Smt. Archana vs Dr. P.K. Tomar on 4/2/2003

JUDGMENT

B.K. Rathi, J.

1. This is an appeal under Section 96 of the C.P.C. against the judgment and order dated 7.2.2002 passed by District Judge, Ghaziabad by which he allowed the petition of the respondent and decreed the petition for dissolution of marriage by the decree of divorce.

2. The respondent who is resident of C–538 Sarojini Nagar, New Delhi filed the petition against the appellant alleging that the appellant is resident of 453/5 Brahampuri, Meerut and is in service as social worker in L.L.R. Medical College, Meerut. The marriage between the parties was solemnized on 13.12.1996 at Meerut according to Hindu rites and ceremonies. That at the time of the marriage it was agreed that the appellant will resign from the job at Meerut and Join the company of the respondent at Delhi and discharge her marital obligations. However, the appellant did not resign from the job as agreed and on the other hand, her behaviour became intolerable and cruel. She several times humiliated the respondent and his parents saying that they are persons of low standard and did not know as to how to live in style. The appellant refused to stay with the respondent and also to resign from the job and, therefore, it was agreed that she will continue in job but will reach the house of the respondent on every Saturday, stay for Sunday and discharge her marital obligations and will return back to Meerut to join the duties on Monday. That the appellant also abuses the mother of the respondent on the ground of wearing jeans or salwar suit and hurled abuses on the respondent and his parents. She stopped coming to Delhi on week ends and started living exclusively with her parents since July, 1997.

3. That the appellant became pregnant and she gave birth to a male child on 19.11.1997 in Medical College, Meerut. The respondent and his parents came to see the child on the next day but they were ill–treated and abused and were not permitted to have access to the newly born baby. The appellant completely deserted the respondents from July, 1997.

4. It is further alleged that the respondent filed a petition under Section 9 of Hindu Marriage Act for restitution of conjugal rights at Delhi which has been stayed. The appellant also filed a petition under Section 9 of the Hindu Marriage Act before Judge, Family Court, Meerut for restitution of conjugal rights against the respondent being Suit No. 378 of 1998. The respondent appeared in the case and denied the allegations made by the appellant in the petition. However, he moved an application before the Judge, Family Court, Meerut to decree the suit of the respondent for restitution of conjugal rights and she may be directed to go with the appellant to his house so that they may start family life afresh. The suit was accordingly decreed on 24.7.1999. He also paid a sum of Rs. 2.500 awarded against the appellant under Sections 24 and 26 of the Hindu Marriage Act. Immediately thereafter, on that day the appellant moved an application that the respondent be directed to go directly from the Court to his house on which the respondent endorsed that she requires one week time to arrange for leave regarding her service and to make other arrangements. Accordingly, one week time was granted and, therefore, the respondent on 1.8.1999, went to the house of the appellant along with his brother and other relatives to take her, but the appellant refused to accompany him and insulted the respondent and his relatives. Then the respondent came to know that a false F.I.R. for offences under Sections 498A, 323, 506, I.P.C. on 28.7.1999 has been lodged at police station Manila Thana, Meerut by the appellant against the respondent and his other family members. Therefore, the decree for dissolution of marriage by divorce was sought by the respondent under Clauses (i–a) and (i–b) of Section 13 of the Hindu Marriage Act (hereinafter referred to as the Act) on the ground of cruelty and desertion.

5. The appellant contested the suit and filed written statement denying the entire allegations. She alleged misbehaviour with her and also made allegations of demand of dowry and cruelty against the respondent. She further alleged that she and her father were beaten by the respondent and his companions on 24.7.1999 in the Court itself and again on 26.7.1999 at her house in Brahampuri, Meerut in connection with demand for dowry, regarding which the case was got registered by her for offences under Sections 498A, 323, 506, I.P.C. at police station Mahila Thana, Meerut. She further alleged that after the birth of the male child, the parents of respondent started demanding Rs. 1 lac and a Maruti Car in dowry. She further alleged that she never went to Delhi and never stayed at the house of the respondent in Sarojini Nagar, New Delhi.

6. That the respondent is resident of town Baraut of District Meerut and she lived with the respondent at Baraut only. She further alleged that attempt was made to murder her by putting fire after sprinkling kerosene oil and also to murder her by poisoning. That inspite of the same, the appellant wants to keep the matrimonial tie and is ready to live with the respondent and to perform her matrimonial obligations for which she also filed the suit which was decreed on 24.7.1998, That the petition is, therefore, liable to be dismissed.

7. The District Judge, Ghaziabad framed necessary issues and recorded the findings of cruelty and desertion in favour of respondent and held that the respondent is entitled to the decree of divorce under Clauses (i–a) and (i–b) of Section 13 of the Act. He accordingly decreed the suit. Aggrieved by it, the present appeal has been preferred.

8. I have heard Sri Vijay Prakash, learned counsel for the appellant and Sri D. N. Wall, learned counsel for the respondent at length and have also perused the entire evidence and record.

9. The first argument of the learned counsel for the appellant is that the District Judge, Ghazlabad has erred in decreeing the suit under Section 13(1–A)(ii) of the Act. I agree with the argument of the learned counsel. This plea was neither raised in the plaint nor any issue was framed regarding it. On the facts also, the respondent is not entitled to the decree of divorce on this ground for the reason that the decree for restitution of conjugal rights in favour of the appellant was passed on 24.7.1999 and the present suit was filed on 6.3.2000. Therefore, one year had not elapsed between the date of the decree for restitution of conjugal rights and the filing of the suit.

Therefore, this ground was not available to the respondent. It may also be mentioned that a decree for restitution of conjugal rights was in favour of the appellant and, therefore, for this reason also, this ground cannot be availed of by the respondent. It has been argued that the District Judge at his own has decreed the suit on this ground also. In view of the above, I find this part of the judgment of the trial court is not correct and the respondent is not entitled to the decree for divorce under Section 13(1–A)(ii) of the Act. The first argument of the learned counsel for the appellant, therefore, succeeds.

10. However, this finding in favour of the appellant on the first argument is not material as the respondent in the suit has sought decree for restitution of conjugal rights only on the ground of cruelty and desertion. Therefore, the question that arises for decision is whether the respondent is able to prove the same and is entitled to the decree for dissolution of marriage by divorce under Clauses (i–a) and (i–b) of Section 13 of the Act. I consider the allegations of the each clause separately.

11. Firstly, I consider whether the respondent had proved that the appellant has deserted her for a continuous period of not less than two years immediately preceding the presentation of the petition. The learned counsel for the appellant In support of the argument has referred to the decision of the Apex

Court in Lachman Utamchand Kirpalani v. Meena, AIR 1964 SC 40, in which the word "desertion" has been explained. It has been held by the Apex Court that it is for the person who alleges desertion to prove it. It is for the petitioner to establish beyond reasonable doubt to the satisfaction of the Court the desertion throughout the entire period of two years before the petition was filed and that such desertion was without just cause. The meaning and impact of word desertion has also been explained by the Court in this case. It was observed :

"If the spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without Intending permanently to cease cohabitation. It will not amount to desertion. For the offence of desertion, so far as the 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, two 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."

On the basts of it, it has been argued that there Is absolutely no evidence to show that there was intention of the appellant to bring cohabitation permanently to an end, and there was reasonable cause for temporary desertion. However, this fact has to be decided from the circumstances of the case. The Apex Court in the above judgment further observed that :

"Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference."

In the light of the dictum and discussion as explained by the Apex Court in the case, it is to be seen whether the respondent who sought the relief is able to prove beyond reasonable doubt the factum of separation and desertion without his consent and the absence of the reasonable cause.

12. In this case what transpired between the parties or with the parents remained inside the close doors of the house and, therefore, there can be no evidence except the statements on oath. It can be inferred as to which version is correct for the circumstances alone. The repeated observations of the District Judge in the finding of Issue No. 1 that there is no reliable and clinching evidence in support of the allegation of the respondent are not correct. Instead of considering the evidence of the parties, the trial court should have considered the circumstances which can never lie. I also agree with the statement of the learned counsel for the appellant that the trial court has wrongly relied on the decision of Saroj v. Dashrath, II (1986) DMC

277. This decision can be of help to the trial court had there been a finding that the false F.I.R. was lodged by the appellant and the same is also malicious. I find that no such finding has been recorded by the trial court. If a correct F.I.R is lodged or for that purpose, even if some exaggeration of the incident is given, it cannot amount to cruelty. Without such a finding, the decision of Saroj v. Dashrath (supra), is of no help to the respondent.

13. Coming to the circumstances of the case, it may safely be said without considering the evidence that certain allegations of the appellant are false. The respondent no doubt is the resident of the town Baraut but is living in House No. C−538 Sarojini Nagar, New Delhi where he is also in service since before the marriage. Therefore, the allegation of the appellant that she never went to the house of respondent at Sarojini Nagar, New Delhi nor ever stayed there appears to be white lie. There is hardly a distance of 50 to 60 kms between Meerut and Delhi and It cannot be accepted that the appellant never went to the house of the respondent at Sarojini Nagar Delhi.

14. The appellant was in service at Meerut and is also resident of Meerut.

The party lived together for some time may be at Meerut or Delhi which is not relevant for the consideration of the point at present. However, it Is admitted that the appellant withdrew from the company of the respondent since July, 1997 and did not go to the house of the appellant. She filed a suit for restitution of conjugal rights being suit No. 378 of 1998 in the Court of Judge, Family Court, Meerut. The question is whether the appellant was sincerely willing for the restitution of the conjugal rights or filed the above suit only to make out the defence for future litigation. At the first date, the respondent paid the entire amount awarded to the appellant in the above suit. Though he filed written statement denying the allegations but without delay, he moved an application that the suit may be decreed and he is ready to keep the appellant. The suit was decreed on 24.7.1999 and on that very day, he made a written request to the Court to direct the appellant to accompany him. It was the appellant who sought one week time in writing on the pretext such as she has to arrange for leave, etc. This request was accepted by the Court and one week time was allowed, therefore, the respondent alleged that he went on 1.8.1999 to the house of the appellant to take her, but she refused to come. The reason being that in the meantime, the appellant lodged an F.I.R. on 28.8.1999 at Mahila Thana, Meerut for offences under Sections 498A, 323, 506, I.P.C. against respondent and his family members. From the circumstances of the case, it appears that it was totally a false F.I.R. The respondent offered to take the appellant from the Court itself. If it is so, where is the question of demand of dowry before taking the appellant to house by the respondent. Apart from this in paragraph 13 of the written statement, it was pleaded by the appellant that she and her father were assaulted in the Court campus on 24.7.1999 itself by the respondent and his companions and again on 26.7.1999 at her house 453/5 Brahampuri, Meerut. It is important to mention that both these allegations also appear to be false. The reason being that in defence, the appellant examined herself and did not produce any other evidence in support of the allegation. She did not have the courage to say in the Court on oath that she and her father were assaulted in the Court on 24.7.1999 by the respondent and his parents, This allegation of para 13 of the written statement was not supported in the statement and, therefore, this allegation is certainly false.

15. Regarding the other incident of assault dated 26.7.1999, there is no reason as to why the F.I.R. of the same was lodged after two days at Mahila Thana on 28.7.1999. It may also be mentioned that it is not alleged that any injury was caused to the appellant or any other member of her family. It is important to mention that the respondent along with his family members could not have reached and assaulted the appellant and her family members at her house in Brahampuri, Meerut for the reason that they could not have escaped from there after assaulting her as he had no place to hide in Meerut and is living in Delhi. The respondent could not have escaped from the house of the appellant after assaulting her and her father on 26.7.1999 and therefore, the reason of assault is also unnatural.

16. It has been argued by the learned counsel for the appellant that the police on investigation found the case to be correct and submitted charge−sheet in the Court. It is contended that the Court of Magistrate will decide regarding the correctness of the allegations. I am unable to agree with the argument of the learned counsel. The copy of the charge−sheet has been filed and is on the record of the trial court. This shows that the charge−sheet has been submitted for offences under Section 323 and 504, I.P.C. only and no charge−sheet has been submitted under Section 498A, I.P.C. thereby showing the allegations of demand of dowry and cruelty was found to be incorrect even by the police. No doubt, the criminal court alone is competent to decide whether any offence has been committed by the respondent or not, but that decision is not relevant for the civil court and judgment is not admissible as provided under Sections 40 to 44 of the Indian Evidence Act. The question whether the F.I.R. was false or correct being relevant for decision of this petition, it has to be decided on the basis of the evidence adduced in this petition. The civil Court cannot look forward or is dependent for a finding of the criminal court on this point to assist the

civil court. Therefore, whatever is decided by the criminal court is irrelevant, and it has to be decided independently by the civil court whether the F.I.R. was false or not as this question arises for decision in this petition.

17. There are also other false allegations of the appellant. In para 36 of the written statement, she has mentioned that attempt was made to give her poison in the food. In para 33, she further alleged that attempt was made to burn her by putting fire to her. This is the bald statement made for the first time in the written statement of this case which has not been corroborated by any evidence. No F.I.R. was lodged earlier regarding any such incident nor any injury was caused. The date, time and place of these incidents have not been disclosed. It may also be mentioned that had it been so and repeated attempt on her life would have been made, she could have never agreed to go and live with the respondent. However, she has also offered to go and live with the respondent. The allegation that she never went to the house of respondent in Sarojini Nagar, Delhi ts also incorrect. The respondent examined herself as P.W. 1, his elder brother Dilawar Singh Tomar P.W. 2, brother−in−law Mahabir Singh P.W. 3 and father Ikbal Singh as P.W,

4. All of them have denied the allegations of the appellant. They have also stated that they want to keep the appellant and never treated her with cruelty. On the other hand, the appellant misbehaved and Insulted them and left the house without any reasonable cause. They have also denied the allegations of demand for dowry and assault.

18. From the above discussions and circumstances it is clear that the appellant was never willing and ready to live with the respondent and to discharge her marital obligations without the consent of the respondent and any reasonable cause. The suit for restitution of conjugal rights was filed by her only to create evidence, and when the suit was not contested and decreed on consent by the respondent, the appellant cleverly found out a way of lodging false F.I.R. for offences under Sections 498A, 323, 506, I.P.C. so that she may have an excuse not to comply with the decree. The circumstances discussed above clearly show that the F.I.R. was not only false but was also malicious and without any reasonable ground and was to make out the defence.

19. From the above discussions, it is, therefore, apparent that the appellant deserted the respondent for a continuous period of more than two years before the presentation of the petition. Therefore, the respondent is entitled to the decree for divorce under Clause (ib) of Section 13 of the Act.

20. As regards the allegations of cruelty and the decree of divorce under Clause (i−a) of Section 13 of Act, it does not require a long discussion as facts and evidence have already been narrated. As already said, there can be no corroborative evidence of what happened between the parties inside the four walls of the house and the matter has to be decided from the circumstances of the case. The marriage took place on 13.12.1996 and a male child was born to the appellant on 19.11.1997. The respondent was living in Sarojini Nagar, Delhi since before the marriage and according to the plaint allegations, he is in service at Delhi from 9.9.1991. The appellant in para 22 of the written statement has alleged that she never went to the house of the respondent in Sarojini Nagar, Delhi. This house was very near to Meerut and would have hardly taken one or two hours to her to reach from Meerut to the house of the respondent. But she never went to the house of the respondent who is her husband. Whether this act of the appellant does not amount to cruelty? The natural answer should be that it is certainly a cruelty as the wife never visited the house of her husband who is living at a distance which may be covered in less than two hours.

21. The lodging of the false F.I.R. for offences under Sections 498A, 323, 506, I.P.C. without any reasonable cause and maliciously also amounts to the mental cruelty.

22. It has also been argued by the learned counsel for the appellant that there is no finding of the trial court that act of cruelty of the appellant has not been condoned by the respondent. That this finding is required to be recorded under Section 23(1)(b) of the Act and in its absence, the suit cannot be decreed. The learned counsel has relied on the decision of Dr. N. G. Dastane v. Mr. S. Dastane. AIR 1975 SC 1534. It was observed by the Apex Court :

"Even though condonation is not pleaded as a defence by the respondent it is Court's duty, in view of the provisions of Section 23(1)(b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the Court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if the Court is satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty."

23. In view of the decision of the Apex Court and the argument of the learned counsel for the appellant, I agree that the trial court should have recorded a finding that the act of cruelty has not been condoned by the respondent before granting the decree, I find that no such finding has been recorded. However, for this reason, the decree of the trial court cannot be set aside. This is the first appeal and this Court is required to consider the facts as well as the law. If the trial court ignored or neglected to record a finding on the point of fact, it can be examined by this Court and a finding can be recorded.

24. The circumstances of this case do not show that the act of cruelty was ever condoned by the respondent. He has not condoned the act of the appellant in lodging false F.I.R. for demand of dowry, cruelty and assault. That matter has not been compromised and he and other members of his family are still facing trial. It cannot be accepted that the said cruelty has been condoned by the respondent. The appellant does not say that she was permitted by the respondent to live at Meerut permanently and not to come to his house. Therefore, this act of cruelty has also not been condoned.

25. I accordingly find that the act of cruelty has not been condoned by the respondent, therefore, the decree of divorce granted by the trial Judge cannot be disturbed.

26. The appeal fails and is hereby dismissed. However, in the circumstances of this case, the parties are directed to bear their own costs of this appeal.