

Court below that the property in dispute formed part of the Cis-Sutlej Jagir in which Jodhbir Singh had only a life interest and consequently, the same is not liable to sale for the mortgage debt created by him.

Hans Raj
and another
v.
Bhupinder Singh
and others

Harbans Singh,
J.

For the reasons given above, we find no force in this appeal and dismiss the same. Taking into consideration, however, the circumstances of the case, we make no order as to costs in this Court. Costs in the Court below have already been directed to be borne by the parties.

B.R.T.

APPELLATE CIVIL

Before I. D. Dua, J.

Mst. BHAGWANTI,—Appellant.

versus

SADHU RAM,—Respondent.

First Appeal From Order No: 6 of 1959:

Hindu Marriage Act (XXV of 1955)—Section 10—Desertion—meaning of—Wife living separately from husband in pursuance of a compromise—Husband having another wife living with him—Refusal to live with husband by the separated wife—Whether amounts to desertion—Code of Criminal Procedure (Act V of 1898)—Section 488—Provisions of—Whether can be taken into consideration in proceedings under the Hindu Marriage Act (XXV of 1955)—Adultery—proof of—Standard and extent of—Practice—Conflict of oral evidence—Finding of fact by the trial court—Whether should be interfered with in appeal.

1959
Nov., 3rd

Held, that desertion has been defined by Explanation to Section 10 of the Hindu Marriage Act, 1955 as desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against

the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage. Mere refusal of matrimonial bed is no desertion, nor is it desertion to neglect opportunity of consorting with the husband. Where the husband agrees to his wife living separately from him when he has another wife living with him, it cannot be said that the wife living separately has deserted him. In fact the existence of another wife is a reasonable cause for the separated wife to refuse to live with her husband as his consort.

Held, that the provisions of sections 9, 10, 13, 14, 23; 24 and 25 of the Hindu Marriage Act, 1955, and of Section 488 of the Code of Criminal Procedure, constitute one system of law and part of a single scheme or of the same legislative plan, and it is fully competent to the Courts— if not imperative for them to construe them all together harmoniously, so that the purpose and equality of the basic principles underlying the subject-matter of the system or the scheme are fully and effectively carried out.

Held, that the burden of providing a serious misconduct like adultery lies heavily on the party asserting it. It is true that no direct or ocular proof of such misconduct can, generally speaking, be forthcoming, but in cases where the allegation consists of the guilty party living a life of promiscuous adultery with any specified individual or individuals, direct evidence may, without much difficulty, be available. Evidence, whether direct or circumstantial, however, must necessarily be of such a character as would induce the guarded discretion of a reasonable and just man to conclude that no other inference than that of misconduct can be drawn from it. The evidence must be clear and convincing as to inclination, opportunity and conduct alike, so as to lead to the irresistible conclusion, though inferential, that the offence impugned has been committed beyond the possibility of a reasonable doubt. Mere possibility that adultery may have been committed is not enough; such commission must be highly probable, because Courts are loath to act in such matters on mere suspicion.

Held, that when there is a conflict of oral evidence of the parties on any matter in issue, and the decision hinges on the credibility of witnesses, then unless there is some special feature about the evidence of any of the witnesses which has escaped the trial Court's notice or otherwise

there is a sufficient balance of improbability to displace the view of the Court of first instance as to where the credibility lies, the appellate court should be slow to interfere with the finding of the trial Court on a question of fact.

Appeal from the decree of the Court of Shri F. S. Gill, Sub-Judge 1st Class, Sangrur, dated the 30th day of December, 1958, granting a decree for judicial separation. Under section 10(1)(a) of the Hindu Marriage Act in favour of Sadhu Ram petitioner against Shrimati Bhagwanti respondent.

BABU RAM AGGARWAL, for Appellant.

D. S. NEHRA, for Respondent.

JUDGMENT

DUA, J.—This appeal, directed against the judgment of the learned Subordinate Judge, 1st Class, Sangrur, granting to Sadhu Ram a decree for judicial separation against his wife Smt. Bhagwanti, has arisen in the following circumstances. Sadhu Ram and Smt. Bhagwanti were admittedly married to each other sometime in the year 1935. They have admittedly got a son who was about 5½ years old in September 1957. It is also not in dispute that Sadhu Ram has another wife living. In 1950 Smt. Bhagwanti instituted proceedings under section 488, Criminal Procedure Code, for maintenance; this application was granted by the Magistrate, but when the matter was taken to the High Court a compromise was effected between the parties. In 1953, it appears that certain disputes again arose and the lady was again compelled to approach the Criminal Court under section 488, Criminal Procedure Code. This time again her petition was allowed by the Magistrate, but when the matter

I. D. Dua, J.

Mst. Bhagwanti
v.
Sadhu Ram
I. D. Dua, J.

was taken to the High Court a compromise was again effected. This time Sadhu Ram gave one-third of the land to Smt. Bhagwanti for her maintenance and also a portion of his house consisting of one room to live in. On the 16th of September 1957, the present petition out of which this appeal has arisen was instituted by Sadhu Ram seeking an order for divorce or, in the alternative, for judicial separation on grounds of adultery and desertion on the part of the wife. On the 6th of December, 1957, on being required by the Court below to implead the alleged adulterer, as required by rule 10 of the Hindu Marriage (Punjab) Rules framed by this Court, Sadhu Ram stated that in spite of his best efforts he had not been able to trace the name of any particular person with whom his wife had been committing adultery. Sadhu Ram was thereupon exempted from impleading the alleged adulterer. Oral evidence with respect to the allegations of adultery and desertion was led by the husband, mentioning one Hari Kishen as the adulterer, but the learned Subordinate Judge considered the evidence with respect to adultery as highly unsatisfactory; he also observed that it was an after-thought on the part of Sadhu Ram to state that Hari Kishen was the adulterer. The evidence led on behalf of Smt. Bhagwanti, was considered by the Court below, to have successfully refuted the oral assertions by the witnesses produced by Sadhu Ram. Hari Kishen, who also appeared as a witness, categorically denied the allegations made by the petitioner's witnesses and was apparently believed by the trial Court. It must in this connection be observed that Hari Kishen is a married man, having about nine children and even grandchildren. With respect to the plea of desertion, however, the Court below has observed that ever since the compromise was effected between the parties on the 9th of April, 1954, when Sadhu

Ram gave to Smt. Bhagwanti some share in land and a part of the house to live in, she has been living separately. This, according to the Court below, amounted to physical desertion of her husband on the part of Smt. Bhagwanti. Having made no endeavour for reconciliation or resumption of marital relations with Sadhu Ram, the Court below appears to think that on the 16th of September, 1957, 3½ years should have elapsed since the husband and the wife started living apart. On these facts the learned Subordinate Judge concluded that desertion on the part of the wife was proved. The Court below was also influenced by her refusal in the present proceedings to go and live with her husband as a wife, holding that there was no prospect of the resumption of conjugal rights between the parties, and as the wife had broken those relations, this was clear wilful neglect on her part showing that she had deserted the petitioner for the requisite period and was therefore at fault. As already observed on this finding a decree for judicial separation was granted under section 10(1)(a) of the Hindu Marriage Act.

Mst. Bhagwanti
v.
Sadhu Ram
I. D. Dua, J.

On appeal Mr. Nehra, on behalf of the respondent, has tried to reopen the finding on issue No. 2 and has contended that evidence fully establishes that Smt. Bhagwanti is living in adultery. He has taken me through the evidence of all the four witnesses, P.W. 1 to P.W. 4, and also of Sadhu Ram. It has been contended that this evidence clearly shows that not only is the lady living in adultery with one Hari Kishen, D.W. 6, but also other people have indiscriminately been visiting her, as if she is a common woman carrying on the profession of a prostitute. In my view the evidence led in this case is wholly inadequate to establish the charge which is the subject-matter of issue No. 2. The Counsel has not been able to offer

Mst. Bhagwanti
v.
Sadhu Ram
I. D. Dua, J.

any reasonable explanation, as to how, and in what circumstances, the name of Hari Kishen came to be known to him, which was introduced in the evidence produced by him on the 17th of March, 1958, when Karnail Singh, P.W. 1, appeared as his witness; up to the 19th of December 1957, when the trial Court exempted Sadhu Ram from impleading the alleged adulterer as a co-respondent, he had been expressing complete ignorance about any particular individual with whom the lady was alleged to be living in or committing adultery. It is not without significance in this connection that on the 3rd of January, 1958, just a couple of weeks after the above-mentioned order permitting Sadhu Ram under rule 10 of the Hindu Marriage (Punjab) Rules, 1956, to be excused from making the alleged adulterer a co-respondent, a list of witnesses was filed in Court by Sadhu Ram, including the witnesses who have named Hari Kishen as one of the alleged adulterers. This circumstance coupled with the vague, general, unconvincing and irresponsible statements of P.W. 1 to P.W. 4 fully justify the view of the learned Subordinate Judge on issue No. 2, and no cogent or substantial ground has been made out in this Court to differ from his conclusions.

Mr. Nehra tried to make capital of the fact that the lady has admitted having taken on rent an apartment from Hari Kishen; it is contended that this has been done for the sole purpose of leading a life of adultery. In my opinion there is absolutely no justification for this submission. This apartment is admittedly about sixty feet away from Sadhu Ram's house, and it is inconceivable that the lady should take on rent an apartment for such a purpose only sixty feet away from her husband's house. It is also admitted by Sadhu Ram in the witness-box that Smt. Bhagwanti is keeping with her, two daughters of her brother,

aged between 12 and 15 years, who are actually studying in some school. It is almost impossible for me to believe that her brother would keep his grown-up daughters with Smt. Bhagwanti if she is living in open adultery, or even if she is not enjoying good reputation in the village. To me the explanation given by the appellant sounds to be much more plausible and reasonable. Her case is that in order to make her both ends meet she sells milk, and indeed this assertion has not been denied even by Sadhu Ram. He admits that the lady does sell milk to make some money; the appellant says that her brother has given her two buffaloes for this purpose, though Sadhu Ram would have us believe that it is he who has got Smt. Bhagwanti the buffaloes. But be that as it may, the fact remains that the lady does require more accommodation than the solitary room given to her by her husband as a result of the proceedings under section 488, Criminal Procedure Code. Finding the accommodation given to her by Sadhu Ram to be insufficient, she took on rent the apartment from Hari Kishen *inter alia* for tethering and keeping the buffaloes. The apartment, according to the case of both the parties, was taken on rent nearly three years ago. If she had really been indulging in misconduct in the apartment taken by her on rent from Hari Kishen, I have not the slightest doubt that Sadhu Ram would have immediately proceeded to take legal action and would not have waited for a period of three years. It may be stated that Sadhu Ram's own case is that for the last three years the lady has taken on rent Hari Kishen's apartment for evil purposes. I have thus no hesitation in agreeing with the findings and conclusions of the Court below on the question of adultery. It must also be borne in mind that when there is a conflict of oral evidence of the parties on any matter in issue, and the decision hinges on the

Mst. Bhagwanti
v.
Sadhu Ram
I. D. Dua, J.

Mst. Bhagwanti
 v.
 Sadhu Ram
 I. D. Dua, J.

credibility of witnesses, then unless there is some special feature about the evidence of any of the witnesses which has escaped the trial Court's notice or otherwise there is a sufficient balance of improbability to displace the view of the Court of first instance as to where the credibility lies, the appellate Court should be slow to interfere with the finding of the trial Court on a question of fact. See *Sarju Pershad v. Raja Jwaleshwari Pratap Narain Singh and others* (1).

I need hardly emphasise that the burden of proving a serious misconduct like adultery lies heavily on the party asserting it. It is true that no direct or ocular proof of such misconduct can, generally speaking, be forthcoming, but in cases where the allegation consists of the guilty party living a life of promiscuous adultery, and it is not confined to adultery with any specified individual or individuals, direct evidence may, without much difficulty, be available. Evidence, whether direct or circumstantial, however, must necessarily be of such a character as would induce the guarded discretion of a reasonable and just man to conclude that no other inference than that of misconduct can be drawn from it. The evidence must be clear and convincing as to inclination, opportunity and conduct alike, so as to lead to the irresistible conclusion, though inferential, that the offence impugned has been committed beyond the possibility of a reasonable doubt. Mere possibility that adultery may have been committed is not enough; such commission must be highly probable, because Courts are loath to act in such matters on mere suspicion. The evidence in the instant case falls far below the standard required.

In so far as the question of desertion is concerned, the Counsel for the appellant has contended, and in my opinion rightly, that Smt. Bhag-

wanti started living separately in pursuance of the compromise effected on the 9th April, 1954, with the consent of Sadhu Ram. Besides, the fact that there was another wife actually living in the house, from whom Sadhu Ram admittedly had even children, would constitute a justifiable and reasonable ground for Smt. Bhagwanti to refuse to live with her husband as a wife. The Court below appears to me to have completely misunderstood and misconceived the implication of the word "desertion". Mere refusal of matrimonial bed is no desertion, nor is it desertion to neglect opportunity of consorting with the husband. Section 23 of the Hindu Marriage Act lays down the circumstances in which alone the Court is entitled to grant a decree under the said Act and clause (e) of sub-section (1) expressly lays down that if there is any other legal ground why the relief should not be granted, the Court should refuse it. Section 10, which deals with the subject of judicial separation, has an Explanation added to it, which is in the following terms:—

"Explanation.—In this section, the expression 'desertion', with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage."

In the present case the compromise, dated the 9th of April, 1954, clearly shows that Sadhu Ram had agreed to the separate residence of Smt. Bhagwanti in the accommodation given by him and it is not shown as to when this consent was withdrawn. Under the law, as it exists today,

Mst. Bhagwanti
v.
Sadhu Ram
I. D. Dua, J.

Mst. Bhagwanti
 v.
 Sadhu Ram
 I. D. Dua, J.

Smt. Bhagwanti is in my view also fully justified in refusing to live as a wife with Sadhu Ram as there is also another wife with whom he is actually living in the house. On the evidence on the record, however, it is not clearly shown that the lady is not living in the room, which was given to her as a result of the compromise effected in the proceedings under section 488, Criminal Procedure Code.

But then Mr. Nehra contends that the amendment of section 488, Criminal Procedure Code, should have nothing to do with the rights and liabilities of the parties under the Hindu Marriage Act and, therefore, according to him the existence of another wife is in law no justification for Smt. Bhagwanti to refuse to perform the marital obligations towards Sadhu Ram. This contention is merely to be stated to be rejected. It is relevant in this connection to refer to section 13(2) (i) of the Hindu Marriage Act which lays down that a wife may also present a petition for the dissolution of her marriage by a decree of divorce, on the ground—

- (i) 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 the either case the other wife is alive at the time of the presentation of the petition."

But this apart, even the provisions of section 488, Criminal Procedure Code, can legitimately be taken into account to determine whether or not the existence of another wife is a reasonable cause

for Smt. Bhagwanti to refuse to live with Sadhu Ram as his consort. The provisions of sections 9, 10, 13, 14, 23, 24 and 25 of the Hindu Marriage Act and of section 488, Criminal Procedure Code, in my view constitute one system of law and part of a single scheme or of the same legislative plan, and it is fully competent to the Courts—if not imperative for them—to construe them all together harmoniously, so that the purpose and equity of the basic principles underlying the subject-matter of the system or the scheme are fully and effectively carried out. The Court below is in my view wholly wrong in concluding that the wife has deserted the husband in the circumstances of the present case and its decision is liable to be set aside.

Mst. Bhagwanti
v.
Sadhu Ram
I. D. Dua, J.

The Counsel for the appellant has also contended that this suit appears to have been inspired by a desire on the part of Sadhu Ram to go back on the terms of the compromise entered into by him. In my opinion this contention is not without basis, and the circumstances do point to the suit having been filed with the desire suggested by the Counsel.

For the reasons given above, this appeal is allowed and setting aside the judgment and decree of the Court below, I dismiss the plaintiff-respondent's suit with costs throughout.

B. R. T.

FULL BENCH.

Before A. N. Bhandari, C. J. and S. S. Dulat, Tek Chand,
R. P. Khosla and I. D. Dua, JJ.

MUNSHA SINGH AND OTHERS,—Appellants.

versus

THE STATE OF PUNJAB AND OTHERS,—Respondents.

Letters Patent Appeal No. 245 of 1958.

East Punjab Hildings (Consolidation and Prevention of
Fragmentation) Act (L of 1948)—Object of—East Punjab

1959

Nov., 5th