



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. : 437 of 2010

Reserved on: 26.05.2023

Decided on : 02.06.2023

Nain Sukh

....Appellant.

Versus

Seema Devi

...Respondent.

Coram

The Hon'ble Mr. Justice Satyen Vaidya, Judge.

Whether approved for reporting?¹ Yes

For the appellant : Mr. Sohail Khan, Advocate.

For the respondent : Mr. Adarsh Sharma, Advocate,

Satyen Vaidya, Judge

This is an appeal of the husband against judgement and decree dated 19.06.2010, passed by learned Additional District Judge, Shimla, H.P. Camp at Rohru in H.M.A. Petition No. 1-R/3 of 2006, whereby his petition for dissolution of marriage by decree of divorce under Section 13 of the Hindu Marriage Act (for short "The Act") has been dismissed.

¹ *Whether reporters of the local papers may be allowed to see the judgment?*

2. Brief facts necessary for the adjudication of the appeal are that the husband filed a petition for dissolution of his marriage with respondent (wife) alleging *inter alia* that he was married to the respondent in the year 1987 according to Hindu rites and ceremonies. Two children were born to the parties out of the wedlock. Respondent resided and cohabitated with husband till 1995 and thereafter she started living in the house of her parents. As per husband, the behavior of the respondent since the time of solemnization of marriage with the petitioner and his family members was not good. She used to quarrel with them and would leave her matrimonial house. Their relationship deteriorated to the such extent that it became impossible for husband to live with respondent. Finally, respondent left the company of husband forever by leaving minor children in the custody of husband. It was further alleged that the husband was working as a Conductor and had to remain on duty during odd hours. The conduct of the respondent added to his mental and physical fatigue. Husband and his family members tried to settle the matter with respondent and made efforts to bring her back but she did not agree. Respondent is also stated to have been

awarded maintenance @ Rs. 1,000/- per month in her claim against husband under Section 125 of Cr.P.C. It was further alleged that the attitude of the respondent with husband and his family members remained quite hostile and indifferent. Respondent never cared for the husband and minor children.

3. Respondent contested the claim of the husband by denying all the allegations. In counter, she alleged that she was turned out from her matrimonial home by husband after seven years of marriage for the reason that the husband wanted to marry another lady and he in fact had married a lady, named, Lachhi and brought her home. Since, the respondent could not withstand such humiliation, she objected to the conduct of the husband and in result was turned out from the matrimonial home. It was further contended that respondent had to leave her matrimonial home alongwith minor children, who later were brought back by husband after about five years.

4. Learned Trial Court framed the following issues:-

1. *Whether the respondent has treated the petitioner with cruelty ? OPP.*
2. *Whether the respondent has deserted the petitioner ? OPP.*
3. *Relief.*

5. Issues No. 1 and 2 were decided in negative and the petition was dismissed.

6. Husband has assailed the impugned judgment and decree, on the ground that it is result of mis-appreciation of the evidence. Husband had proved issue No. 1 by overwhelming evidence, which was ignored by learned Trial Court. As per husband, he had proved that the respondent had deserted him without their being any cause and despite efforts had not returned back.

7. I have heard learned counsel for the parties and have also gone through the record carefully.

8. It is evident from the contents of petition filed by the husband under Section 13 of the Act that the allegations of cruelty were vague and general in nature. No specific instance constituting cruelty was pleaded. It was averred only that the attitude of respondent towards husband and his family members was hostile from the beginning of married life. She had been picking quarrels and leaving the matrimonial home. Nothing beyond has been either specifically pleaded or suggested.

9. The Hindu Marriage and Divorce (Himachal Pradesh) Rules 1982, framed by this Court specifically

require the allegations of cruelty to be specified in the petition with sufficient particularity with time and place of the Act alleged and other facts relied upon. In the case in hand, the contents of petition are completely non-compliant to above referred rules.

10. In order to prove his case husband examined himself as PW-1. He also examined his father Sh. Jagotu Ram as PW-2. In addition, two more witnesses S/Sh. Bhag Dass (PW-3) and Labdu (PW-4) were also examined. While leading the evidence, husband tried to prove that the respondent was interested to reside with husband at his place of posting rather than residing in the company of the parents of husband at his native place. Since, it was not convenient and possible for husband to keep respondent at his place of posting, her proposal was not acceded to, which resulted in husband facing hostility at the hands of respondent. Husband and his father deposed to above effect, however, such evidence could not be looked into for the simple reason that it was not the pleaded case of husband. The petition of husband did not contain any such averment.

11. It is well settled that the onus to prove the allegations of cruelty is on the person who alleges it. In ***Dr. N.G Dastane Vs. Mrs. S. Dastane***, reported in **1975, 2 SCC 326**, Hon'ble Supreme Court has held as under:-

“23. But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with common-sense as it is so much easier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of [Section 10\(1\)\(b\)](#) of the Act. But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt ? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order to judge whether the burden has been discharged ?

24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the [Evidence Act, Section 3](#), a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the

circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note : "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue" Per Dixon, J. in [Wright v. Wright](#) (1948) 77 C.L.R. 191 at p. 210; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" *Blyth v. Blyth* [1966] 1 A.E.R. 534 at 536. But whether the issue is one of cruelty or of a loan on a promissory note, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this,

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normally, is the standard of proof to apply for finding whether the burden of proof is discharged.”

12. Reverting to the material on record, the husband and his witnesses tried to emphasize the fact that respondent was of quarrel some nature and had left the matrimonial home of her own. Despite efforts by husband and his family members, she did not return back. Again, the statements of husband and his father as PW-1 and PW-2 were in general terms without specifying any particular incident. The facts were narrated only in generalized terms, which cannot be held sufficient for discharging the burden of the husband as petitioner.

13. The only thing which can be said to be proved on record is the fact that respondent has been residing separately from her husband since 1995. In order to justify her conduct of living separately, respondent has alleged that the husband had married another lady, named, Lachhi and had begotten two sons from such relationship. Noticeably, husband did not take any exception to the allegation of having married another woman. In his examination-in-chief, husband has not uttered even a single word regarding such allegation. He simply denied the

suggestions made to him during his cross-examination that he had married another woman named Lachhi and had two children from her. On the other hand, respondent and her witnesses had been categorical in asserting the factum of husband having married another lady. The standard of proof required in matrimonial disputes is of preponderance of evidence. One of the witnesses of respondent i.e RW-2, Sh. Sohan Lal, claimed himself to be the resident of same village to which husband belonged. He verified that husband had married another lady named Lachhi. Statement of this witness on above account remained unchallenged. In his cross-examination, neither the factum of RW-2 being resident of the village of husband nor the factum of husband having married Lachhi were challenged. Further, nothing was brought on record to suggest that RW-2 had reasons to depose against husband. In the background of such material, the allegations of respondent against husband cannot be said to be without substance. Thus, respondent had justifiable ground to live separately as no wife can be forced to live in matrimonial home with husband keeping another lady with him.

14. As regards issue of desertion, it appears to have been framed wrongly as the ground was not specifically pleaded in accordance with law. Section 13(1)(i)(b) reads as under:-

“ Any marriage solemnised, 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; has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

As per explanation appended to Section 13 the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.”

15. The pleading of necessary jurisdictional facts for the ground of desertion were clearly missing in the petition. Even otherwise, as held hereinabove, not only the husband had failed to plead and prove the acts of cruelty on the part of respondent, the defence of respondent justifying her conduct to live separately stood probabelised. Thus, the respondent had shown reasonable

cause to live separately and hence the ground of desertion was also not proved.

16. In light of above discussion, there is no merit in the appeal and the same is dismissed.

17. The appeal is accordingly disposed of, so also the pending miscellaneous application, if any.

2nd June, 2023
(sushma)

(Satyen Vaidya)
Judge

High Court

OHPR