

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Orders reserved on : May 7, 2007
Date of decision : June 13, 2007

+ MAT.APP. 63/2004

SHOBHA GUPTA Appellant
Through Ms. Anjali Chopra, Advocate

versus

RAJESH GUPTA & ANR. Respondents

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER

: Dr. S. Muralidhar, J.

1. This appeal is directed against the judgment dated 16.11.2004 passed by the learned Additional District Judge (ADJ) Delhi in HMA No. 58 of 583 of 2003. By the impugned judgment the learned ADJ dismissed the appellant's petition for divorce filed against the respondent on the grounds of adultery, cruelty and desertion. The ground for dismissal was that the appellant had not been able to produce before the Trial Court proof of her earlier marriage with one Shri Kailash Jain having been dissolved by a decree of divorce by mutual consent.

2. It is the appellant's case that she and Respondent No. 1 herein were married on 24.1.1985 at Delhi. A male child Ravi Gupta was born on 4.1.1986. The appellant does admit that she was earlier married to one Shri Kailash Jain and had a daughter Sonia and a son Ashish from the said marriage. Subsequently, according to the petitioner, she and Shri Kailash Jain were divorced.

3. The appellant's petition for divorce was based on three grounds. First was that Respondent No.1, the husband, was having an adulterous relationship with Respondent No.2, in whose house he was employed as a driver. The second was that Respondent No.1 had treated her with cruelty and the third that without any reasonable cause the Respondent No. 1 had deserted her and the family.

4. Before the Trial Court Respondent No. 1 was served but chose to remain absent. Accordingly on 17.12.2002 the Trial Court found that he had refused service. It therefore ordered service by publication in the newspaper. That was also done. Finally on 20.2.2003 Respondent No. 1 was set ex parte by the Trial Court. Respondent No. 2 was also set ex parte at the hearing on 4.6.2003.

5. The appellant then led exhaustive evidence, including evidence by way of a CD, the affidavits of evidence of the husband of Respondent No. 2, and certain others who had observed both Respondents 1 and 2 to support her plea that respondents 1 and 2 led an adulterous life. In support of her plea that she and Respondent No. 1 had been married, the appellant produced photographs showing them living together, the birth certificate of their child Ravi Gupta which showed parentage as that of the Respondent No. 1 and certain other documents.

6. The Trial Court first examined the aspect whether the earlier marriage of the appellant with Shri Kailash Jain stood dissolved. The conclusion reached by the Trial Court was as follows:

“The petitioner has alleged that she was earlier married to

Sh. Kailash Jain. That respondent No.1 was friend of Sh. Kailash Jain and would visit them frequently. Subsequently, petitioner and Sh. Kailash Jain were divorced. Respondent No.1 then proposed the petitioner and respondent No.1 got married in a simple ceremony.

The petitioner vide her subsequent affidavit has further submitted that she had obtained divorce from Shri Kailash Jain, her earlier husband, sometimes in the year 1984, by mutual consent. That she does not remember the date of divorce or name of the court except that it was in Tis Hazari. That decree of divorce was given by her to respondent no. 1, who never returned the same to her. Shri Kailash Jain had agreed to give her divorce by mutual consent at the instance of respondent no. 1. An advocate was also engaged by respondent no. 1 for the purposes of representing her and Shri Kailash Jain. That she does not even know the present whereabouts of Shri Kailash Jain.

Admittedly, the petitioner was earlier married with one Shri Kailash Jain. She has alleged that she had obtained divorce from her earlier husband by way of mutual consent. Petitioner has however failed to place on record any evidence, documentary or otherwise in support of her contention that marriage between her and her earlier husband has been dissolved as per law.

Petitioner has, therefore, failed to prove that her earlier marriage with Shri Kailash Jain been legally dissolved.

19. In view of the above, the petitioner has failed to prove the validity of her subsequent marriage with respondent No. 1."

7. Before this court, Respondent No. 1 again chose to remain ex parte. Respondent No. 2 who was served, filed an application stating that she had been unnecessarily dragged into these proceedings and that she should be struck off from the array of parties. On 10.1.2007 this court passed a detailed order stating that Respondent No. 2 should be struck off as far as the present appeal is concerned and in

the event that the matter was remanded to the Trial Court for a decision on merits then the presence of Respondent No. 2 may be necessary.

8. As far as the present appeal is concerned, the ground urged by counsel for the appellant, Ms. Anjali Chopra is that the affidavit filed by the appellants before the Trial Court went un rebutted with both the contesting respondents remaining ex parte. She refers to the appellant's affidavit where she stated that she did not possess the documents to show the grant of divorce by mutual consent in relation to her first marriage with Shri Kailash Jain and that those papers were with Respondent No. 1. Since he chose to remain absent, the said documents could not be reproduced. According to Mrs. Chopra, the said affidavit should have been accepted and acted upon by the Trial Court. In other words she says that as far as the appellant was concerned she had sufficiently discharged the burden of showing that her earlier marriage with Shri Kailash Jain stood dissolved and that she had in fact been married to Respondent No. 1 herein. Reliance is placed by counsel on the judgments of the Karnataka High Court in ***Lakshamma vs. Kamamma and Others*** AIR 2001 Kar 120, ***Neelavva vs. The Divisional Collector, K.S.R.T.C.*** Air 2002 Kar 347. Reliance is also placed on the judgment of the Hon'ble Supreme Court in ***S.P.S. Balasubramanyam vs. Suruttayan*** AIR 1992 SC 756.

9. This court finds considerable force in the contention advanced by counsel for the appellant. It is fairly well settled now in a series of decisions that the burden of proof lies on the person who contests a valid marriage. In this case, in the first place it was the trial court

itself which required the appellant (i.e. the petitioner before it), to satisfy the court that the first marriage with Shri Kailash Jain stood dissolved by a decree of divorce by mutual consent. The affidavit filed by the appellant before the Trial Court has been perused by this court. In fact there are two such affidavits. In the first affidavit dated 23rd July 2003 this is what was said by the appellant in relation to her marriage with Respondent No. 1:

“1. I got married to respondent at Delhi on 24th January 1985 as per Hindu Rites & Ceremonies. Thereafter we started living together and four old photographs taken on various occasions are exhibit as Ex. PW1/1 to PW1/4. Being old photographs there negatives are not now traceable.

2. One son master Ravi Gupta was born out of my marriage with the respondent on 4.1.1986 at Swami Dayanand Hospital, Shahadra, Delhi. Medical discharge card is exhibit as Ex. PW 1/5 and birth certificate is Ex. PW 1/6. His school progress report is exhibit as Ex. PW 1/7.

3. I was earlier married to Shri Kailash Jain and from this marriage a daughter Sonia and a son Ashish were born. After my divorce with Shri Kailash Jain, respondent no. 1 who was close friend of Kailash Jain proposed to me and I married him.”

10. This was supplemented by a further affidavit dated 31st May 2004 where she described her marriage with Shri Kailash Jain having been dissolved in the following manner:

“I was married to the respondent no. 1 on 24.1.1985 (wrongly typed in the affidavit annexed to the petition on 24.4.1985).

Before getting married to the respondent No.1, I was married to Shri Kailash Jain but I do not remember the date of marriage. I had obtained divorce from Shri Kailash Jain sometime in the year 1984 by mutual consent but I do not remember the date of divorce or the name of the Court except that it was in Tis Hazari Court. The decree of divorce was given by me to respondent no.1 who has never returned the same to me. Only the respondent no. 1 can produce the document relating to my divorce with Shri Kailash Jain as at the instance of the respondent no.1 Shri Kailash Jain had agreed to give me divorce by mutual consent and the Advocate was also engaged by the respondent no.1 for the purposes of representing me and Shri Kailash Jain in the Court. I do not even know the present whereabouts of Shri Kailash Jain.”

With both these affidavits remaining unrebutted, there should have been no difficulty in the Trial Court accepting and acting upon the same.

11. As far as the law is concerned, the decisions cited by the appellant do reiterate the settled position that the party which challenges the validity of a marriage must prove that there was no valid marriage. The concurring view of Justice J.S.Thakur in the judgment in ***Somnath*** is succinct in the alienation of the law. Para 38 of the said judgment requires to be reproduced in full:

“28. The legal position in regard to the presumption available in favour of the existence of the marriage is of vintage value. In the case of ***Mohabat Ali Khan v. Muhammad Ibrahim Khan***, AIR 1929 PC 135 it was held that law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years. In the case of ***Mt. Titli v. Alfred Robert Jones***, AIR 1934 All. 273 the Court

held that the burden would lie on any party, who asserts that any rites, ceremonies or customs were not observed, to prove not only the omission but also that such rites, ceremonies or customs were absolutely essential and indispensable in the sense that on account of their not being duly performed the marriage itself was void. In the case of ***Gokal Chand v. Parvin Kumari***, AIR 1952 SC 231 the Court declared that continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years would raise the presumption of marriage. In the case of ***Badri Prasad v. Deputy Director of Consolidation and Ors.***, the Supreme Court held thus.-- "A strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy. In this view, the contention of Shri Garg, for the petitioner, that long after the alleged marriage, evidence has not been produced to sustain its ceremonial process by examining the priest or other witnesses, deserves no consideration. If man and woman who live as husband and wife in society are compelled to prove, half a century later, by eye-witness evidence that they were validly married few will succeed".

The above exposition of the law sums up the decisions of the Privy Council as well as the Hon'ble Supreme Court on the point.

12. Therefore, as far as the first hurdle faced by the appellant is concerned, that is out of the way since this court holds that the appellant has sufficiently discharged the burden of showing that her earlier marriage with Shri Kailash Jain in fact stood dissolved.

13. With that hurdle out of the way, there are two courses open to

be followed. The first is to remand this matter to the Trial Court for a trial on merits. The second course is to consider whether the matter can be decided here itself on one of the grounds on which the divorce is sought. As already noticed earlier when this court was informed that one of the grounds on which the appellant was seeking divorce was adultery, this court was of the view that the presence of Respondent No. 2 with whom Respondent No. 1 is alleged to be living in adultery, would be a necessary party for determining the justification of that plea by the Trial Court. However, on a closer examination this court finds that one other ground on which the appellant has sought divorce is that of desertion. This court finds that the point concerning desertion can be decided even without the participation of Respondent No.2. Further, considering that Respondent No. 1 remained ex parte before the Trial Court, and chose not to participate in these proceedings as well despite being served, there is no real opposition as such to this plea raised by the appellant. It can be decided on the pleadings and records of the case without having to remand the matter to the Trial Court. This course therefore commends itself and the court proceeds to decide whether divorce can be granted to the appellant on the ground of desertion.

14. As regards the desertion, the facts necessary for this purpose can be culled out from the affidavit dated 23 July 2003 filed by the appellant before the Trial Court. The relevant portions of the said affidavit, which are consistent with what is pleaded before the Trial Court, read as under:

“From time to time the respondent No.1 would call me up and inform me that he was very unhappy and willing to come back to me as soon as he made some money. Finally, in 1997 October, the respondent No.1 came back

from Bombay only to inform me that he was going to Kuwait for good and would only show his face to me and the children when he would make something of himself. He promised to return to us after amassing great wealth so that he can make a life with me. The respondent No.1 also wrote a letter seeking pardon of his wrong deeds and the same is exhibit as Ex. PW1/B.

25. Thereafter though the respondent No.1 would call off and on, he never sent me any money, gradually he also stopped calling me and I had no knowledge as to his whereabouts....

Constrained under the circumstances mentioned above, I had no alternative but to seek a divorce from the respondent No. 1. I have been staying alone since April 1993 when the respondent No. 1 left the matrimonial home to go to Bombay. The respondent No. 1 and myself have also not cohabited since then....

Moreover, the respondent No. 1 has misrepresented and mislead me by falsely stating that he was in Kuwait and trying to earn money for the family and giving false hopes that one day everything would be alright and he would come back to me, while all the time he has been living in continuous adultery with the respondent No. 2. Thus, the respondent No. 1 is also guilty of having deserted me without any reasonable excuse as he has deserted me and abandoned the matrimonial house just to make merry with respondent No. 2.

32. I have not in any manner condoned the acts of desertion and the conduct of cruelty and adultery indulged in by the respondent No. 1”

15. There is absolutely no reason why the above statements made in the affidavit of the appellant should not be accepted as being correct. The affidavit has gone unrebutted. Even the Respondent No. 2 cannot possibly deny these facts because they concern the Respondent No. 1 and the appellant here. From the above narration of the facts it is

clear that since 1993 the parties have not lived together. The facts also make it clear that not only has there been a physical separation but there is absolutely no intention of Respondent No. 1 to resume his married life with the appellant. The essential components of desertion in terms of section 13 (1)(ib) of the Act exist.

16. This court having already held that the earlier marriage of the appellant with Shri Kailash Jain stood dissolved and the proof of her marriage with Respondent No. 1 having been established, proceeds to hold that the appellant has been able to discharge the burden of showing that Respondent No. 1 is guilty of desertion.

17. For all of the above reasons this court finds that the impugned order of the learned ADJ is unsustainable in law. It is accordingly set aside. The court further holds that the Respondent No. 1 is guilty of desertion and that the appellant deserves to succeed in obtaining a decree of divorce on that ground. Accordingly the marriage between the appellant and Respondent No. 1 Rajesh Gupta hereby stands dissolved by a decree of divorce on the ground of desertion under section 13(1)(ib) of the Act.

18. Since this court has decided the issue on the ground of desertion, it finds it not necessary to examine the grounds of either adultery or cruelty which in any event would have required the matter to be remanded to the Trial Court. That course not having found favour with this court, no view is expressed on those grounds.

19. The appeal is accordingly allowed but in the circumstances with no orders as to costs. The decree will be drawn up in terms of para 17 of this judgment.

Sd/-
(S. Muralidhar)
Judge.

June 13, 2007