

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28/11/2002

Coram

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice K. GNANAPRAKASAM

Civil Miscellaneous Appeal No. 946 of 1993

Pasumpon Gandhi. .. Appellant/Petitioner.

-Vs-

1. Shirely Gandhi,
E/o. Pasumpon Gandhi,
Working at A.F.Ferguson and Company
Geena Building Annexe,
304/305, Anna Salai, Madras-600 002.

2. Rahamadullah @ Basha Bai,
Partner, Aaysons Apparels,
312, Ist Floor, Thambu Chetty Street,
Madras-1. .. Respondents/Respondents.

Appeal filed under Section 19 of the Family Courts Act against the order and decretal order passed in F.C.O.P.No. 856/92 dated 8-3-93 on the file of the Additional Family Court at Madras.

!For Appellant :Mrs. Radhika for Mr. M.S. Krishnan

^No appearance: For respondents.

:JUDGMENT

(Judgment of the Court was made by P. Sathasivam, J.)

Petitioner in F.C.O.P.No. 856 of 92 on the file of the Additional Principal Judge (Additional Family Court), Madras, dismissing his petition filed under Section 10 of the Indian Divorce Act, 1869 to dissolve the marriage performed between him and the first respondent herein, has filed the above appeal. He filed the said petition before the Family Court under Section 10 of the Indian Divorce Act to dissolve the marriage on the ground of adultery coupled with cruelty and desertion. It is contended before the Family Court that the marriage between him and the first respondent was solemnized on 25-01-1978 according to Christian rites. Thereafter they lived together till April,

1992. Alleging that the first respondent had committed adultery with the second respondent, he prayed for divorce. Before the Family Court, the petitioner-husband was examined as P.W.1 and marked documents Exs. A-1 to A-5. In spite of the fact that the first respondent herein, wife did not file counter statement and let in evidence disputing the claim of the husband, by the impugned order dated 8-3-1993, the Additional Family Court dismissed the petition of the husband; hence the present appeal. Even in this appeal, in spite of service of notice immediately after the admission of the appeal in 1993 and also second notice at the time of final hearing, the respondents, particularly the contesting first respondent-wife has not chosen to contest the appeal by engaging a counsel. In such a circumstance, we heard the argument of the learned counsel for the appellant.

2. After taking us through the various averments made in the petition filed before the Family Court, and the evidence both oral and documentary, let in by the appellant/husband, and by pointing out the fact that the first respondent-wife neither sent reply to the notice, nor filed counter statement before the Family Court and also not participated in the proceedings before the Family Court as well as before this Court, Mrs. Radhika, learned counsel for the appellant, would contend that inasmuch as the appellant has made out a case for divorce under Section 10 of the Indian Divorce Act on the ground of adultery, the Family Court ought to have dissolved the marriage and allowed the appellant's petition. She also contended that the Family Court failed to appreciate that there are sufficient oral and documentary evidence to prove the charges of adultery and the dismissal of his petition for want of sufficient evidence is erroneous and liable to be set aside.

3. We have already referred to the specific case of the appellant that the marriage between the appellant and the first respondent was solemnized on 25-01-1978 according to Christian rites. It is also his case that thereafter they lived together till April, 1992, and 3 children were born to them. In the petition it is specifically stated that he was employed in Air Force and posted at Chandigarh at the relevant time. The first respondent was residing at Madras and working in a construction concern. She refused to heed his advice to come and join him at Chandigarh by resigning her job. The appellant obtained voluntary retirement and returned back to Madras. He got an employment at Central Bank of India, Pondicherry and because of the attitude of the wife and to take care of children, he returned to Madras and settled down. During this time, he noticed her arrival at 10'O clock at night though her working hours closed at 5 P.M. On noticing her suspicious activities, he engaged Globe Detective Agency (P) Limited, and through their surveillance report it was found out that she was having illicit intimacy with one Rahamadullah @ Bashabai, second respondent herein, who is having his office at first floor, No.312, Thambu Chetty Street, Madras-1 as partner of Aaysons Apparels. When he lodged a police complaint on 22-1-92, she admitted that she is living in adultery and she wanted a Divorce. After some time she removed all the articles and left his company and living in adultery forgetting her husband and children. It is relevant to note that before filing the said petition for Divorce on the ground of adultery, he sent a legal notice dated 7-7-92 to the first respondent herein. She did not send any reply. Even before the Family Court, she did not file a counter statement and contest the

Divorce petition. In his evidence as P.W.1, the appellant /petitioner has stated about his marriage with the first respondent on 25-1-1978, birth of 3 children, his visit to his native place, the subsequent information that the first respondent had left their house at Chennai, and her intimacy with the second respondent. He also specifically stated that since the first respondent herein is having relationship with the second respondent, she failed to live with him, and she used to return home late during night and made a police complaint also. Apart from the specific assertion regarding her illegal relationship with the second respondent and his statement as P.W.1, the appellant has also produced Xerox copy of the marriage certificate, legal notice, acknowledgement, complaint to the police as well as the copy of the report of the Detective Agency as documents. It is true that the report of the detective agency had not been marked through the author of the same. The Family Court is right in not giving importance to Ex. A-1 report given by the private detective agency. However, we have to find out whether the appellant-husband has made out a case for Divorce on the ground of adultery in terms of Section 10 of the Indian Divorce Act, 1869.

4. The family Court, after holding that in the absence of clinching material to indicate and prove beyond doubt the illicit intimacy between the first respondent and the second respondent, the charge of adultery, put-forward by the petitioner (appellant), cannot be upheld and dismissed the said petition. Learned counsel appearing for the appellant has very much relied on a decision of the Supreme Court in *Dr. N.G. DASTANE v. Mrs. S. DASTANE* (AIR 1975 Supreme Court 1534) and contended that in a matter like this, particularly seeking divorce on the ground of adultery, the Court can act on preponderance of probabilities and arrived at a conclusion and need not expect that all the conditions prescribed are to be satisfied beyond a reasonable doubt. There is no dispute that Section 10 of the Act enables the husband to seek for divorce on the ground that since the solemnization of the marriage, the wife has committed adultery. In the petition, the husband had alleged the conduct of the first respondent in not taking care of him, his 3 children and her close intimacy with second respondent, as adulterer. The appellant has also alleged the fact that because of her illegal association with the second respondent, she used to return home late night. He also referred to the complaint given to the police and their advice to approach to appropriate court for necessary relief. Even prior to the filing of the said petition, the appellant has referred to all the factual details in the notice sent to the first respondent. It has been marked as Ex. A-3 and the acknowledgement card as Ex. A-4. Same averments have been reiterated by the appellant in his evidence as P.W.1 before the Family Court. As stated earlier, the first respondent wife did not send any reply for Ex. A-3, file counter statement for the divorce petition and failed to appear before the Family Court to put-forth her case. As stated earlier, even before this Court, in spite of service of notice on two occasions, she did not care to contest the case by engaging a counsel. With reference to the conclusion of the Family Court that the husband failed to substantiate the materials, it is relevant to refer to the conclusion of Their Lordships in the said decision, namely, AIR 1975 S.C. 1534 (cited supra). The following conclusion is relevant: (para 26)

"26. Neither Section 10 of the Act which enumerates the grounds on which a

petition for judicial separation may be presented nor Section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in Cls. (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt." Section 23 does not alter the standard of proof in civil cases."

The case before the Supreme Court arose from Hindu Marriage Act and they referred to Section 23 of the Hindu marriage Act which governs the jurisdiction of the court to pass the decree in any proceeding under the Act. It does not require that the petitioner must prove his case beyond a reasonable doubt. After referring to the language used therein, particularly "if it is satisfied", the Supreme Court has held that the word "satisfied" must mean "satisfied on a preponderance of probabilities and not "satisfied beyond a reasonable doubt". In our case, similar provision is there in Section 12 of the Indian Divorce Act, 1869. Here again, on a petition being filed under Section 10 of the Act, the Court has to satisfy itself all aspects including absence of collusion, form of marriage, the adultery, condonation etc., and if the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed, the Court has to dismiss the said petition under Section 13. In the light of the conclusion of the Supreme Court in the decision referred to above, we are of the view that the interpretation relating to Section 23 of the Hindu Marriage Act is applicable to Sections 12 and 13 of the Indian Divorce Act; accordingly we hold that the word "satisfied" referred in Sections 12 and 13 of the Indian Divorce Act must mean "satisfied on a preponderance of probabilities" and not beyond a reasonable doubt, as observed by the Court below.

5. It is also relevant to note a Full Bench decision of the High Court of Madhya Pradesh in LALIT v. LAVINA (FB), reported in AIR 1979 Madhya Pradesh 70. While considering Section 10 of the Indian Divorce Act, which we are also concerned in the present appeal, the Full Bench has observed thus: (para 6 and 7)

"6. The next question to be considered is whether the petitioner has proved that the respondent No.1 is guilty of adultery. Previously the view was that the matrimonial offences have to be proved by petitioner beyond reasonable doubt but recently the view has been modified and it has been held that petitioner is only required to prove his case by preponderance of probabilities and the degree of probability depends on the gravity of the offence. Rayden on Divorce in Vol.I at page 193 has observed "But a suit for divorce is a civil and not a criminal proceeding and the analogies and precedents of criminal law have no authority in the courts administering divorces; they are civil tribunals. It is wrong, therefore, to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case. As far as the standard of proof is concerned, adultery, like any other fact on which irretrievable breakdown of marriage is concerned, may be proved by a preponderance of probability, and

although it has been said that in proportion as the offence is grave, so ought the proof to be clear, and that even in these days there is a stigma in adultery, nevertheless views on adultery have changed and it no longer generally entails the serious social consequences that in some former times resulted from its discovery." Halsbury in para 562 has further observed that adultery must be proved to the satisfaction of the court, that is on a preponderance of probability; but the degree of probability depends on the subject matter, and, in proportion as the offence is grave, so ought the proof to be clear. Divorce is a civil proceeding and the analogies of criminal law are not apt. It seems that the Supreme Court has also veered round to this view in the recent case of *Dastane N.G. v. S. Dastane*, AIR 1975 SC 1534 and it has been held, while considering a case under Hindu Marriage Act, that the proceeding under the Act being essentially of a civil nature, the word 'satisfied' means satisfied on preponderance of probability and not satisfied beyond reasonable doubt.

7. Direct proof of adultery can rarely be given. Even if given, it is suspect and is apt to be disbelieved. The accepted rule, therefore, is that circumstantial evidence is all that can normally be expected in proof of the charge. The circumstances must be such as lead to it by fair inference, as a necessary conclusion; and unless this were so, no protection whatever could be given to marital rights?."

We are in respectful agreement with the above view and hold that the petitioner who approached the Court for divorce on the ground of adultery is only required to prove his case by preponderance of probabilities and need not satisfy beyond reasonable doubt. To make it clear that circumstantial evidence can also be considered and take a note of. Previously the view was that the matrimonial offences have to be proved by the petitioner beyond a reasonable doubt, but recently the view has been changed and it has been held that the petitioner is only required to prove his case by preponderance of probabilities and the degree of probability depending upon the gravity of the offences. The accepted rule, therefore, is that circumstantial evidence is all that can normally be expected in proof of the charge. The circumstances must be such as lead to it by fair inference, as a necessary conclusion, and unless this were so, no protection whatever could be given to marital rights. In the instant case, as observed earlier, before filing a petition for divorce under Section 10 of the Act, the appellant/husband sent a registered notice alleging that first respondent having intimacy with the second respondent, failed to take any interest either on his welfare or on their children. Though she acknowledged the notice, she has not sent any reply. Similar averments had been made in the petition before the Family Court and the same was substantiated by his evidence as P.W.1. Even if we eschew the report of the private detective agency-Ex.A-1, in the absence of contest by the first respondent either before the Family Court or before this Court, and in view of the present view, namely, that the petitioner is only required to prove his case by preponderance of probabilities, we satisfy and hold that the appellant-husband proved his case for a decree for divorce on the ground of adultery. The Court below has committed an error in dismissing his petition.

6. In the result, the order of the Family Court dated 8 -3-1993 made in

F.C.O.P.No. 856/92, dismissing the said petition is set aside and we grant a decree for divorce to the appellant under Section 10 of the Indian Divorce Act, 1869. The Civil Miscellaneous Appeal is allowed and in the circumstances of the case, there shall be no order as to costs.

(P.S.J.,) (K.G.P.J.,)

28-11-2002

R.B.

Index:- Yes

Internet: Yes.

To:

1) The Additional Family Court, Madras (with records).

2) The Section Officer, V.R Section, High Court, Madras□