan High Court in the case of **Smt. Madhu vs. Mukesh Naryar and others**, 2007(2) J:R 715 that the charge of adultery is required to be established, though not by direct evidence, but by evidence of unimpeachable character especially when the said allegation has been made after so many years of the marriage and birth of two children. He has further submitted that the oral evidence of the respondent and his brother is not sufficient to prove the alleged act of adultery on the part of the appellant and the documentary evidence Ex.PW3/A and Ex.PW3/B, the record of Kalawati Hospital, does not inspire confidence to show that the treatment taken by the appellant from the said hospital was for the purpose of abortion. He has further submitted that although the appellant has mentioned the birth of her sons Dipender and Yogender in the years 1988 and 1989 but they were actually born in the years 1985 and 1987 and their date of birth was mentioned as 1988 and 1989 to show them younger in the school record as they had become over age at that time. It is further submitted that in any case, the appellant has not denied in his petition that he is father of both the children and

has levelled allegation of adultery after the birth of both the children when he came to know that the appellant had aborted a child in the year 1992 in Kalawati hospital. It is further submitted by him that the appellant has not admitted the act of adultery in any of her letters Ex.PX and Ex.PY rather she has only mentioned that she has committed some sin, which does not mean that she has committed adultery. It is further submitted that the Family Court has further committed an error in recording a finding that it is not necessary for the respondent to implead the adulterer because it was not possible for him to know the identity of the adulterer as he was serving in the State of Gujrat. It is submitted that this finding runs contrary to the pleadings of para no.9 of the petition in which he has specifically named the person who had sexual intercourse with his wife in his house in his presence.

On the other hand, counsel for the respondent has submitted that the documentary evidence of Kalawati hospital (Ex.PW3/A and Ex.PW3/B), letters written by the appellant (Ex.PX and Ex.PY) and the other oral evidence led by the witnesses of the respondent are sufficient to prove that the appellant was leading the life of adultery.

After hearing learned counsel for the parties and perusing the available record in this regard, we are of the considered opinion that the Court below has erred in appreciation of evidence available on record because Ex.PW3/A and Ex.PW3/B do not show that the appellant had taken the treatment at Kalawati hospital for the purpose of abortion and in particular, the document Ex.PW3/B is mentioned in such a manner as if the appellant is a male instead of a female because the first line of the said document reads that “*main apni aurat ki safai apni marji se kara raha hu*”. Similarly, the letters

available on record, more particularly Ex.PX and Ex.PY, do not show at all the admission on the part of the appellant of having sexual intercourse with a person rather than his husband has to prove the allegation of adultery. There is no cogent evidence brought on record to prove that the appellant, after her abortion at home, had concealed the foetus because not even a single person much-less a lady amongst his family members were examined by the respondent in regard to termination of pregnancy by the appellant, who could have been the best witness. The appellant has relied upon the statement of his friend who was with him in Gujrat Police and has no connection with the family of the appellant and, thus, his evidence cannot be relied upon.

Keeping in view the totality of the aforesaid facts and circumstances, we are of the considered opinion that the respondent has miserably failed to prove the act of adultery on the part of the appellant by leading cogent and convincing evidence and also the petition filed by him, knowing fully well about the person with whom the appellant was living the alleged life of adultery but without impleading him as a co-respondent, was not maintainable in view of Rule 10 of the Rules.

Thus, in view of the above, the present appeal is hereby allowed being meritorious and the judgment and decree passed by the Court below dated 20.12.2002 is set aside, though without any order as to costs.

(Rakesh Kumar Jain)
Judge

May 01, 2019
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(Harnaresh Singh Gill)
Judge

Whether speaking / reasoned: Yes/No

Whether Reportable: Yes/No