

Parkash Chand Gupta Vs. Kamla Gupta

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Court : Delhi

Decided On : Feb-21-1978

Reported in : AIR1979Delhi33

Judge : Dalip K. Kapur, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 10, 11 and 13; Hindu Marriage (Amendment) Act, 1976

Appeal No. : Civil Revn. Nos. 533 and 718 of 1977

Appellant : Parkash Chand Gupta

Respondent : Kamla Gupta

Advocate for Def. : Harnam Dass, Adv.

Advocate for Pet/Ap. : C.L. Joseph and ; P.D. Gur, Advs

Judgement :

ORDER

1. These are two cross revisions before the Court directed against the same order which was passed during the hearing of a petition under S. 13 of the [Hindu Marriage Act, 1955](#), instituted by Shri Parkash Chand Gupta against his wife Shrimati Kamla Gupta praying for divorce under S. 13 of the said Act.

2. This is not the first case between the parties; in fact it is the third case, and hence an issue was raised to the effect that the petition was barred on principles of rest judicata which was tried as a preliminary issue. The petition being based on the grounds of cruelty and desertion was held by Shri G.R. Luthra, Additional District judge. Delhi to be barred by rest judicata but not so barred on the ground of cruelty. This has led to both the parties coming before this Court for revision of the order. It is the case of the husband (Petitioner in the court below and petitioner in C.R.No.533 of 1977) that neither of the grounds is barred by rest judicata and it is the case of the wife (respondent in the case below and petitioner in C.R.No.718 of 1977) that both the grounds are barred by rest judicata.

3. As it is necessary to give the facts in order to decide this claim, it is first necessary to refer to the previous proceedings. In the year 1965, the husband filed a petition for judicial separation under Section 10 of the [Hindu Marriage Act, 1955](#), on the ground of cruelty, but the same was dismissed by Shri S.C. Jain, Subordinate judge, Delhi, on 25th March, 1968. The judgment became final. That was the first of the three

proceedings.

4. Next, the husband, filed a petition for divorce on the grounds of adultery, but the same was dismissed by Shri Jagdish Chandra, Additional District judge on 16th May, 1975. The husband appealed to the High Court which came before B.C. Misra J. for hearing. An application was moved for withdrawal of the petition with leave to file a fresh petition. This leave was granted by an order passed on 16th Dec., 1976, subject to payment of Rs.500/- as costs. The result of that order would be that the petition based on the grounds of adultery was withdrawn with leave to move a fresh petition. This was the second case in between the parties.

5. When the third case, i.e., the present case was instituted, the plea raised by the wife was that the ground of cruelty was barred by rest judicata because of the judgment of Shri S.C. Jain, Subordinate judge, recorded in the earlier case under Section 10 of the Act. As regards the ground of desertion, the case of the wife was that this ground had not been raised in either of the earlier two cases, and hence, on the principle of constructive rest judicata this ground could not now be agitated.

6. It is now necessary to mention how the Additional District judge has dealt with the question in issue. As far as the ground of cruelty is concerned, he has held that the Hindu Marriage Act, has been amended in 1976. The ground of cruelty is now different and has become a ground of divorce. therefore, it has been held that S. 11 of the Civil P.C. does not apply. On the question of desertion, it has been held that according to the pleadings desertion took place in May, 1963 and hence even when the earlier petition for divorce was filed this could have been a ground. Hence, it has been held that this ground is barred by constructive rest judicata.

7. I have heard learned counsel for both parties and have considered the question carefully. The question of rest judicata has to be decided in this case keeping in view the fact that the [Hindu Marriage Act, 1955](#) has been drastically amended by Act 68 of 1976. The grounds of divorce appearing in the Act as originally passed did not include a ground permitting divorce if cruelty was proved. However, judicial separation could be ordered if it was proved that the respondent had treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the other party. In order to get judicial separation, the previous law required proof of cruelty and also proof that such cruelty would be harmful or injurious or at least, it should so be apprehended by the petitioner seeking the order of the Court. The amendment is that cruelty is no longer a ground for judicial separation, but it is a ground for divorce under S. 13. Moreover the ground as appearing in the Act now is: 'has after the solemnization of the marriage, treated the petitioner with cruelty'. The present wording of the ground is obviously very different. Now, cruelty without any apprehension in the mind is sufficient. Also any cruelty after the solemnization of the marriage may be enough. Obviously, the present ground is much wider and easier to establish than the ground which originally appeared as a ground for judicial separation. Probably, the intention of the amendment was to make divorce easier. Similar changes have also been made in other countries gradually and divorce has been made easier and easier so that there may be in the laws of various countries a stage where no divorce is permissible and progressively a more liberal attitude in the matter of divorce has come to prevail, making it easier for the Court to grant divorce. The changes introduced by the Hindu Marriage Act (Amendment of 1976) is an example of divorce being liberalised. In 1955, cruelty in itself was a ground for

judicial separation, whereas it has now become a ground for divorce. Thus. I am in full agreement with the Additional District judge that the principle of rest judicata cannot be made available to the present case, because the ground is different. Even if the ground was the same, I am of the view that rest judicata would only apply if the facts were also identical. Thus, it may be that the act complained of in 1965 which was held to be not sufficient to award judicial separation may be coupled with later facts so as to establish the ground. Although the judgment recorded by Shri S.C. Jain, Subordinate judge 1st Class would be of value in determining the facts or relationship between the parties up to the date of the decision and must be taken into consideration, it would not in my view, be conclusive about the question whether cruelty had been established in the year 1977. In a continuous relationship like marriage, there is bound to be a change and alteration in the relationship between the parties from time to time. Hence, the principle of rest judicata can only be made applicable in very exceptional cases. Of course, if there has been no alteration, in the situation for all these years, then possibly rest judicata might be invoked. As in this case, the law itself has changed and so also the ground and its legal requirements. this discussion is merely academic. I am quite clear that as far as this me is concerned, no rest Judicata is available on the question of cruelty. I uphold the decision of the Additional District judge on this point.

8. Turning now to the other question whether the ground of desertion is barred by constructive rest judicata, I find that a more difficult problem is invoked. Undoubtedly, when the application for judicial separation was moved in the year 1965 desertion could have been made one of the grounds, because then under Section 10 of the [Hindu Marriage Act, 1955](#), desertion was a ground for judicial separation. That ground has now been transposed to S. 13 as a result of the amendment of 1976, and has become a ground of divorce. As the wording is exactly the same, it would at first sight seem that the additional District judge has rightly decided that constructive rest judicata applies. The wording of the ground as appearing in S. 10(1)(a) of the Act of 1955 and as now appearing in Section 13(1)(ib) is: 'has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition'. Though the ground is the same, it can readily be seen that the period is not the same. The previous petition was presented under Section 10 some time 1965. The present petition has been presented in 1977. The two years previous to the filing of the petition are, therefore, not the same because in the previous case, the petitioner had to establish desertion from 1963 to 1965 and now it is sufficient to prove desertion from 1975 to 1977. The periods being different, the causes of action are also different. However, it is urged on behalf of the wife by Mr. Harnam Dass, her learned counsel that the case of husband is that the desertion has continued without interruption from 1963 onwards, and hence, really the cause of action is the same. I cannot accept this contention, attractive though it may be. It may be that a husband or wife does not move for desertion at a given stage of time or does not think that it is much of a ground, but later on he or she may be in a better position to establish the same. I do not think that rest Judicata is available in such cases at all. Fox instance, if a landlord sues his tenant for rent, the mere fact that he did not sue for rent for an earlier period will not operate as constructive rest judicata. In my view, if there is desertion, each day of desertion or at least each period of two years of desertion gives a separate cause of action. All that the petitioner has to prove is that there was desertion for a period of two years immediately before the date of the filing of the petition. The Court is not concerned with an earlier period. Even if there was desertion for several years followed by a period of resumption of conjugal relationship, the earlier period of desertion would not be taken into consideration. In

my view, the court is only concerned with the last two years and with no other period. If desertion is established for the last two years then this ground will have been established. In this context; it is also necessary to recall that the term desertion appearing in S. 10 of the original Act and now appearing in Section 13 is defined by an Explanation which says that desertion means desertion without reasonable cause and without consent or the wish of the other party and includes willful neglect of the petitioner. In order to apply this Explanation to the two periods now under consideration, it may be that for the period 1963-65, the wife had reasonable cause or had the consent etc. of her husband. The question whether she had reasonable cause or consent etc., for the period 1975 to 1977 is altogether a different question. Reasonable cause can vary from time to time. As I have already said, marriage is a living relationship in which various factors may alter from time to time. Hence, if at any given time desertion may not be actionable, it may be actionable at some other time dependent on the application of the Explanation appended to the section. I cannot possibly come to the view that merely because desertion has not been acted upon or has been condoned for a given period, it will never become actionable in future. I would, therefore, come to the conclusion that in spite of the language being the same and in spite of the apparent cause of action being the same, the real question to be taken into consideration is the reasons for the desertion-and the reasonableness of the parties' conduct and other factors which are relevant when the question of marital relationship is in question. There can be no constructive rest judicata in a case of this type. I, therefore, come to the conclusion that the principle of rest judicata is not applicable in a case of desertion. I would accordingly reverse the decision of the Additional District judge on this part of the issue. I would thus decide that the petition is not barred by rest judicata on either of the two grounds. Civil Revn.No.533 of 1977 and C.R.No.718 of 1977 would stand decided accordingly. I would leave the parties to bear their own costs.

9. Revision allowed.

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