REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 1868 OF 2007

—

RAVI KUMAR ..Appellant(s)

Versus

JULMIDEVI ..Respondent(s)

J U D G M E N T

GANGULY, J.

1. The husband is in appeal before us impugning the Judgment and Order of the High Court in a Matrimonial Proceeding whereby the Judgment and Order of the District Judge, Mandi in Hindu Marriage Petition No.20 of 2002 dated 27.10.2004 was reversed by the High Court.

2. The marriage between the parties took place on 13.12.1988 according to Hindu rites and customs and in March, 1990 a girl child was born to them. The husband alleged that after

the birth of the girl child, his wife left for parental house at village Samlet and spent her period of maternity leave there. It was further alleged that his wife, who was working, on being transferred from Garli to Chauaku, stayed at Chauaku instead of in the matrimonial home which was only at a distance of 3 Kms. from the place of her posting. However, the husband admitted that in May, 1994, his wife came to his house for a short period and stayed there with him till the month of May, 1994. Thereafter, his wife is alleged to have permanently deserted him. The further allegation is that in September, 1996, he tried to bring his wife back to his residence for staying with him and his old parents but she refused to do so.

3. Ultimately, the appellant filed a proceeding under Section 9 of the Hindu Marriage Act (hereinafter referred to as the Act) for restitution of conjugal rights and that was contested by his wife. Ultimately a

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compromise was arrived at before the Lok Adalat and the learned Sub-Judge, Sarkaghat presiding over the Lok Adalat passed an Order on 26-9-1998 treating the said petition under Section 9 as withdrawn, having ended in a compromise. The statements of the parties before the Lok Adalat were recorded and formed part of the decree. The statements, recorded before the Lok Adalat, may be set out hereinbelow:-

(a) Statement of appellant - Husband

Stated that I shall provide room and kitchen for proper living to my wife Julmi Devi and I shall not trouble her in any manner.

(b) Statement of respondent - Wife

Stated that I am prepared to live with my husband Shri Ravi Kumar, I shall live with my husband properly.

4. The allegation of the appellant is that his wife did not comply with the stand taken before the Lok Adalat by residing with him

and continued to stay separately. The appellant, being frustrated thereby, filed a petition for a decree of divorce and dissolution of marriage on the grounds of cruelty and desertion. It was numbered as Petition No.20 of 2002.

5. Initially, the District Judge, Mandi made some unsuccessful efforts to bring about a reconciliation between the parties. Then the proceeding was ultimately tried and evidence was recorded and by a Judgment and an Order dated 27.10.2004, the learned District Judge granted a decree of divorce which was challenged by the respondent wife before the High Court and the High Court reversed the finding of the learned District Judge.

6. While reversing the finding of the learned District Judge, the High Court acted in exercise of its powers under Section 28 of the Act. In doing to, the High Court acted as a first Court of appeal, which is a Court,

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both on facts and law. The High Court noted the case of the parties and also the evidence which was adduced before the Trial Court.

7. Several questions cropped up in the course of hearing before the High Court. One of them being whether in view of filing of a proceeding for restitution of conjugal rights, the appellant had condoned all alleged prior acts of cruelty of the wife. The High Court after considering some decisions came to a finding that by filing a petition under Section 9 of the Act, the appellant had condoned the earlier alleged acts of cruelty of the respondent wife. Condonation is basically a question of fact. This Court finds that reasoning of the High Court on condonation in the facts of this case is correct.

8. After recording the said finding, the High Court noted that there is no specific allegation by the appellant of wife's cruelty and in his deposition also husband does not

refer to any specific instances of cruelty by his wife. In the absence of such specific allegations, the learned Trial Court was, in the opinion of the High Court, in error by granting a divorce on grounds of cruelty.

9. From the petition filed by the appellant husband, it appears that in paragraph 6 of the said petition, the proceeding under Section 9 of the Act has been referred to. After the said paragraph, this Court finds that in paragraphs 7, 8, 9, 10 and 11 there is no specific allegation of cruelty against the wife. There are some vague allegations but no allegation with specific particulars has been given about the alleged cruelty of the respondent wife. No specific case of desertion has been pleaded either.

10. It may be noted only after the amendment of the said Act by the amending Act 68 of 1976, desertion per se became a ground for divorce.

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On the question of desertion, the High Court held that in order to prove a case of desertion, the party alleging desertion must not only prove that the other spouse was living separately but also must prove that there is an animus deserendi on the part of the wife and the husband must prove that he has not conducted himself in a way which furnishes reasonable cause for the wife to stay away from the matrimonial home.

11. Looking to the materials which have come on record in this case, it is clear that the wife had sufficient ground to live separately. In this case, the evidence of the daughter is very crucial.

12. The daughter in her evidence categorically stated that her father used to beat her mother. She denied that her mother abused her father but she repeatedly deposed that her father used to beat her mother and the reasons of which are not known to her.

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13. It has been argued by the learned counsel for the appellant that Appellate Court did not have the occasion to appreciate the demeanour of the witnesses and the High Court acting as a First Appellate Court ought not to reverse a finding which was arrived at by the learned Trial Court.

14. It is difficult for this Court to accept the aforesaid contention. It cannot be disputed that while exercising its power under Section 28 of the said Act, the High Court, as the first Court of Appeal is both a Court of Law and also of facts.

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15. The power of the Appellate Court as explained in Order 41 Rule 33 of the Civil Procedure Code shows that very wide powers have been conferred. Commenting on the width of this power, Mulla (CPC 15th Edn, p. 2647) commented that this rule is modelled on Order 59, rule 10(4) of the Supreme Court of

Judicature in England. The learned author further commented that the object of this rule is to empower the appellate court to do complete justice between the parties.

16. This Court is in respectful agreement with the aforesaid commentary of Mulla on order 41 Rule 33 with one rider. If there is a legal interdict, the rule will not apply – (See **S. Nazeer Ahmed** vs. **State Bank of Mysore** - (2007) 11 SCC 75 and which has been followed in **Samundra Devi & Ors.** vs. **Narendra Kaur & Ors.**- AIR 2008 SC 3205 at para 19, p 3208).

17. Therefore, in exercise of its power, the First Appellate Court can come to a finding different from the one which has been arrived at by the Trial Court especially in a case where appreciation of evidence by the Trial Court is not proper. In the instant case, this Court finds that Trial Court has not properly appreciated the evidence of the child. It may be noticed here that the

evidence of the child is very vital in the facts and circumstances of this case of matrimonial discord. In this case the child has clearly stated the cruelty of the appellant-husband towards his wife. Therefore, there is sufficient reason for the wife to stay apart. Under such circumstances one cannot say the wife is guilty of either cruelty or desertion.

18. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, some time it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty. Therefore, cruelty in

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matrimonial behaviour defies any definition and its category can never be closed. Whether husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any pre-determined rigid formula. Cruelty in matrimonial cases can be of infinite variety – it may be subtle or even brutal and may be by gestures and words. That possibly explains why Lord Denning in **Sheldon** vs. **Sheldon**, [(1966) 2 All E.R. 257] held that categories of cruelty in matrimonial cases are never closed.

19. This Court is reminded of what was said by Lord Reid in **Gollins** vs. **Gollins** [(1963) 2 All. E.R. 966] about judging cruelty in matrimonial cases. The pertinent observations are:

> "In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty

cases one can hardly ever start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

20. The aforesaid passage was quoted with approval by this Court in **Dastane** vs. **Dastane** [(1975) 2 SCC 326]. About changing perception of cruelty in matrimonial cases, this Court observed in **Shobha Rani** vs. **Madhukar Reddi** - AIR 1988 SC 121 at page 123 of the report:

"It will be necessary to bear in mind that there has been a marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties".

21. For the reasons aforesaid, this Court does not find any reason to interfere with the judgment of the High court.

22. The appeal is dismissed. The parties are to bear their own costs.

.....J.
(P. SATHASIVAM)

.....J.
(ASOK KUMAR GANGULY)

New Delhi
February 9, 2010

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