Rajasthan High Court
Smt. Leela vs Dr. Rao Anand Singh And Anr. on 29 January, 1963
Equivalent citations: AIR 1963 Raj 178
Author: Chhangani
Bench: D Dave, L Chhangani
JUDGMENT Chhangani, J.

1. This is an appeal by Shrimati Leela under Section 28 of the Hindu Marriage Act (No. 25 of 1955 hereinafter to be referred to as the "Act") against the judgment of the District Judge, Jaipur City, dated 18-1-1960 dismissing her petition under Section 13 of the Act for dissolution of the marriage.

2. A few facts about which there is no controversy may be stated first. The respondent No. 1 Dr. Rao Anand Singh is a Hindu and had already been married to Shrimati Roopwati Devi according to Hindu rites prior to his marriage with the petitioner-appellant. The petitioner-appellant was a Christian by birth. The appellant and the respondent No. 1 tried in the first instance to get their marriage solemnised according to christian-rites but did not succeed. She, therefore, became a convert to Hinduism on 27-8-1953 and on the same day she was married to the respondent No. 1 according to Hindu rites. The case of the petitioner in her petition then was that at the time of her marriage with the respondent No. I the petitioner did not know that the respondent No. 1 had already married Mst. Roopwati Devi and that she had been alive at the time of the marriage. This fact according to the petitioner, was deliberately concealed by the respondent No. 1 and his relations. The petitioner's version is that she came to know of this fact on 4-8-7956. The petitioner further alleged that since August 1958 the respondent No. 1 had without just cause completely withdrawn the society of the petitioner and that the respondent No. 1 treated the petitioner with such cruelty and constant threats as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful, injurious and dangerous for the petitioner to live with the respondent No. 1. On these facts, she played for a decree for divorce.

3. The petition was resisted by the respondents. The respondent No. 1 admitted his marriage with Mst. Leela. He also admitted his prior marriage with respondent No. 1 but did not admit the petitioner's allegation that his marriage with respondent No. 2 was kept secret. He also denied the allegations relating to cruelty. He further pleaded that the petition having been filed after delay could not be entertained having regard to the provisions of Section 23(1)(d).

4. The trial court framed the following three issues on 5-9-1959:

1. Is it a fact that respondent No. 1 concealed his first marriage with respondent No. 2 as alleged by the petitioner?

2. Is the applicant being treated with cruelty by respondent No. 1?

3. Is the application delayed and as such cannot be maintained under Section 23(d) of the Hindu Marriage Act, 1955?

After recording evidence, the trial Court decided all the issues against the petitioner and dismissed the appellant's petition. The petitioner has consequently filed the present appeal and Mr. Shyam Behari Lal, appearing for her, has challenged the findings of the lower Court on all the issues.

5. After considering the arguments of the learned counsel for the parties and going through the evidence on record we find no good ground to entertain any doubt as to the correctness of the findings of the trial Judge on issues Nos. 1 and 2.

6. With regard to issue No. 1, the only evidence consists of the statement of the petitioner herself. She stated that she had no knowledge at the time of her marriage with the respondent of the respondent No. 1's prior marriage with Shrimati Roopwati Devi. (His Lordship referred to the evidence and proceeded).

This evidence, in our opinion, sufficiently establishes the petitioner's knowledge of the respondent's prior marriage with Shrimati Roopwati Devi and the issue appears to have been correctly decided.

7. With regard to issue No. 2 also, there is the solitary statement of the petitioner. That statement is too general and vague to justify a conclusion of legal cruelty on the part of the respondent No. 1 towards the petitioner. This issue too has been rightly decided against the petitioner.

8. The findings on issues Nos. 1 and 2 which were in respect of the grounds on which the petitioner had sought divorce do not conclude the matter in view of the provisions of Section 13(2) of the Act which reads as follows:

"(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,--

(1) in the case of any marriage solemnized before the commencement of this Act that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner :

Provided that in either case the other wife is alive at the time of the presentation o£ the petition".

It is clear from the above provision that if a person had married two wives prior to the Act who are alive after the passing of the Act, the wife of the second marriage can apply for the dissolution of the marriage on the ground that the prior wife was alive at the time of her marriage. It may also be mentioned that the wife of the first marriage is also entitled to apply for dissplution of marriage on the ground that the husband had married again. The only limitation on the right of a wife who applies for divorce is that the other wife should be alive at the time of the presentation of the petition. The appellant thus is entitled to claim divorce irrespective of the findings on issues No. 1 and 2, and this position cannot be denied and has not been challenged by Mr. Bhandari. He, therefore, reiied upon undue delay as disentitling the petitioner to any relief.

9. Thus the main controversy between the parties, relates to issue No, 3 and the question for determination is whether in the facts of the present case the petitioner has been guilty of unnecessary or improper delay in instituting the proceedings within the meaning of Section 23(1)(d) of the Act and is, therefore, not entitled to any relief.

Learned counsel relied upon English cases on analogous law also on cases under the Indian Divorce Act, 1869 for the principles governing the determination of such a question. At the outset we may notice Chandrabhagabai Rajaram v. Rajaram J. Patil AIR 1956 Bom 91 relied upon by Mr. Section B. Lal'ln support of the contention that Section 13(2)(1) gives an absolute right to the wife to claim divorce on proof that the husband had contracted two pre-Act marriages before the coming into operation of the Act and further proving that the other wife was alive at the time of the presentation of the petition and that delay of institution of proceedings in such a case cannot be material inasmuch as there can be no question of condonation when the dissolution is sought on the ground of Pre-Act two polygamous marriages by the husband.

The facts of that case were that the plaintiff was married to the defendant in the year 1938. The defendant married a second wife in December 1941. The plaintiff continued to reside with the defendant till 1951 and during the period between 1941 to 1951 the plaintiff had four children born of the defendant. In 1951 the plaintiff filed a suit for dissolution of her marriage with the defendant on the ground that the defendant had married again before the coming into operation of the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 and his second wife was living at the time of the institution of the suit. The plaintiff's claim was resisted on the ground that the plaintifE by living and co-habiting with the defendant for 10 years after the second marriage condoned the alleged matrimonial offence.

A Single Judge of the Bombay High Court posed the question whether there can be and has been a condonation of the second marriage of the defendant and answered it in the negative. After discussing in detail the arguments advanced in support of a plea of condonation and the English cases and examining the language of Section 3 of the Bombay Prevention of Hindu Bigamous, Marriage Act, 1946, the learned Judge summed-up the position as follows:--

"A plain reading of Section 3 and other relevant sections of the Act would suggest that a second marriage contracted by the husband before the coming into operation of the Bombay Prevention of Hindu Bigamous Marriage Act, 1946, is not regarded as on par with matrimonial offences, it being a marriage valid under the Hindu Law".

The learned Judge at a later stage observed as follows -

"Therefore, the rule laid down in Section 3 (2) seems to enact a clear and distinct ground founded on the status of the parties and not on any matrimonial offence. Some support is to be derived for this view from intrinsic evidence. The sub-section confers on the first wife the right to ask for dissolution of her marriage only if the second wife is living at "the time of the institution of the suit. The emphasis is on status and not on any marital delinquency."

The learned Judge then discussed the connotation of the expression "condonation" and held that the doctrine of condonation has no application to the ground of divorce effected in Section 3(2), Bombay Divorce Act.

10. The decision in Bombay case, AIR 1956 Born 91 turned upon the construction of the Bombay Act where there was no provision for delay being pleaded in bar of the relief. The position under the present law is different. Section 23(1)(d) of the Act has provided unnecessary or improper delay as a bar to relief in general terms and is applicable even to a case of divorce claimed on the ground "mentioned in Section 13(2)(1). Clearly then, under the scheme of the Hindu Marriage Act it is not only competent to a court but even necessary and incumbent on it to consider in any such case whether there was any unnecessary or improper delay in instituting the proceedings in terms of Section 23(1)(d) apart from the doctrine of condonation. We are, therefore, unable to accept the argument that Section 13(2)(1) recognises an absolute right of divorce and must hold that the Court will not permit itself to be used as a place to which a party to a marriage can come for redress whenever it suits him or her to do so, having in the meantime held the weapon of redress over the head of the other party to the marriage.

11. We will, however, add that the observations made and the reasoning adopted in AIR 1956 Bom 91 do indicate that delay as leading to an inference of condonation of or connivance of or indifference to matrimonial wrong is not an appropriate consideration for cases under Section 13(2)(i). Consequently, there must be some other factors for characterising the delay as unnecessary and improper. It follows that courts have comparatively a fewer considerations and lesser justification to throw applications for divorce on the ground of delay.

12. Mr. Bhandari relied upon the principles of the English cases and on analogous law and King v. King, AIR 1930 Cal 418 under the Indian Divorce Act, The leading English cases prior to 1930 were all noticed and referred to in the Calcutta case AIR 7930 Cal 418 and the relevant and material observations therefrom were extracted. The trial Judge has quoted and relied upon them. We may usefully reproduce the observations of the Calcutta High Court in this connection:

"Mr. Banerjee referred me to the leading cases on this point, e. g., the case of Mortimer v. Mortimer (1820) 2 Hags Con. 310, which contains the well known dictum of Lord Stowell that the Court 'will be indisposed to relieve a party who appears to have slumbered in sufficient comfort ... . and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury whether real or supposed, or a condonation of it'.

That dictum of Lord Stowell was quoted with approval and emphasised by Sir C. Cresswell in the case of Boulting v. Boulting (1864) 3 Sw. and Tr. 329, where he said -- delay is not of itsell a bar to the suit :

'but it is a most material matter, which unexplained would lead the Court to conclusions fatal to the petitioner's relief.

The same point was dealt with by Horridge J., in the Divorce Court in England in the case of Richard v. Rickard and Bond, (1920) 37 TLR 26 (1), where in effect, Horridge J., said that it is not open to a party in a matrimonial suit to choose his own time for coming to Court and asking for relief'.

The earlier English cases no doubt show thai English Judges gave sufficient importance to delay in instituting proceedings for divorce and were readily inclined to infer acquiescence in the injury or condonation of it or connivance of it or entire indifference of it or insincerity in the complaint and in the exercise of their discretion refused relief of divorce. The later cases, however, revealed a change in the trend.

We will like to refer in this connection to the leading case of Blunt v. Blunt ET E Contra 1943-2 All ER 76 and obviously as this case does not relate to delay, we may point out how it is relevant. The English statutory law ever since 1857 always contained a provision to the effect that the courts shall not be bound to pronounce a decree of divorce and may dismiss the petition, if it finds that the petitioner has during the marriage been guilty of adultery or when the petition has been filed after unnecessary delay.

Blunt's case, 1943-2 All E R 76 relates to the principles governing the exercise of discretion in relation to the petitioner's adultery but the principles stated therein are and have been considered relevant in cases relating to delay in instituting proceedings. In this case. Viscount Simon, L. C. who delivered the judgment of the House of Lords, after referring to Lord Penzance'g deprecation of a loose and unfettered discretion exercised as a free option subordinate to no rules and the need of reducing the exercise to method observed thus -

"The scope within which the Divorce Court has thought it right to exercise a favourable discretion has been greatly widened since the pronouncement of Lord Penzance, and in contrast with his view it has for long been the practice to regard the discretion as "unfettered."

It is impossible to lay down strict rules for its exercise, and to attempt to do so would really be to restrict the liberty conferred by the language of the statute. I would adopt the view of the Court of Appeal, expressed a quarter of a century ago in Wickins v. Wickins 1918 P. 265 per Swinfen Eady, M. R., at p. 272, that :

..... where Parliament has invested the court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases, of classes of cases fit, for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greatef fetters upon the judge of the Divorce Division than the legislature has thought fit to impose".

The learned Lord then referred to the four chief considerations to be borne in mind in deciding divorce cases, namely.

"(a) the position and interest of any children of the marriage; (b) the interest of the party, with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage; (c) the question whether, if the marriage is not dissolved, there is a prospect of reconcilation between husband and wife; and (d) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably".

and added a fifth of a more general character, which he observed, "must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down".

It was further observed that "It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused."

For a case relating to delay, we may refer to Purton v. Purton and George 1956-3 All E R 952. The facts in this case were -- The parties were married in 1927 and there were four children of the marriage born in 1928, 1930, 1939 and 1944. In May, 1946, the wife left the matrimonial home, taking with her the two youngest children, and went to live with the co-respondent as his wife. The husband continued to provide a home for and look after the two eldest children. He hoped that the wife would return to him but by 1951 he had given up this hope. In 1955 the husband became desirous of marrying someone who was free to marry him and in December, 1955. he presented a petition for divorce on the grounds of the wife's desertion and adultery. Towards the end of 1955 the woman whom the husband now wished to marry became his housekeeper and from about Christmas, 1955, they had "lived together as a man and wife; and the husband asked the court to exercise its discretion in respect of his adultery. It was conceded that the husband had been guilty of unreasonable delay amounting to culpable delay. On the facts Karminski J. held that the delay was culpable yet observing that the husband had not been guilty for acquiescence in the wife's adultery, granted a decree for divorce. The learned Judge rightly observed that in matters of discretion it is essential to try to form a general view of the whole case, and that discretion is to be exercised on the principles laid down in 1943-2 All E R 76.

13. In Key v. Key and Staples, 1956-3 All E R 955n. the same Judge excused a delay of ten years in instituting divorce proceedings and accepted the explanation of the husband that he tried his best for some years to find out where the wife had gone and then he tried to save up enough money to start proceedings.

14. Thus, the more modern trend is to exercise a liberal discretion in cases where formally a decree would have been refused on the ground of unnecessary delay and this change is explicable on account of the changing patterns of the social behaviour and this should not be overlooked while referring to English cases in determining the cases in this country. Now it may be observed that divorce was unknown to strict Hindu Law as was administered in India although customary divorce in certain communities was recognised. The Indian Law of divorce has been borrowed from the

English law and, therefore, the principles enunciated in English cases do serve as valuable guiding principles. But in applying them a caution has to be exercised and two important considerations should not be ignored :

15. The differences in the conditions of the Indian society and the English society. This consideration was recognised and given effect to in Dr. Niranjan Das Mohan v. Mrs. Ena Mohan AIR 1943 Cal 146. In that case the petition for divorce was presented on 19th January, 1940 on a number of acts of adultery, the latest of them having been committed between 9th December, 1939 to 7th January, 1940. The District Judge dismissed the petition. On appeal, a Bench of the Calcutta High Court considered the last act of adultery as a good ground for granting relief to the petitioner and further considering the explanation offered by the petitioner in respect of delay relating to earlier adultery laid down the rule as thus -

"He (petitioner) has stated that for the sake of the children and the honour of the family, he wished to avoid publicity; but when the respondent started proceedings for judicial separation at the end of 1938 and he himself had to supply detailed particulars in connexion with those proceedings (which he did on 14th August, 1939), his hands were forced. We are prepared to believe this statement and having regard to the conditions of Indian society, we think this to be a sufficient explanation of any delay there has been on the part of the petitioner."

16. The second and the very important consideration relates to some fundamental differences in the English law and Indian law. In England, monogamy had always been the rule and, therefore, a question of a wife seeking divorce on the ground of the husband's marriage with another woman could not arise and consequently English law cannot be a safe-guard in determining the effect of delay in cases of petitions for divorce on the ground of the husband's polygamous marriages under Section 13(2)(1). Prior to the present Act, polygamy was valid and permissible under the Hindu Law although some States had enacted legislations to prevent polygamy in their respective areas. The present Act has introduced the rule of monogamy and has made bigamous marriages, if contracted after the coming into force of the Act, null and void, vide Section 11 read with Section 5(1). The question of statutory enforcement of monogamy was accompanied by a controversy over earlier valid polygamous marriages. It will be interesting to refer in this connection to the views expressed by Shrimati Chandravati Lakhanpal in her Minute of Dissent of the Report of the Joint Committee -

"It is also necessary in my view to provide a right of divorce to all the wives of polygamous marriages which took place before the commncement of the Act. It is argued that all such previous polygamous marriages should be saved in the interests of the family. This however is not a correct approach. Every wife added by the Hindu husband must cause great unhappiness to the one who is discarded and all such wives must have a right to free themselves from the bond of marriage if they desire to do so. This principle has been recognized in the State of Bombay under the Bombay Hindu Divorce Act, 1947, and it is difficult to imagine why it should not be recognized in this Bill. It is said that in any case such a right should not be given to the last wife because she married with open eyes and with knowledge that her husband had previous wives. This however overlooks the dependent position of the Hindu Woman who when pressed or forced by the father or other guardian will have little choice left but to enter into the proposed polygamous marriage. Under such pressure or force

every young Hindu woman would have been known to have married men almost on the point of entering their graves. The argument therefore must lose all its validity. I suggest, therefore, that this principle should be recognized and provided in Clause 13."

Section 13(2) appears to have recognised the force of the above views and has given wives of pre-Act polygamous marriages a right to claim divorce subject to the limitation that the other wife must be alive at the time of the presentation of the petition. The legislature knew very well that several pre-Act polygamous marriages had been contracted several years ago and that there were several children born of such marriages. Yet, the legislature gave the wives a right to seek dissolution in quite general terms. The legislature further prescribed no time limit for petitions even in respect of such pre-Act marriages. A proper understanding of the statutory recognition of monogamy and the provisions of Section 13(2)(1) in its true back ground leads us to infer that the Courts should not give any undue weightage to delay simpliciter in cases of this type and should be liberal entertaining petitions except in cases of the interests of the parties to the marriage and their children compel a contrary course. Secondly, wader the English law, delay is only a discretionary bar. The position under the Indian law is different. The words "then, and in such a case, but not otherwise, the Court shall decree such, relief accordingly" appearing at the close of Sub-section (1) appear to show that unnecessary or improper delay along with other grounds mentioned in clauses (b) to (c) should operate an absolute bar. The creation of an absolute bar does no doubt indicate that the legislature did not deem it proper to make divorce easy but at the same time it cannot be presumed that the legislature contemplated to force the parties to remain tied even though there are grounds for divorce and the parties cannot be expected to pull together. This necessarily implies that the Courts in India have greater responsibility in determining what should be treated as unnecessary or improper, delay aad should naturally be strict in this behalf on account of the creation of absolute bar. These differences and the peculiar nature of the cases under Section 13(2)(1) must be given due weight and recognition and, in our opinion, they prominently and pointedly indicate a caution against refusing relief on the ground of delay.

17. We have stated earlier that the modern trend under the English law is liberal. We may odd that delay has been liberally excused on various grounds, namely,

(a) delay resulting from ignorance of law;

(b) the petitioner's want of means and property;

(c) unwillingness to involve members of the petitioner's family in family difficulties;

(d) fear of scandal and desire to avoid a final break-up, if possible;

(e) reasonable hope of reconciliation; and,

(f) patience and forbearance on the part of a spouse and particularly the wife and considerations of welfare and position and interest of children of the marriage.

Realising that consideration of the application of the bar of delay may arise in a variety of cases and it would be impossible to expect rules which may be of assistance in all cases, and that it does not seem possible to list cases in which delay would the regarded as falling short of the rule which bars relief where it is unnecessary or improper, the decisions in England have taken the view that the discretion vested in the Court, though said to be a regulated discretion, is in a way unfettered, and that the matters to be considered in the exercise of discretion cannot be reduced to any rules of an exhaustive character and the utmost that can be properly done is to indicate the chief considerations which ought to be weighed in appropriate cases as helping to arrive of a just conclusion. The test as would appear from the observations in 1956-3 All ER 955n is whether the delay is culpable OT to put it in slightly stronger words, whether it is in the nature of wrong. In view of the peculiar nature of the cases under Section 13(2)(1) we are inclined to take the view that the liberal trend of the English law in" an extended form should be applied to cases of this type. We, however, express no opinion and say" nothing regarding cases of other categories with regard to them as it requires an examination of a counter opinion which takes note of the flow of divorce and broken marriages in England and America.

18. Proceeding to examine the culpability of the delay as disentitling relief in the light of the considerations prescribed by English cases and the examination of legal position under the present Act, we are persuaded to take, the view that while in the ultimate analysis case has to be decided on a consideration of the term of the whole case the Courts may and should consider the following factors which are enumerated illustratively and not with any claim to exhaustiveness.

1) the date of the actual and constructive knowledge by a wife petitioner of her right to claim divorce under Section 13(2)(1) and the extent of delay in instituting the complaint after such knowledge;

2) presence or absence of any sufficient or reasonable explanation for delay referred to in No. 1;

3) birth of children after the Act and particularly after awareness of a right to claim divorce and the consideration of interest of such children;

4) conduct of the wife seeking the divorce in relation to proceedings by the other wife or wives for divorce. This may be illustrated by means of an example -- A person has two pre-Act wives --X and Y. His relations with X are very cordial. On that account or otherwise his relations with Y are strained and unhappy. Y demanded a fair deal but was refused by the husband with the connivance of X. Y then institutes proceedings for divorce, after a great delay but before the final disposal X herself institutes proceedings for divorce. Delay on the part of X in such a case may be considered culpable and may disentitle her to relief;

5) consideration of the interest of the petitioner, respondent as also of other persons concerned, such as the other wife or wives of the husband and the prospective husband of the wife seeking divorce. In this connection the reasonable possibility of eventual reconcilation; the effect of the continuance or dissolution of the marriage on the other wife or wives; the manner in which the marriage life was led by the parties in the past; circumstances responsible for the break down; may be appropriately considered. Incidentally, we may observe that consideration of condonation of

acquiescence should not by themselves be of great relevance in determining the culpability of the delay.

19. Judging the present case in the light of foregoing discussions we must refer to the following peculiar factors of the case: -

1) The petitioner and the respondent were married very late i. e., in the year 1953 when the previously married wife of the respondent Mst. Roopwati Devi was alive and who is still alive. The petitioner appears to be older than the respondent.

2) After the marriage, the petitioner did not go to the respondent's house and live with him in his family house. She lived in a separate house.

It is immaterial whether the house was her mother's house or was one obtained by her on lease.

3) No child has been bom of the marriage.

4) The respondent has suggested faithlessness on the part of the petitioner and has accused her of a questionable friendship with Shri R.S. Sharma, and in the circumstances of the case, there does not appear any eventual possibility of reconcilation. The interests of the parties are not likely to suffer on account of dissolution of marriage. The petitioner is a Head Mistress at Udai-pur and is in a position to maintain and support herself. The respondent will continue to have the society of his previously married wife Roopwati Devi and he should have no grievance,

5) The petitioner in her statement had stated that when in February, 1956, she came to know of her husband's earlier marriage, she did not raise any objection in the hope that the respondent would be in a position to behave properly with both. She also had no knowledge of the promulgation of the law which gave her a right to claim a divorced. This explanation does not appear to be unreasonable.

20. All the factors enumerated above, lead us to the conclusion that the delay on the part of the petitioner is not unnecessary or improper and cannot be treated as culpable so as to reject her claim for divorce. We are also of the view that the District Judge did not take into account the relevant considerations which have been referred to by us earlier and influenced by the earlier English cases, dismissed the petition without considering the subsequent English cases and the peculiar nature of the provisions of Section 13(2)(1) of the Act. We are entirely unable to sustain his judgment.

21. We, accordingly, accept this appeal, set aside the judgment and decree of the Court below and allow the petitioner's application and grant a decree for divorce. In the circumstances of the case, the parties shall bear their own costs.