Rajasthan High Court
Chhaganlal vs Smt. Sakkha Devi And Anr. on 6 April, 1974
Equivalent citations: AIR 1975 Raj 8, 1974 (7) WLN 301
Author: K Singh
Bench: K Singh
JUDGMENT Kan Singh, J.

1. This appeal is brought under Section 28 of the Hindu Marriage Act, 1955, hereinafter to be referred as the "Act" by a husband against the judgment of the learned District Judge, Ajmer, dated 30-11-1972 whereby the learned District Judge passed a decree for judicial separation against the appellant-husband in favour of his wife Smt. Sakkha Devi and at the same time ordered the husband to pay interim maintenance to the wife at Rs. 30/- per month under Section 24 of the Act.

2. The petition under Section 10 of the Act was made by the wife Smt. Sakkha Devi on 28-2-1968. It was averred by her that Chhaganlal appellant and Smt. Sakkha Devi were married according to the Hindu rites in April, 1953 and that the parties lived together happily as husband and wife in village Tabijee near Ajmer till the month of October, 1963. Since October, 1963. the relations between the two spouses were strained. It was further averred by the wife that the husband had developed illicit intimacy with one Smt. Savari. a married woman, sometime in July, 1963. The coming in of a second woman between the two spouses resulted in the husband, being cruel to the wife. He was alleged to have behaved in a most insulting manner towards the wife and he disgraced her and called her names. This happened almost every day between July, 1963 and November. 1963 when the husband also beat the wife. As a result of the cruel treatment meted out to the wife she was forced to leave the husband's home and since November, 1963 she was living with her brother Ladu Ram at Johns Ganj, Aimer. On account of the aforesaid conduct of the husband the wife apprehended that it would be harmful or injurious for her to live with her husband. Consequently she prayed for a decree for judicial separation. Smt. Sayari, the other woman, has been impleaded as a co-respondent.

3. The husband contested the application. He denied that he had committed any adultery with Smt. Sayari or that he had been cruel to his wife. He alleged that Ladu Ram wanted to give Smt. Sakkha Devi to another in remarriage and, therefore, the application under Section 10 was made with this motive. Smt. Sayari also contested the application by a separate written statement. She denied that she had committed any adultery with Chhaganlal at any time.

4. The learned District Judge framed the following issues on the basis of the pleadings of the parties:--

"1. Whether the respondent No. 1 developed illegal intimacy with respondent No. 2 in July 1963 and is leading an adulterous life with her ?

2. Whether the respondent No. 1 is guilty of cruelty towards the petitioner as alleged in para 4 of the petition; and, if so, its effect ?

3. Whether the respondent No. 2 is entitled to special damages ?

4. What should the relief be ?"

5. The wife examined herself as P. W. 1 and produced her brother Ladu Ram P. W. 2, Chhaganlal P. W. 3 and Smt. Gyarsi P. W. 4. In rebuttal the husband examined himself as D. W. 1 and produced Jagdish D. W. 2, Jiwanram D. W. 3 and Pukhraj D. W. 4. There was further the statement of P. W. 5 Ram Swaroop on the side of the wife. His statement was recorded after the evidence of the husband and it is about the pay and other emoluments of the husband and was, therefore, not material for the determination of any of the issues excepting for the disposal of the application under Section 24 of the Act for the grant of interim maintenance and expenses of litigation to her.

6. The learned District Judge took up both the main petition under Section 10 of the Act and the application under Section 24 of the Act for grant of interim maintenance together. Regarding the application under Section 24 of the Act he observed that Rs. 100/- had already been awarded by way of expenses of litigation to the wife. As regards the interim maintenance he ordered the husband to pay Rs. 30/- per month to the wife from the date of her application under Section 24 of the Act namely, 3-8-68. Then he proceeded to consider the evidence regarding the main issues in the case. As regards issue No. 2 regarding cruelty the learned District Judge observed that there was only the bald statement of the wife that she had been beaten by her husband and was turned out, but no witness had been examined by her to corroborate her statement. Under the circumstances the learned District Judge did not find sufficient evidence for holding that the husband was cruel towards the wife. As regards the other issue regarding commission of adultery with Smt. Sayari. the learned District Judge came to the conclusion that the wife had been successful in proving the issue. Since this is the main finding which has come in for a serious challenge by the learned counsel for the husband I may read the relevant portion of the judgment of the learned District Judge in this behalf:--

"In the light of the submissions made at the bar, I have gone through the evidence on record very carefully. Only on account of this fact that Ladu and his mother Gyarsi are closely related with the petitioner, their evidence should be disbelieved is no ground to discard their evidence; but their evidence requires a serious scrutiny before it can be believed. I have gone through the statements of Ladu. Gyarsi and Chhogalal as also the petitioner herself very carefully. To me their statements inspire confidence when I examine their evidence in the light of the circumstances which have come on record. Sayari has been living in the same house in which respondent No. 1 Chha-gana resides, Sayari is said to be a married woman and is having one son with her. The village in which she was married is Bhanvta and her parents reside in village Fatehpuria. Whv she has left the abode of her Husband nothing has come on record from the side of the respondents. Sayari was the proper person to enlighten the court as to why she was residing in village Tabiji instead of her husband's village or in the village of her parents. She was the most material witness to refute the contention of the petitioner that she was residing as wife of respondent No. 1. Sayari has not been produced either by respondent No. 1 nor she herself stepped in evidence of her own accord. Her non-production in evidence is most material circumstance in favour of the petitioner and against the respondents. Shri Pukhraj D. W. 4, who has stated that Sayari is residing in one of the apartments of his house and has been paying Rs. 2/- p. m. as rent and has also deposed that he was maintaining account-books and has also stated that from other tenants he had obtained rent-notes executed but he has not got any

rent-note executed by Sayari. If he had got executed rent-notes from other tenants as stated by him, there was no reason why he ought not to have got the same executed by Sayari also. His explanation that as Saya was paying Rs. 2/- p. m. as rent, he did not think it proper to get the rent-note executed does not appeal to me because the other tenants were paying Rs. 5/- as per his statement and he thought it proper to get rent-notes executed by them then it was equally necessary for him to get the same executed by her also. If he was getting the rent as per his statement from Sayari, then it was also proper for him to produce his account-books in order to satisfy the court that Sayari was paying rent separately to him. In view of all these circumstances coupled with the evidence of the petitioner, I find that the evidence produced by the petitioner is much more weighty than the evidence produced by respondent No. 1. I am, therefore, of this view that respondent No. 1 is living in adultery with Sayari and hence issue No. 1 is decided in favour of the petitioner and against the respondents."

7. In challenging this finding learned Counsel for the appellant contends that the learned District Judge had not applied the correct legal standard in appreciating the evidence regarding the matrimonial offence of adultery. Learned Counsel maintains that the offence of adultery on the part of a spouse has to be proved beyond all reasonable doubt as in a criminal case and the learned District Judge was in error in deciding the case on the balance of probabilities. Learned Counsel further argued that even the evidence led by the wife on the charge of adultery was wholly unsatisfactory. In the first place, proceeds learned Counsel, the wife had not been believed regarding the cruel treatment alleged to have been meted out to the wife and, therefore, her own statement should not have been taken to be sufficient for the issue of adultery. Learned Counsel emphasises that none of the witnesses examined were from village Tabijee. The witnesses were residents of other places and were in no position to say that the husband was carrying on with Smt. Sayari. Further, according to learned Counsel, the District Judge was entirely wrong in thinking that it was incumbent on the appellant to examine Smt. Sayari as his witness. Learned Counsel points out that Smt. Sayari was a married woman and was not likely to stake her reputation by entering the witness-box though while filing her written statement she had denied the allegations of adultery advanced against her. The learned Counsel further argued that there was positive evidence for showing that Smt. Sayari was living in separate apartments in the house of Pukhraj D. W. 4 as Pukhraj's tenant. This evidence should not have been lightly brushed aside. Lastly; the learned Counsel raised the question of delay of more than 4 years in presenting the application under Section 10 of the Act. Learned Counsel submitted that the inordinate delay in presenting the application not only cast a doubt on the credibility of the wife's case, but also created a bar against the court decreeing the suit under Section 23(d) of the Act. Learned Counsel argued that even if the court were satisfied regarding the commission of the offence of adultery it could mot yet pass a decree in favour of the wife, as the court cannot be said to have been satisfied that there has not been any unnecessary or improper delay in instituting the proceedings. This, according to learned Counsel, went to show that the wife had an oblique motive in seeking judicial separation from her husband so that she could be given in remarriage to another. Learned Counsel placed reliance on a number of cases in support of his contentions namely E J. White v. Mrs. K. O. White, AIR 1958 SC 441; Devyani v. Kantilal, AIR 1963 Bom 98; Sachindranath v. Nilima, AIR 1970 Cal 38; Pushpa Devi v. Radhey Shyam, AIR 1972 Raj 260 and Manohar Bapuji v. Chandrawati, AIR 1936 Nag 26 (SB).

8. The appeal thus involves three matters. -- (1) regarding interim maintenance; (2) regarding the standard of proof required for establishing a matrimonial offence on the part of a spouse; and (3) the question of delay in presenting the application. I may take up points (2) and (3) first as they relate to the decree for judicial separation.

9. As held by their Lordships ol the Supreme Court in AIR 1958 SC 441 while construing a similar provision under the Indian Divorce Act, 1869, the words "satisfied on the evidence" imply that the duty of the Court is to pronounce a decree if satisfied that the case for the petitioner has been proved but dismiss the petition if not satisfied. Their Lordships then referred to the rule laid down by the House of Lords in 1951 AC 391 and went on to say that this rule provides the principle and rule which the Indian Courts should apply to cases governed by the Divorce Act and the standard of proof In divorce cases would be such that if the Judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence he would be satisfied within the meaning of Section 14 of the Indian Divorce Act. Their Lordships added that the Court is to be satisfied on the evidence in respect of the matrimonial offence that the guilt must be proved beyond reasonable doubt and it is on that principle that the Courts in India would act. Their Lordships emphasised that the reason for adopting this standard of proof is the grave consequence which follows a finding of a guilt in matrimonial causes. Their Lordships underlined that it is not necessary and it is indeed rarely possible to prove the matrimonial offence by any direct evidence for in very few cases can such proof be obtainable.

10. Section 23 does not use expression "court is satisfied on evidence", but the expression used is "if the court is satisfied". But the omission of the word "evidence" after the word "satisfied" is immaterial, as the satisfaction, of the court has to be based on evidence led in the case. In AIR 1972 Raj 260 which was a case under the Hindu Marriage Act and the ground for judicial separation was adultery, this is what I observed:--

"As regards the question whether the adultery on the part of the wife has been established the learned Additional District Judge is no doubt, right in saying, that it is not necessary to prove the fact of adultery toy direct evidence. It would be unreasonable to expect direct evidence and such evidence, if produced, would be normally suspect and is likely to be discarded. Normally the matrimonial offence of adultery is expected to be established by circumstantial evidence, but in that event the circumstances must be such as lead to the necessary conclusion that adultery was committed by the spouse concerned. It would not be possible to lay down, as a rule of the thumb as to what circumstances would be sufficient to establish adultery, because circumstances may be diversified by the situation and character of the parties, by the state of general manners and by many other incidental circumstances, apparently slight and delicate in themselves, but they may have important bearing on the particular case. The only general rule upon the subject is that the circumstances must be such as would lead to a guarded judgment of a reasonable and just man to the conclusion. Proof beyond reasonable doubt means such proof as it precludes every reasonable hypothesis except that which it tends to support. It need not reach certainty, but must carry a high degree of probability. The Court would not as a general rule infer adultery from evidence of opportunity alone, but would require some more satisfactory proof (vide Mulla's Hindu Law, 13th Edn., pages 671 to 672)."

other cited cases more or less lav down the same thing. It is noteworthy that not a single person from village Tabiji has been examined for the petitioner wife for proving the association between her husband and Smt. Sayari. Then it is remark-able that she had filed the application for judicial separation after more than four years of her being turned out by her husband on account of evaporation of the happiness of the spouses due to the second woman coming in. Then by and large the learned District Judge has based his judg-ment on the circumstance of Smt. Sayari not being produced in evidence. The learned Judge has pointed out that Smt. Sayari had been living in the same house as Chhagna and that Smt. Sayari was living away from her parents as well as her husband though her son was living with her.

I am afraid too much cannot be made out of Smt. Sayari not entering the witness-box. Being a married woman she may not like to face the ordeal of cross-examination in the witness-box where her own antecedents might be questioned.

Then learned Judge has observed that Pukhraj (D. W. 4), the landlord of the house, has not got any rent-note executed from Smt. Sayari. In villages a person paying a small rent of Re. 1/- or Rs. 2/-per month may not be called upon to execute a rent-note by the landlord. So also a landlord with small range of income may not be maintaining proper account-books. The learned District Judge was certainly not right in deciding the case on the balance of probability. His observations,--

"I find that the evidence produced by the petitioner is much more weighty than the evidence produced by respondent No. 1. I am, therefore, of this view that respondent No. 1 is living in adultery with Sayari."

betray that he is not judging the evidence regarding the matrimonial offence of adultery from a correct standard of proof. Though there need be no direct evidence, yet adultery has to be established beyond reasonable doubt. The evidence consists of four witnesses already mentioned. P. W I is Sakkha Devi. P. W. 2 Laduram is her brother, P. W. 4 Smt, Gyarsi is her own mother. The only other witness is P. W. 3 Chhogalal. He does not belong to Tabiji. He stated that he had seen one woman living with Chhagna at Tabiji. One boy was also living with him. He went to the length of saying that Chhagna had performed 'Nata' with this woman. He had admitted in his cross-examination that he had been to Chhagna's house only twice. On these occasions Smt. Sakkha Devi was not there at the house of Chhagna. On one occasion he had gone with Ladu and on the second occasion without Ladu's company. The evidence of these four witnesses are to my mind does not measure up to the requisite standard of proof for the matrimonial offence of adultery.

11. The contention regarding delay in filing the application appears to be a weighty one. I may read the relevant portion of Section 23 of the Act,--

"23. (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that-

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and XX XX XX XX

(d) there has not been any unnecessary or improper delay in instituting the proceedings, and XX XX XX XX then, and in such a case, but not otherwise, the court shall decree such relief accordingly."

The other clauses namely (b), (c) and (e) relate to condonation, collusion and the like, with which we are not concerned in the present case. Section 23 lays down the conditions for passing a decree in proceedings under Sections 9, 10 and other related sections of the Act. The first condition is a positive one, namely, that the grounds for granting relief exist. The other condition before a decree can be passed is inter alia that there has not been unnecessary or improper delay in instituting the proceeding. Whereas under the English Law unreasonable delay in presenting the petition for divorce or judicial separation is not an absolute bar but a discretionary one under the scheme of the Act the bar is a stringent one. The expression "unnecessary or improper delay" connotes culpable delay. Consideration of the application of the bar of delay may arise in a variety of cases and it would be difficult to find rules which may be helpful in all cases. It will be a question of fact to be determined in each case whether the delay occasioned in instituting the proceeding was unnecessary or improper. If the court holds that this was so then the court is precluded from passing a decree. In the present case there is no explanation whatsoever for the delay of more than four years in instituting the proceeding for judicial separation. The petitioner wife carried a heavy burden of convincing the court that the delay occasioned in presenting the application was not unnecessary or improper. Normally such a delay would be regarded as unnecessary or improper; more so when the offence of adultery is to be established on oral evidence. The lapse of such a long period may result in fading of memories and also may give ample room to a party to manufacture evidence. On this ground also, therefore, no relief could have been granted to the petitioner wife.

12. I may lastly deal with the matter under Section 24 of the Hindu Marriage Act. The first thing that struck me was that the learned District Judge should not have mixed up the matters. He should not have disposed of the application under Section 24 of the Act by the same judgment as for the main application. The two matters were separate and distinct and different considerations could govern their disposal. Section 24 of the Act makes provision for grant of interim relief. This has to be granted, if at all, during the proceedings themselves and not at their fag-end. By and large under Section 24 of the Act applications are disposed of on affidavits in a summary fashion; of course allowing the opposite party to cross-examine the deponents, if he or she so expresses any desire to do so. It is not proper to delay the disposal of such an application till the determination of the main petition, as thereby the very purpose of granting an interim relief may be defeated. At the end of the proceedings, Section 25 of the Act may be invoked whenever it is considered just and proper on being moved by the needy spouse. There the conduct of the spouse as also other circumstances like the income and the property of the spouse, have to be taken into consideration. Apart from everything the merits of the case would be there before the Court while exercising its power under Section 25 of the Act. This would not be so at the stage of the disposal of the application under Section 24 of the Act. As pointed out by a learned single Judge of the Allahabad High Court in a recent case reported in Suren-dra Kumar v. Kamlesh, AIR 1974 All 110 the grant of pendente lite maintenance and/or expenses is not dependent either on the merits or demerits of the petition or on the decision of a particular issue. Thus the considerations for deciding an application under Section 24 of the Act are not the same as those for an application under Section 25 of the Act; the latter involving the merits of the case. The Court was, therefore, not justified in postponing the decision of

the application under Section 24 of the Act till it came to decide the case on merits. Thus, the District Judge was certainly in error in firstly, not deciding the application under Section 24 of the Act promptly, which he should have done, and secondly, he should not have decided the application by the same judgment, as that for the main petition. Any way, I have gone into the matter and as the wife, was not shown to have any independent means of income, the grant of interim maintenance to her under Section 24 of the Act was justified on merits.

13. In the result, therefore, I dismiss Chhagan Lal's appeal qua grant of interim maintenance, but allow it so far as the decree for judicial separation is concerned. The decree for judicial separation granted in favour of Smt. Sakkha Devi is reversed and her application for judicial separation is ordered to be dismissed. There will be no order as to costs.