

MANU/RH/0033/1979

Equivalent Citation: AIR1979Raj156, RLW1979()Raj248

**IN THE HIGH COURT OF RAJASTHAN
SPECIAL BENCH**

Civil Reference (Divorce) No. 120 of 1978 and Civil Misc. Appeal No. 32 of 1978

Decided On: 26.03.1979

Appellants: **B.D. Charles**
Vs.

Respondent: **Smt. Nora Benjamin and Anr.**

Judges/Coram:

K.D. Sharma, S.K. Mal Lodha and S.C. Agrawal, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: M.L. Kala, Adv.

For Respondents/Defendant: L.R. Calla, Adv. and S.R. Singhi, Adv. for Ravikumar Goswami

Subject: Family

Subject: Law of Evidence

Acts/Rules/Orders:

- Divorce Act, 1869 - Section 10,
- Divorce Act, 1869 - Section 14,
- Divorce Act, 1869 - Section 34;
- Indian Penal Code 1860, (IPC) - Section 497

Cases Referred:

- Loveden v. Loveden, (1810) 161 ER 648;
- George Arthur Canning Hearsey v. A.M. Hearsey, AIR 1931 Oudh 259;
- Mrs. Agnes Cecilia Gome v. Lancelot Ashley Gome, AIR 1964 Cal 28;
- A.S. Puri v. K.L. Ahuja, AIR 1970 Delhi 214;
- Smt. Pushpa Devi v. Radhey Shyam, AIR 1972 Raj 260;
- Lalithamma v. Kannan, AIR 1966 Mys 178;
- Lakshmi Ammal v. Alagariswami Chettiar, AIR 1975 Mad 211;
- Mudge v. Mudge, (1950) 1 All ER 607;
- W.H. Thomas v. Mrs. Thomas, AIR 1925 Cal 585;
- D'Cruz v. Mrs. D'Cruz, AIR 1927 Oudh 34

Citing Reference:

A.M. Hearsey, MANU/OU/0126/1930	Discussed
A.S. Puri v. K.L. Ahuja, MANU/DE/0025/1970	Discussed
Ashley Gome, MANU/WB/0002/1964	Mentioned
D'Cruz v. Mrs. D'Cruz, MANU/OU/0048/1926	Discussed
Lakshmi Ammal v. Alagariswami Chettiar, MANU/TN/0193/1975	Mentioned
Lalithamma v. Kannan	Discussed
Loveden v. Loveden	Discussed
Mudge v. Mudge	Discussed
Smt. Pushpa Devi v. Radhey Shyam, MANU/RH/0071/1972	Discussed
W.H. Thomas v. Mrs. Thomas, MANU/WB/0019/1925	Mentioned

CaseNote:

Family - Confirmation of divorce decree - Section 11 of Indian Divorce Act, 1869 - Reference for confirmation of a decree nisi passed by District Judge - Whether wife had been guilty of adultery - Whether wife and adulterer lived in adultery with connivance of husband and he condoned it - Held, Section 11 enjoined upon a husband-Petitioner to make alleged adulterer a co-Respondent to a petition under Section 10 of Act unless he was excused from doing so on one of grounds mentioned in section - Until leave to dispense with presence of adulterer as co-Respondent was actually obtained, petition could not succeed - Direct proof of adultery was very rare - Adultery could be established by circumstantial evidence - Circumstances must be such as would lead guarded discretion of a reasonable and just man to a conclusion of adultery - Reasons given by District Judge for not believing statements of wife and the adulterer were correct - In facts and circumstances of case, it could not be said that there was any acquiescence or condonation of adulterous conduct of wife by husband - Findings of District Judge were confirmed - District Judge was right in granting a decree for dissolution of marriage as prayed for by husband on ground that wife had been guilty of adultery - Decree nisi was confirmed.

Family -Payment of amount- Section 34 of Indian Divorce Act, 1869 - Appeal against order of District Judge by which he awarded Rs. 1,000/- as damages to Petitioner-husband by Appellant-non-Petitioner 2-alleged adulterer - Whether husband was entitled to award damages - Held, according to Section 34 of Act, compensation, was given to husband for loss which he had sustained and not punitive, damages - In case actual loss or injury suffered by husband on account of adultery was not established, husband was not entitled to damages - In case of award of damages to husband from adulterer, it was necessary to consider circumstances of married life of husband and wife from beginning - In petition, husband had made no averment for claiming damages from adulterer - He had said nothing regarding his claim for damages under Section 34 of Act - No allegation about damages in petition and no evidence about injury which husband had suffered as a result of conduct of adulterer - District Judge was not justified in directing Appellant-adulterer to pay Rs. 1000/- as damages to husband under Section 34 of Act - Direction made under Section 34 of Act for awarding Rs. 1000/- as damages to husband by Appellant-adulterer was set aside - Appeal partly allowed

JUDGMENT

S.K. Mal Lodha, J.

1. F. B. Civil Misc. Reference (Divorce) No. 120 of 1978 has come up before us exercising jurisdiction over matrimonial causes under Sec. 17 of the Indian Divorce Act, 1869 (No. IV of 1869) (for short, 'the Act' hereafter) for confirmation of a decree nisi passed by the learned District Judge,

Jodhpur dated January 3, 1978. S. B. Civil Misc. Appeal No. 32 of 1978 under Sec. 55 of the Act is directed against the aforesaid order of the learned District Judge by which he awarded Rs. 1,000/- as damages to the petitioner-husband by the appellant-non-petitioner No. 2 (alleged adulterer). The reference and the appeal were heard

together. As common questions of law and fact are involved, it is convenient to decide them by a common judgment.

2. B. D. Charles is the husband, Smt. Nora Benjamin is his wife and Ravikumar Goswami is the alleged adulterer, who will hereafter be referred to as the 'husband', 'the wife' and 'the adulterer' respectively. In the petition of the husband under Sec. 10 of the Act, the wife and the adulterer were impleaded as non-petitioners Nos. 1 and 2 respectively. The case of the husband is that he and his wife are Christians and they were married in Tudala City, District Agra on Oct. 20, 1958 according to Christian rites and that out of this wedlock, Savita Charles (P. W. 4), Santosh Charles (P. W. 3), Sanjay Charles (P. W. 5), Sharley Charles and Sandeep Charles were born. It was further stated in para 6 of the petition that during the three years immediately preceding the date of filing it, the wife ran away from the house of the husband for about four to five times and lived separately where the adulterer was frequently visiting and cohabiting with her. The illicit relation of the wife with the adulterer developed day by day and she left the house of the husband and shifted to another house situate at Paota 'C' Road, Jodhpur on Sep. 29, 1976. It was averred that she had no intention to return to her matrimonial home. A notice was issued by the husband to the adulterer on June 5, 1978 which was delivered to him but no reply was received. The petitioner also mentioned that the adulterer also is a married man and knowing fully well that the wife is lawfully married to the husband who is alive still indulged in sexual intercourse with the wife frequently against the wishes and without the consent or connivance of the petitioner. On the ground of adultery, it was prayed that decree of divorce may be passed in favour of the husband and against the wife and their marriage may be dissolved. A sum of Rs. 5,000/- was claimed as damages from the adulterer for having committed adultery with the wife. This petition was filed on Oct. 18, 1976.

3. The wife contested the petition by filing a reply dated March 11, 1977. She denied the allegation of adultery and also denied that she had eloped with the adulterer and had been living with him. It was stated by

her that the allegation of adultery has been levelled against her by the husband to harass her and that the cruel behavior of the husband had forced her to live separately and leave the matrimonial home. It was submitted in the reply that the husband, according to his own saying, is guilty of connivance and condonation, for, the wife had been living with the husband up to Sep. 1976 and had been discharging all her marital obligations faithfully. An objection was taken that the husband has not been able to explain the gross delay in filing the petition. In these circumstances, it was prayed that the petition may be dismissed with costs.

4. The adulterer also resisted the petition by filing a separate reply. According to him, the husband has concocted false story to malign the adulterer. A similar objection to one which was taken by the wife regarding gross delay, was also raised by him. The learned District Judge framed three issues inclusive of relief, which when translated into English, read as under:

1. Whether non-petitioner No. 1 (wife) has been living in adultery with non-petitioner No. 2 (adulterer) for more than three years ?

2. Whether non-petitioner No. 1 (wife) and non-petitioner No. 2 (adulterer) lived in adultery with the connivance of the petitioner (husband) and whether the petitioner has condoned the same ?

3. Relief.

The husband examined himself as P. W. 1, Shivkumar P. W. 2, Santosh Phillips Charles P. W. 3, Sharley Charles P. W. 4, Sanjay Charles P. W. 5 and Cyril Lobo P. W. 6. In rebuttal, the statements of the wife and the adulterer were recorded as DW 1 and NA2/W1. The learned District Judge accepted the petition and granted a decree nisi for dissolution of the marriage by his judgment dated Jan. 3, 1978, He also awarded Rs. 1,000/- as damages to the husband from the adulterer. The decree nisi passed by the learned District Judge dissolving the marriage has come up for confirmation under Section 17 of the Act. The adulterer has preferred appeal praying that the judgment of the learned

District Judge should be set aside so far as it relates to him regarding the finding of adultery and award of Rs. 1,000/- as damages and costs to the husband.

5. We have heard Mr. M. L. Kala for the husband, Mr. L. R. Calla for the wife and Mr. S. R. Singhi for the adulterer and have also carefully perused the record of the case.

6. The burden of issue No. 1 was placed on the husband as he moved the petition under Section 10 of the Act for dissolution of the marriage on the ground that his wife has, since the solemnization thereof been guilty of adultery. Section 11 enjoins upon a husband-petitioner to make the alleged adulterer a co-respondent to a petition under Section 10 of the Act unless he is excused from doing so on one of the grounds mentioned in the section. Until leave to dispense with the presence of the adulterer as co-respondent is actually obtained, the petition cannot succeed. Relying on *Loveden v. Loveden*, (1810 161 ER 648, Pullan, J., in *George Arthur Canning Hearsey v. A. M. Hearsey*, MANU/OU/0126/1930 : AIR 1931 Oudh 259, observed that it is a fundamental rule that it is not necessary to prove the direct fact of adultery and that in every case, almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and unless this were the case, and unless this were so held no protection whatever could be given to the marital rights. It was also held that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.

7. In *Mrs. Agnes Cecillia Gome v. Lancelot Ashley Gome*, MANU/WB/0002/1964 : AIR 1964 Cal 28 (FB), it was observed (at p. 29):

"It is not necessary that there should be direct evidence of adultery: as it is not easily available, rather direct proof is very rare. It has been pointed out in a number of cases that rarely the parties are surprised in a direct act of adultery.But circumstantial evidence must be sufficiently strong and conclusive. Association coupled with opportunity, illicit affection, undue familiarity, guilty attachment are some of the instances

which create an inference upon which the Court can act. There is an old legal maxim in Scotland which runs as follows: "Solus cum sola in suspecto loco presumitur dicere pater noster", which being translated means that when a man and a woman are found together under suspicious circumstances, it cannot be presumed that they are saying their prayers. It would also be difficult to ascribe the theory of "platonic love" in such circumstances but then again the circumstances must be such as would lead "the guarded discretion of a reasonable and just man to the conclusion" or "fair inference as a necessary conclusion"."

The provisions of Section 497, Penal Code, came up for consideration before a learned Single Judge of the Delhi High Court in *A. S. Puri v. K. L. Ahuja*, MANU/DE/0025/1970 : AIR 1970 Delhi 214. In para 32 of the report, it was observed:

".....What is essential for the offence of adultery is proof of "sexual intercourse". It is also true that this could rarely be proved by direct evidence because precautions are taken to screen it from the view of others. But in evaluating the husband's accusation against his wife of adultery the entire background and the context in which such accusation is made is highly relevant. When the parties concerned are sophisticated, conclusions cannot be arrived at on the mere basis of opportunities for sexual intercourse; such an inference may be more readily possible when dealing with persons whose social mores are more rigid and less sophisticated. The fact of adultery has, therefore, to be inferred from the totality of circumstances that lead to it by fair inference and as a necessary conclusion. What those circumstances are cannot be laid down universally. Nonetheless, the circumstances must be such as should lead the guarded discretion of a reasonable and just mind to that conclusion; it is not to be reached by rash and intemperate judgment, or upon assurances that they are equally capable of two interpretations."

(Underlining is ours.)

In *Smt. Pushpa Devi v. Radhey Shyam*, MANU/RH/0071/1972 : AIR 1972 Raj 260,

Kansingh, J., while dealing with the wife's appeal under Section 28 of the Hindu Marriage Act, 1955 directed against the decree for dissolution of marriage by divorce on the ground of adultery, held that it is not necessary to prove the fact of adultery by direct evidence and such evidence, if produced, would normally be suspect and likely to be discarded and that normally adultery is proved by circumstantial evidence. It was further held that the general rule is that the circumstances must be such as would lead to a guarded judgment of a reasonable and just man to the conclusion.

8. The following principles emerge from the aforesaid decisions:

- 1.** Direct proof of adultery is very rare,
- 2.** Adultery can be established by circumstantial evidence, and
- 3.** Circumstances must be such as would lead the guarded discretion of a reasonable and just man to a conclusion of adultery.

Keeping these principles in view, we propose to review the evidence. The learned District Judge, on a careful consideration of the oral evidence of P. W. 1, B. D. Charles, P. W. 2 Shivkumar, p. W. 3 Santosh Charles, P. W. 4 Sharley Charles, P. W. 5 Sanjay Charles, P. W. 6 Cyril Lobo, D, W. 1 Nora Benjamin and NAW/W1 Ravi Kumar Goswami and the letters Ex. 1 to Ex. 8 which are said to have been written by the adulterer to the wife, reached the conclusion that the wife had been living in adultery with the adulterer.

9. We may briefly refer to the evidence. P. W. 1 B. D. Charles (husband) has deposed that three years ago from the date of his statement in Court, there was illicit relation between the wife and the adulterer, that his wife had sexual intercourse with the adulterer and roamed about with him and about these things, he came to know from p. W. 2 Shivkumar. P.W. 2 Shivkumar has stated that he has been visiting the house of the husband for the work of refrigeration, that he saw the adulterer coming to the house generally in the evening, that the wife and the adulterer

used to talk inside the house, that they used to kiss each other and that he had seen the wife and the adulterer naked on a bed in a room. It may be stated that this witness was not believed by the learned District Judge. P, W. 3 Santosh has stated in his statement that the adulterer used to teach him, that whenever the adulterer came, he either used to give him some work, or used to send him out for some work, that the adulterer and the wife used to go inside the room and used to remain there sometimes for one or two hours and sometimes for sufficiently long period. He has further stated that he has seen them naked and in compromising position inside the room on one cot. This witness went on to state that he has seen such instances in the years 1972, 1973 and 1975. P. W. 4 Sharley has deposed that when her father was not in the house, the aduterer used to come and used to kiss the wife, that they both used to drink together and used to bolt the door and keep them outside the house. It is further clear from her statement that the adulterer used to come at 10 in the night and return in the morning. P. W. 5 Sanjay has supported P. W. 3 Santosh and P. W. 4 Sharley. P W. 6 Cyril Lobo is the landlord in whose house the adulterer was living at the relevant time, He has deposed that when the adulterer's wife went for delivery to Bikaner and he was alone, the wife used to come daily to his house in the side room which was on rent with the adulterer. He has further stated that the wife used to come in the morning, afternoon and in the evening and at times, she used to spend the whole night in the adulterer's room and leave in the morning. From his statement, it is clear that in the adulterer's room, there was no third person and only the wife and the adulterer used to stay in the night. This, according to this witness, continued for a period of two months.

10. The learned District Judge has examined in detail the statements of the wife and the adulterer given in the Court. Having read them, we are satisfied that the reasons given by the learned District Judge for (not) believing them are correct.

11. Letters Ex. 1 to Ex. 8 have been placed on record by the husband. These letters have been proved by the statements of B. D. Charles PW 1 (husband) and PW 3

Santosh Charles. The husband has stated that he has seen the adulterer writing and he can identify the handwriting of the adulterer. PW 3 Santosh has stated that the writing of the letters Ex. 1 to Ex. 8 appears to be that of the adulterer as he can identify it. This evidence is admissible under Section 47 of the Evidence Act. The wife and the adulterer have denied that these letters are written by the adulterer. Besides denial simpliciter by the wife and the adulterer, there is no other independent and convincing evidence to hold that these letters were not written by the adulterer. The learned District Judge has rightly placed reliance on the statements of the husband and his son PW 3 Santosh Charles for holding that these letters are proved to have been written by the adulterer. On going through the contents of these letters and the words used therein, reference of which has been made by the learned District Judge in his judgment, it is clear that the wife was having illicit intimacy with the adulterer. From the evidence of PW 3 Santosh Charles and PW 6 Cyril Lobo, it is clear that the wife and the adulterer used to remain in a room at night. From this, an inference of adultery can be drawn in the absence of any evidence tending to negative it. It may be added that PW 3 Santosh Charles has stated that he had seen the adulterer and the wife in a room in compromising position. In these circumstances, we are satisfied, on the basis of the aforesaid evidence, both oral and documentary, that the wife has been guilty of adultery.

12. The next question that arises for our consideration is whether the wife and the adulterer lived in adultery with the connivance of the husband and he condoned it. The contention raised on behalf of the wife before us was that the husband and the wife lived together up to Sept. 29, 1976 and the petition under Section 10 was filed on Oct. 18, 1976. According to the learned counsel for the wife, the husband has condoned the conduct of the wife and the petition is highly belated.

13. The delay, that operates as a bar to the grant of relief of divorce, is the delay which could be described as either unnecessary or improper or as culpable delay in English decisions. It was held in

Lalithamma v. Kannan AIR 1966 Mys 178 that delay really means the delay for which some blame can be attached to the party guilty of delay. In Lakshmi Ammal v. Alagariswami Chettiar, MANU/TN/0193/1975 : AIR 1975 Mad 211 it was held that the court must be satisfied that the delay has not been due to any such reason as acquiescence in the injury or indifference to the same or there is some wrong motive for seeking relief after sleeping over the matter for an inordinate period.

14. It is well settled that condonation means forgiveness of all such material offences which are known to or believed by the offended spouse so as to restore, between him/her and the offending spouse, the position which existed prior to the commission of the matrimonial offence, i.e. restoration between them the status quo ante. It is equally well settled that whether or not there has been condonation is a question of fact in every case.

15. Connivance in the cases of adultery is such conduct by one spouse as intentionally or recklessly allowing the adultery on the part of the other.

16. It has been stated by the petitioner that he came to know about the adulterous conduct of the wife gradually. It has not been elicited from his statement that after having acquired knowledge in regard to the adulterous conduct of the wife, he had cohabited with her. A perusal of the statement of the husband as PW 1 shows that the wife had left his house finally on Sept. 29, 1976 and that in 1975, when he went out on tour, he came to know that the wife was having illicit intimacy with the adulterer in 1970-71. He has stated that he did not take any proceedings in 1975 because for 11/2 years, he was in Bihar. The learned District Judge rightly held, on the basis of the statement of the husband that he had come to know about the adultery of the wife gradually. Thus, delay in this case cannot operate as a bar. In the facts and circumstances of the case, it cannot be said that there was any acquiescence or condonation of the adulterous conduct of the wife by the husband. In Mudge v. Mudge (1950) 1 All ER 607, it was held that if a husband, who suspects his wife of adultery in order to get

proof of the adultery watches her or employs agent for this purpose, there is no connivance.

17. For the reasons mentioned above, we confirm the findings of the learned District Judge, which he recorded in respect of issues Nos. 1 and 2. There appears to be no collusion between the husband and the wife. On the basis of the evidence led in the case, the learned District Judge was right in granting a decree for dissolution of the marriage as prayed for by the husband on the ground that the wife has been guilty of adultery.

18. Now we take up the question of award of damages to the husband. The learned District Judge has directed that the husband will be entitled to receive, from the adulterer, a sum of Rs. 1,000/- as damages. Section 34 of the Act reads as under,--

"34. Husband may claim damages from the Adulterer. Any husband may either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such objects only claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife, unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied."

According to this Section, compensation, is given to the husband for the loss which he has sustained and not punitive, damages. In case actual loss or injury suffered by the husband on account of the adultery is not established, the husband is not entitled to damages. In the case of award of damages to the husband from the adulterer, it is

necessary to consider the circumstances of the married life of the husband and the wife from the beginning. We are supported in this view by the observations made in George Arthur's case MANU/OU/0126/1930 : AIR 1931 Oudh 259. In W. H. Thomas v. Mrs. Thomas, MANU/WB/0019/1925 : AIR 1925 Cal 585 it was held that the object of awarding damages against an adulterer is not to punish at all and all that the law permits to be given is compensation for the loss which the husband has sustained. In D'Cruz v. Mrs. D'Cruz, MANU/OU/0048/1926 : AIR 1927 Oudh 34 it was observed,--

"...There are at least three points to be considered in measuring the damages; (1) How has the husband demeaned himself, (2) did he and his wife live happily together; and (3) the position of the partner in adultery, though the actual means of the man have nothing to do with the question."

In the petition, the husband has made no averment for claiming damages from the adulterer. In para 24 dealing with the reliefs, amongst others, it has been stated by the husband that the adulterer may be directed to pay a sum of Rupees 5,000/- to the husband as damages by reason of his having committed adultery with the wife. In his statement as PW 1, he has said nothing regarding his claim for damages under Section 34 of the Act. As there is no allegation about the damages in the petition and as there is no evidence about the injury which the husband had suffered as a result of the conduct of the adulterer, we hold that the learned District Judge was not justified in directing the adulterer to pay Rs. 1000/- as damages to the husband under Section 34 of the Act.

19. It follows from the discussion made hereinabove that the decree nisi should be confirmed and the direction awarding damages in the sum of Rupees 1000/- should be set aside.

20. The decree nisi is accordingly confirmed and the appeal of the adulterer is allowed in part and the direction made under Section 34 of the Act for awarding Rs. 1000/- as damages to the husband by the adulterer is set aside. There will be no order as to costs.



© Manupatra Information Solutions Pvt.
Ltd.