

Punjab-Haryana High Court

Pawan Kumar vs Aruna Rani on 6 November, 2007

Equivalent citations: (2009) 149 PLR 628

Author: R Madan

Bench: R Madan

JUDGMENT R.S. Madan, J.

1. This is a husband's appeal filed against the judgment and decree dated 28.8.2001 passed by Shri K.C.Puri, the then Additional District Judge, Amritsar, in a Petition being No. 195/1992, under Section 13(1) of the Hindu Marriage Act, 1955, as amended for dissolution of marriage by a decree of divorce, which was dismissed.

2. In brief the facts of the case are that the appellant-husband filed a petition under Section 13 of the Hindu Marriage Act for dissolution of marriage by a decree of divorce against the respondent-wife on the ground of desertion and cruelty. But later on by way of amendment, ground of adultery was also added after about a period of four years of filing of the divorce petition.

3. The marriage between the parties was solemnized on 11.5.1981 according to Hindu rites and ceremonies at Sujampur, District Gurdaspur. Both the parties resided together as husband and wife and cohabited with each other at Amritsar. Out of this wedlock, two children, namely, Rachna and Raghurai were born. The case of the appellant that right from the inception of marriage, the conduct of the respondent was very cruel. She always used to insult and abuse him in front of his friends and relatives. Despite this, he had been tolerating the act of the respondent with a hope that better sense would prevail upon her with the passage of time and she would improve herself but all in vain. While highlighting the acts of cruelty, the appellant alleged that the respondent has been frequent visitor to her parents' house soon after the inception of the marriage and without the consent of the appellant which was not to the liking of the appellant. It was also alleged that the respondent left the house of the appellant in January 1985 and continuously remained at her parent's house for a period of 3-1/2 years. The appellant was also hurt by her respondent by her unbearable words who used to state that she was married against her wishes and she does not like to keep martial relationship with him. It was alleged that the respondent stayed for 7/8 days soon after the marriage with the appellant and then went back to her parents' house from where she returned after 1-1/2 months.

4. On 8.7.1988 the father and brother of the respondent gave a writing in which it was mentioned that she had left the house of the appellant 3-1/2 years back leaving behind the children at the mercy of the appellant. During this period, her attitude and conduct was worst then before and she refused to share bed with him. The appellant had failed a petition for divorce on 13.2.1990 in the court of Additional District Judge, Amritsar and notice was given to the respondent for 4.4.1990. However, during the pendency of this petition, a panchayat was convened on 26.5.1990 in which an agreement was effected between the parties that the respondent should be provided a separate accommodation as well as Rs. 900/- per month as maintenance as she refused to live with him. She was given residence in House No. 3429/1, Gali Kakezian, Katra Baghian, Amritsar. The divorce petition was dismissed as withdrawn having been compromised.

5. The appellant started suspecting Ashok Kumar and Sarwan Singh employees of the police department having illicit relations with the respondent. According to the appellant, on 2.8.1992 he caught red handed Ashok Kumar with the help of his friends, namely, Sunil Kumar, Gurdial and Billa etc. and inhabitants of the Mohalla. Due to this act of the respondent, the appellant had received acute mental shock and agony on his mind. He, thus, pleaded that this incident is an act of mental cruelty as well as that the respondent is living in adultery.

6. The respondent-wife on receipt of notice of divorce petition, contested the same by filing written statement and denied all the allegations made therein. She, however, submitted that she was forced to go to her parents' house for delivery of child as the appellant and his family members were not willing to take the responsibility for delivery charges and other expenses. She also submitted that after the birth of second child, she was thrown out of the house on the pretext of not bringing sufficient gifts. It was pleaded that all these allegations have been made against the respondent just to defame her and to create a ground for divorce. The appellant and his family members right from the inception of marriage were not happy with the dowry articles. As her parents were unable to meet their illegal demands of dowry, she was not allowed to come to the matrimonial home. It was on account of these facts that she was forced to live at the house of her parents. She also denied that the appellant ever visited the house of the respondents parents. She also denied the allegations of adultery levelled against her. Rather she submitted that Ashok Kumar is friendly to the appellant and they have shops adjacent to each other. She also denied that on 2.8.1992, Ashok Kumar was caught red handed by the petitioner, his friends and inhabitants of the mohalla with her. At the end, she pleaded that the appellant cannot be allowed to take a advantage of his own wrongs.

7. Replication was filed by the appellant and controverted the averments made in the written statement and reiterated the facts set out in the divorce petition.

The trial Court framed the following issues:

1. Whether the marriage between the parties is liable to be dissolved on the grounds mentioned in the divorce petition? OPP

2. Relief.

8. In order to prove his case, the appellant examined AW1 Rajesh Sehgal, AW2 Gurdial Billa, AW3 Krishan Lal, AW4 Sunil Kumar, AW5 Kuldip Rai and himself appeared as AW6. The respondent examined RW1 Amar Nath, RW2 Tilak Raj Gupta, RW3 Varinder Kumar, RW4 Darbari Lal, RW5 Yashpal, and herself appeared as RW6. Exhibit AX/1 is a statement of Amar Nath, AX/2 is the copy of the statement of Aruna Kumari made in the complaint filed by her on 12.8.1992 under Sections 354/452 I.P.C. etc against her husband (appellant). AX/3 is a compromise arrived at between Aruna Kumari and Pawan Kumar on 26.3.1990 with respect to providing maintenance at the rate of Rs. 900/- per month and separate accommodation. Mark A to E are the receipts with regarding to receipt of maintenance. Exhibit AX/7 is the undertaking given by the respondent that she will not file petition under Section 125 C.P.C. to claim maintenance in case the appellant sent money order and she will not harass him by summoning him for non-payment of maintenance. Exhibit AX/9 is

the copy of the complaint filed by the respondent under Sections 354/452 I.P.C. Exhibit AZ is the order of framing charges against the appellant. Exhibit RX is a deed of pardon written by Pawan Kumar wherein he has given assurance that he will not file false complaints against Yashpal. Exhibit RW6/1 is the order passed in a petition filed by the appellant against the respondent which was the result of compromise arrived at between the parties. Exhibit RW6/5 is the copy of statement given by Aruna Kumari respondent in a petition under Section 125 Cr.P.C. Exhibit RW6/6 is the copy of statement of Aruna Kumar made during examination-in-chief and RW6/7 is her cross-examination.

After due analysis and appreciation of evidence led by the parties, the trial court dismissed the petition, holding that the appellant had failed to prove all the three grounds i.e. cruelty, desertion and adultery on which the decree of divorce against the respondent was sought. He, thereafter, came up in appeal to this Court.

I have heard the learned Counsel for the parties and have carefully gone through the record.

9. Learned Counsel for the appellant contended that entire averments made in the petition with respect to acts of cruelty, desertion and adultery have been proved against the respondent. The learned trial Court ignored the evidence led by the appellant in this regard and has not appreciated the same. It is admitted by the respondent that she remained at her parent's house for about 3-1/2 years and the appellant was not allowed to visit the house of his in-laws. In this way, the husband was deprived of his right to enjoy the matrimonial life by causing mental cruelty and desertion. In this connection, learned Counsel referred to *Kanwaljit Singh Pannu. v. Smt. Parveen* 2006(1) Civil Court Cases 212 (P&H), wherein it was held that, "desertion means withdrawing from the matrimonial obligation i.e. not permitting or allowing co-habitation between the parties."

10. Learned Counsel for the appellant submitted that due to cruel behaviour and attitude of the respondent, who used to insult and abuse the appellant, her brother admitted all her guilt and gave it in writing on 8.7.1988. When she refused to live with the appellant a panchayat was convened for resolving the dispute and an agreement was effected before the panchayat between the parties that she will live separately and will be given Rs. 900/- per month as maintenance by the appellant. This act of the respondent for not living with the appellant is itself a ground for desertion.

11. Learned Counsel for the appellant further submitted that on 2.8.1992, the respondent was found in the company of Ashok Kumar son of Satpal and Sarwan Kumar in the presence of his friends Sunil Kumar, Gurdial Billa and inhabitants of the mohalla. The appellant had received acute shock and mental agony due to this incident which is sufficient for grant of divorce on the ground of adultery. Instead of feeling ashamed of her this act, the respondent filed complaint under Sections 354/452 I.P.C. etc. against him in the court of JMIC levelling allegations of tress-pass, molestation, etc. It is not disputed that the parties are residing in the same vicinity but in the different house. The appellant thereby deprived of his matrimonial rights. He has been a victim of cruel behaviour right from the date of inception of marriage. He submitted that once a wife filed a false criminal complaint against his husband, this itself means cruelty and the husband is entitled to the decree of divorce. Reference was made to *G.V.N. Kameswara Rao v. G. Jabilli* 2002(2) Supreme Court Cases 296, wherein it was held that, "traumatic experiences suffered by complainant spouse as a result of

the persistent non-cooperation and hostile attitude of the respondent spouse, can be included in the' expression "cruelty". It was also held that, "false police complaint and consequent loss of reputation and standing in society at the instance of one's spouse, would amount to cruelty."

12. Learned Counsel for the appellant further submitted that the parties are living separately from each other which means that there is an irretrievable breakdown of marriage. In this connection he placed reliance on *Durga Prasanna Tripathy v. Arundhati Tripathy* A.I.R. 2005 S.C. 3297:(2005)7 S.C.C. 353, wherein it was held that, "parties living separately for 14 years means that there is an irretrievable breakdown of marriage and it has been rendered a complete dead wood."

13. Learned Counsel for the appellant further contended that once it is proved on the record that wife is living separately for the last so many years, the marriage is a broken marriage and it should be a statutory ground for divorce. He relied upon *Naveen Kohli v. Neelu Kohli* , wherein it was observed, "when parties are living separately for a sufficient length of time and one of them brings a petition for divorce decree, it can be presumed that marriage has broken down irretrievably. It will be against the interest of both the parties as well as against interest of the society to refuse to grant decree for divorce in such cases. Parliament recommended to pass such an amendment."

14. Learned Counsel for the appellant submitted that it has come on the record that she had left the house of the appellant in the year 1985 and returned on 8.7.1988 when her brother gave in writing that she had left the matrimonial house as the misunderstanding cropped up between the parties and the factum of her absence from the matrimonial house for a period of three years stand admitted in this writing. It was on account of this compromise that the respondent started living with the appellant but she refused to share bed with him. This act of the respondent, according to the counsel for the appellant, even though living under the same roof and not sharing bed with the appellant, amounts to desertion.

15. On the other hand, learned Counsel for the respondent contended that it is a case where the appellant has miserably failed to prove all the three grounds for divorce i.e. cruelty, desertion and adultery. In support of his arguments, he submitted that the appellant cannot be allowed to take advantage of his own wrongs. Even if it is admitted that respondent-wife stayed at her parents' house for a period of 3-1/2 years but the appellant never visited there to enquire about her welfare. It was on 8.7.1988 that a compromise was arrived at between the parties and the respondent started living at the house of the respondent. Therefore, the act of desertion if any stands condoned and it cannot, by any stretch of interpretation, be termed a case of desertion on the part of the respondent.

16. Learned Counsel for the respondent also submitted that previously the appellant has filed a petition for divorce against the respondent, despite the fact that she was residing at his house. A compromise was effected on 26.3.1990, as a result of which the petition was withdrawn on 4.4.1990. Thereafter, the appellant filed the present petition against the respondent on 18.11.1992 and sought amendment in the main petition in the year 1996 for incorporating the ground of adultery. As per the Rule 10 of the Hindu ' Marriage (Punjab) Rules 1956, the adulterer is a necessary party and petition filed on the ground of adultery cannot proceed without impleading him as a party. Reference was made to *D. Thomas v. Tara* , wherein it was held that, "In fact, the prescription in

Section 11 is a mandate which cannot be avoided by a husband seeking divorce on the ground of adultery. Where no such person, though known to the plaintiff, is made a party, the suit for dissolution is not maintainable in law. "Reference was also made to Ram Kumar @ Ramender Kumar v. Smt. Raksha @ Galabo , wherein it has been held as under:

Even otherwise, the prayer of the appellant for divorce on the ground of adultery cannot be allowed as he has not disclosed the name of the person with whom the respondent is having illicit relations nor such person has been made party in the petition filed by him. Rule 10 of the Hindu Marriage (Punjab). Rules, 1956 provides that if a petition is presented by husband for divorce on the ground of adultery, then he is required to implead the alleged adulterer, a co-respondent. It has been held in Parvati v. Shiv Ram 1988 Civil Court Cases 539 (H.P.) and Mirapala Venkataramana v. Mirapala Peddiraga II(2000) Divorce and Matrimonial Cases 40 that in a petition for divorce filed by the husband on the ground of adultery, it is necessary for the petitioner to implead the alleged adulterer as co-respondent. In case the husband has not impleaded the alleged adulterer, the petition filed by him is not maintainable being non joining of the necessary party.

17. In the instant case, Ashok Kumar the alleged adulterer, was not impleaded as a co-respondent by the appellant. The allegations of adultery given were not proved on the file. Rather the respondent has taken a specific stand that said Ashok Kumar is a friend of the appellant who was forcibly pushed in the room of the respondent to defame her in the society and to. create a ground of divorce. Due to this incident, she had filed a complaint under Sections 354/452 IPC against the appellant in which the charges were framed against him and the case has not so far been disposed of. Therefore, the appellant cannot take advantage of the fact that the respondent has filed a false complaint against him. Even according to the appellant himself, the respondent was still residing in his house when compromise was effected between them. AW1 Rajesh Sehgal categorically stated that when he visited the house of the appellant, his mother was ill and when the appellant asked the respondent to prepare tea, to which she refused to do so and there was exchange of words between the parties. This kind of incident cannot be termed as cruelty because the respondent wife was looking after her ailing mother-in-law, it is not possible that she would adopt hostile attitude towards the appellant. All the witnesses produced by the appellant are his friends. It is very easy for the witnesses of the appellant to toe the line of the appellant as per his wishes. In order to know the wear and tear in the family life, it is the members of the family who could be the best witnesses to throw light on the matrimonial relationship of the parties. But not a single witness of the family was examined by the appellant. The respondent was serving her mother-in-law in the year 1989 and even thereafter she was residing with the appellant upto 1990 in a joint house. Therefore, it cannot be said to be a case of desertion.

18. It is a case where the respondent was forced to live separately by the appellant by way of a compromise effected on 26.3.1990 in panchayat which was consented by him, therefore, it does not lie in the mouth of the appellant to state that she has withdrawn herself from the matrimonial obligations or society of the appellant. It is the appellant who was responsible for taking advantage of his own wrongs. Throughout the matrimonial life of the parties, the appellant was trying to get rid of the respondent by levelling false allegations against her. It is not disputed that the appellant is residing in the same vicinity where the respondent is residing and paying a sum of Rs. 900/-per

month as maintenance as per the consented arrangement.

19. The appellant has duly proved on the file the agreement dated 26.3.1990 vide which the earlier petition for divorce was withdrawn. It was, thereafter, that the present petition for divorce was filed on 18.11.1992 on the grounds of desertion and cruelty but the allegation of adultery was not found mentioned therein. As per his own case, the appellant caught the respondent on 2.8.1992 in the company of Ashok Kumar with the help of his friends Sunil Kumar, Gurdial and Billa. This ground was available to him on the date of filing of the petition i.e. on 18.11.1992 but he added the same by way of amendment in the petition in the year 1996 as a counter-blast to the criminal complaint filed by the respondent-wife under Sections 354/452 I.P.C. on 12.8.1992. This ground was taken to put pressure on the respondent to withdraw the complaint filed against him.

20. It is a case where the parties are living separately on account of their mutual consent and agreement and it would not amount that the marriage of the parties has broken down and decree of divorce could be granted to the appellant on the grounds of desertion and cruelty. Reliance was placed to *Balwinder Pal v. Anita Kumari* (2007-1)145 P.L.R. 832, wherein it was held as under:

In the instant case, it has been found from the evidence on record that the appellant-husband is not willing at all to live with the respondent-wife any more. On the other hand, respondent-wife is still willing to live with her husband. In this background, in the facts enumerated above, the appellant-husband cannot get decree of divorce relying on the theory that the marriage between the parties has irretrievably broken down. Emphasis is from the case of *Dipak Kumar Sarkar v. Smt. Sima Sarkar* 2005(1) H.L.R. 730. In *Birbal Goswami v. Indra Devi* 1997 Marriage Law Journal 415, it was found that the wife is willing to live with the husband and the husband levelled false charges to get rid of her and it was held that he cannot seek divorce on that ground and dismissal of the divorce petition was upheld. In *Rupinder Kaur v. G.S. Sandhu*, it was held that assuming that the marriage had broken irretrievably, breakdown of marriage is no ground to dissolve the marriage.

21. In *Naveen Kohli's* case (supra), the Apex Court has recommended to the Parliament to enact the ground of irretrievable broken-down marriage as a ground for divorce. This ground at present has not so far been available in the statute. It is a case where the husband has been found guilty of levelling false allegations against the respondent but miserably failed to prove any of the three grounds on which the dissolution of marriage was sought. The case of the appellant is also hit by Section 23 of the Hindu Marriage Act and he cannot be allowed to take advantage of his own wrongs.

In the light of the above discussion, the appeal fails and is dismissed, leaving the parties to bear their own costs.