

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

First Appeal No. 40 of 2010

Dayal Joshi

S/o Late Shri Chandramani Joshi

R/o Hindustan Zinc Smelter

Quarter No. 217-B/4, Devari

Tehsil-Girva, District Udaipur,

Rajasthan

..... Appellant

Versus

Smt Usha Joshi

W/o Shri Dayal Joshi

D/o Bholadutt Harbola

R/o Unchapul, Harinagar

Haripurnayak, Haldwani, Nainital

..... .Respondent

Shri A.M.Saklani, Advocate, present for the appellant Shri R.S.Sammal, with Vishal Singh, Prem Kaushal, B.S.Bhandari, Advocates, present for the respondent

Coram: Hon'ble Prafulla C. Pant, J. Hon'ble Nirmal Yadav, J.

Oral: Hon'ble Prafulla C.Pant, J.

This appeal, preferred under section 19 of Family Court Act, 1984, is directed against the judgment and order dated 16.06.2010 passed by Judge, Family Court, 2

Nainital, in Suit No. 128 of 2007 whereby said court has dismissed the petition of the appellant, moved under section 13 of Hindu Marriage Act, 1955.

(2) Heard learned counsel for the parties and perused the papers on record.

(3) Brief facts of the case are that the appellant Dayal Joshi got married to respondent Uma Joshi on 24.04.1992 in Mehat Gaon, District Almora. A female child (named Khusbu) was born out of the wedlock on 31.10.1995. The appellant/husband lives in Udaipur where he is employed with Hindustan Zinc Limited. It appears that after a couple of years of marriage, the parties to matrimony started quarreling and their relations got soured. The husband / appellant filed a divorce petition in the year 2006 alleging that his wife used to

quarrel with him and did not pay respect to his parents. He has further alleged that the respondent (wife) did not even care to see her daughter Khusbu when she was suffering from illness. It is also pleaded by the husband that the wife left her matrimonial home in the year 1996 leaving the young female child with him. He has also pleaded that on several occasions he made efforts to bring back his wife but to no avail. Lastly it is pleaded by the husband 3

that for more than ten years the parties to matrimony are living separately, and now it has become impossible for them to live together, as such the decree of divorce is prayed.

(4) The respondent (wife) admitted having married to the appellant on 24.04.1992. It is also admitted to her that the female child (Khusbu) was born out of the wedlock on 31.10.1995. However, she denied rest of the allegations. She pleaded that she paid respect to her in-laws. She alleged that it was the husband who treated her with cruelty. She further pleaded that she was beaten by her husband and that is what made her to leave her husband's house in the year 1996. She has further pleaded that she is ready to live with her husband provided he undertakes not to make demand of dowry and not to harass her. She has also alleged that her husband has illicit relations with one Pushpa Papne.

(5) On the basis that pleading of the parties, the trial court framed following issues:-

(i) Whether, the respondent quarreled with her husband and in-laws as pleaded in para 2 and 3 of the divorce petition? (ii) Whether, the respondent, leaving her 4

eight months old female child, left her husband's house on 25.06.1996 as pleaded in para 5 and 6 in the petition?

(iii) Whether, the petitioner treated the respondent with cruelty and committed ' MARPEET ' against her, and she was made to leave her husband's house on 26.05.1996 as pleaded in para 5 of the written

statement?

(iv) Whether, on 10.05.2005 the petitioner (appellant) came to the house of the respondent and cohabited with her as alleged in para 10 of the written statement, if so it effect?

(v) Whether, the petitioner had illicit relations with one Pushpa and out of the said relation a son was born, as alleged in para-2 of the additional plea in the written statement?

(vi) To what relief, if any, the petitioner is entitled?

After recording the evidence and hearing the parties, the trial court decided issue no.1, issue no.2 and issue no.3, issue no.4 in affirmative. No finding was given on issue no.5. Issue no.6 was decided in negative. 5

With these findings, the trial court dismissed the divorce petition vide impugned order dated 16.06.2010. Hence this appeal.

(6) Learned counsel for the appellant argued that the trial court has erred in law in holding that the respondent has not treated the petitioner with cruelty. It is further contended that the trial court has not appreciated the facts and evidence on record correctly in holding that the petitioner has not been deserted by the respondent. Lastly it is also submitted that even other wise it is a case of irretrievable breakdown of marriage, and the decree of divorce should have been granted of that ground, as the parties are admittedly living separately for last ten years (now 14 years).

(7) Having re assessed evidence on record, we find that small quarrels between the spouses or mere fact that the respondent did not prepare tea for the parents of the petitioner, do not constitute cruelty to entitle him decree of divorce. However, this depends on the facts and the circumstances of the case, what a particular act on part of a spouse would constitute cruelty against the other spouse.

(8) In the present case the marriage between the 6

parties is admitted. It is also admitted between the parties that a female child was born out of the wedlock. It is also not disputed that said child is living with her father. Not even the fact that since 1996 they are living separately, is disputed. It has also come on the record that after this divorce petition was filed, the respondent filed a criminal complaint against her husband and in-laws on 28th of April 1996 in respect of offences punishable under section 498A, 494, 504 I.P.C., and one punishable under section 3/4 of Dowry Prohibition Act, 1961. Certainly this report appears to have been lodged after the respondent lived separately for more than ten years from her husband. This has further worsened condition and soured the relations between the parties to the matrimony, and we can say that the marriage between the parties has now been irretrievably broken down.

(9) In the above circumstances, we are of the view, that if we dismiss this appeal and maintain the dismissal of decree of divorce, we will be indirectly allowing the parties to the matrimony to live further miserable life all time to come. Therefore, in the interest of justice, we find it just and proper to allow this appeal and grant the decree of divorce on the ground that marriage between the parties has been irretrievably broken 7

down. However, we are conscious of the fact that respondent Uma Joshi is not an earning member. She needs reasonable amount for her maintenance from her husband (petitioner/appellant). To asses the amount of alimony we have to see economic status of the parties. Petitioner/appellant Dayal Joshi is an employee with Hindustan Zinc Limited whose total salary in 2008 was 15,029.00 (Basic pay 8150.00, DA 6879.00, PP 00.00) as per the salary slip shown to us by the appellant. We have also to keep in mind that the daughter of the parties is living with the father. Considering all the relevant facts and circumstances we are of the view that directing the petitioner to pay one time lumpsum permanent alimony amounting Rs. 5 lakhs to his wife would meet the ends of justice.

(10) Accordingly, the appeal is allowed, and impugned judgment and order dated 16.06.2010 passed by Judge, Family Court, Nainital, in Suit No. 128 of 2007, is set aside. The petition moved under section 13 of Hindu Marriage Act, 1955, is allowed on the condition that the petitioner/appellant shall pay Rs. 5 lakhs as lumpsum permanent alimony to respondent (wife) within a period of three months or deposit in her favour before the trial court, within said time. In case the condition is fulfilled, the decree of divorce 8

shall stand granted. In case the petitioner/appellant fails to comply with the condition mentioned above, this appeal shall stand dismissed.

(Nirmal Yadav, J.) (Prafulla C. Pant, J.) 26.08.2010

N.P