

Before S. S. Sandhawalia C.J. and S. P. Goyal, J.

PARAS RAM,—Appellant.

versus

KAMLESH,—Respondent.

F.A.O. No. 70-M of 1980.

September 24, 1981.

*Hindu Marriage Act (XXV of 1955)—Section 13(1) (i-a)—Petition for dissolution of marriage by the husband—Wife raising in defence in the written statement the plea of adultery by the husband—Such plea not put in issue—Mere allegation of adultery in the written statement—Whether per se amounts to cruelty within the meaning of section 13(1) (i-a).*

*Held*, that a false allegation of adultery against a spouse amounts to cruelty in the eye of law. However, it would be a far cry to infer therefrom that an allegation of adultery, whether proved or not, would by itself be the mathematical equivalent of legal cruelty. It is not, and cannot possibly be the law that a factually true allegation of adultery whether made otherwise or in defence in a written statement would amount to cruelty. In this field the truth or otherwise of such an allegation is the crux of the matter. Therefore, before an allegation of adultery can be deemed as legal cruelty it must first be proved as factually false. To highlight, it is a blatantly false allegation of adultery which would amount to legal cruelty and not possible a true allegation of that nature which cannot give any cause of action to the offending spouse. Once this is so, it would appear to be elementary that any such allegation of adultery must be put to trial and it is only when its falsity or otherwise is determined that any legal consequence can flow therefrom. It can, not, therefore, be held that a mere allegation by itself and that too made by way of a defence in legal pleadings should become legal cruelty in the eye of law and *per se* be the ground for divorce.

(Para 5).

*Smt. Jiwan Lata v. Krishan Kumar*, 1979 *Current Law Journal* 509 **OVERRULED.**

*First Appeal from the order of Shri O. P. Gupta, Additional District Judge Narnaul dated 14th February, 1980 dismissing the petition with costs.*

Ashok Kumar Aggarwal, Advocate, for the Appellant.

Chandra Singh Advocate, for the Respondent.

## JUDGMENT

*S. S. Sandhwalia, C.J.*

1. Would a mere allegation of adultery by a spouse against the other made in defence in a written statement, by itself amount to cruelty, within the meaning of section 13(1)(10) of the Hindu Marriage Act is the core question which has necessitated this reference.

2. Because of reasons which appear hereinafter necessitating a remand to the trial Court, it suffices to advert briefly to the facts relevant to the issue aforesaid only. The appellant-husband had preferred the petition for the dissolution of marriage against his wife under section 13 of the Hindu Marriage Act *inter alia* on the ground of cruelty and desertion. The respondent-wife filed a written statement and subsequently an amendment thereof. Therein whilst denying the factual averments made by the appellant-husband she herself alleged that he had illicit relations with some women in the village and wanted her to leave him for ever so that he may either carry on such a liaison with them or marry afresh. Equally scurrilous allegation made was that the wife of Sardar Singh, the elder brother of the appellant-husband having died he himself as also his relations wished her to cohabit with Sardar Singh or get Sardar Singh married by exercising the influence of her father. On the aforesaid pleadings the omnibus issue framed by the trial Court was in the following terms :—

- (1) Whether the petitioner is entitled for dissolution of marriage by divorce on the grounds stated in para No. 4 of the petition
- (2) Relief.

The trial Court found the material issue No. 1 against the appellant-husband on a firm finding that neither the ground of desertion nor that of cruelty as alleged in the petition stood proved. It was, however, urged before it that the respondent-wife had made a wild allegation of adultery in her written statement which would *per se* amount to legal cruelty and, therefore, the appellant-husband was entitled to succeed on that score alone. This stand was rejected on the ground that it was not proved that these wild allegations against the appellant had been made prior to the filing of the petition and

having been made merely by way of defence in the written statement these cannot amount to cruelty. As a necessary consequence the petition was dismissed.

3. On appeal when the matter came up before my learned brother S. P. Goyal, J., the aforesaid contention that the mere allegation of adultery made in the written statement would amount to mental or legal cruelty was strenuously pressed primarily on the basis of *Smt. Jiwan Lata v. Krishan Kumar*, (1). Finding that the observations in *Jiwan Lata's case* did tend to support the appellant's claim and expressing a doubt about the correctness of its ratio, the matter was referred to a larger Bench.

4. As before the learned Single Judge so before us, the learned counsel for the appellant did not challenge the findings of the trial Court on the facts constituting the pleas of cruelty and desertion already taken in the petition which are accordingly affirmed. For the contention that the scurrilous allegation of adultery levelled by the respondent-wife in her statement would, without more amount to legal cruelty and the appellant was, therefore, entitled to succeed on this ground alone irrespective of his failure to establish the case set up by him, the ratio of *Smt. Jiwan Lata's case* has inevitably been commended for acceptance on behalf of the appellant.

5. Before adverting to the judgment on which basic reliance is sought to be placed the aforesaid argument deserves some consideration on principle as well. To my mind the inherent fallacy which seems to have crept in here stems from the settled legal position that a false allegation of adultery against a spouse amounts to cruelty in the eye of law. However, it would be a far cry to infer therefrom that an allegation of adultery, whether proved or not, would by itself be the mathematical equivalent of legal cruelty. It is not, and in my view cannot possibly be the law, that a factually true allegation of adultery whether made otherwise or in defence in a written statement would amount to cruelty. In this field the truth or otherwise of such an allegation is the crux of the matter. Therefore, before an allegation of adultery can be deemed as legal cruelty it must first be proved as factually false. To highlight, it is a blantly false allegation of adultery which would amount to legal cruelty,

and not possibly a true allegation of that nature which cannot give any cause of action to the offending spouse. Once this is so, it would appear to be elementary that any such allegation of adultery must be put to trial and it is only when its falsity or otherwise is determined that any legal consequence can flow therefrom. It would indeed be going too far to hold that a mere allegation by itself and that too made by way of a defence in legal pleadings should become legal cruelty in the eye of law and *per se* be the ground for divorce. Such a proposition is unwarranted either on the language of the statute or on principle. This apart, holding so might well frustrate a true and open trial of a matrimonial offence of adultery because it might well inhibit a spouse to raise such a defence, even though it may be factually true.

6. One may now examine the correctness of the view in *Smt. Jiwan Lata's case* which provides the corner-stone for the argument on behalf of the appellant. Undoubtedly the observations therein would lend support to such a stand. A close perusal of the judgment, however, reveals that on this specific point there is hardly any discussion either on principle or by reference to precedent. It appears that the issue was hardly debated before the learned judge and the observations have been made on first impression. These again seemed to be based on a concession by the counsel for the parties on the larger issue that a false allegation of adultery would amount to cruelty without further analysis about the nature and the modus of proof therefor. The crucial distinction between allegation of adultery made prior to the filing of the case of *allunde* or in collateral proceedings and such an allegation made by way of defence in the written statement seems to have been totally lost sight of. As already noticed there is no manner of doubt that an allegation of adultery made prior to the filing of the petition and put in issue and found to be false would constitute legal cruelty. However, a mere allegation by way of a defence in the written statement irrespective of its falsity or otherwise is not in the same category unless, of course, such an issue is specifically put to trial and the firm finding arrived at whether the allegation was false or substantiated.

7. In arriving at the conclusion which he did, the learned Single Judge referred to and has obviously placed reliance on *Madan Mohan Kohli v. Smt. Sarla Kohli*, (2), and *Smt. Dassi v. Dhani Ram* (3).

(2) AIR 1967 Pb. & Hary. 397.

(3) AIR 1969 Pb. & Hary. 25.

An analysis of both of them would show that they pertain to allegation of adultery made earlier than the filing of the petition or in collateral proceedings which were at issue between the parties. These cases are no warrant for the authority that an allegation of this nature made in defence in written statement irrespective of its proof or falsity would by itself be legal cruelty on the basis of which a petitioner can succeed. Learned counsel for the appellant was indeed fair enough to concede that both the aforesaid cases are not directly attracted to the point. It was candidly conceded that there was no other authority to the effect that the mere allegation of adultery without more was itself cruelty even though it has neither been put in issue or tried thereafter.

8. The view taken in *Smt. Jiwan Lata's case*, if endorsed would tend to lead to curious, if not, startling consequences. One can well visualise a situation where such an allegation of adultery is made by the defending spouse in the written statement and neither the petitioner nor the respondent thereafter led any evidence. On the ratio of *Smt. Jiwan Lata's case* even though the petitioner would have totally failed to establish the case set up by him he would nevertheless be entitled to succeed on the mere ground that an allegation of adultery by the defending spouse had been made. The petition would thus have to succeed even though the petitioner neither leads evidence nor substantiates his case. Such a startling result did in fact ensue in *Smt. Jiwan Lata's case* despite the finding that the allegation levelled by the appellant-petitioner had not been proved yet the petition for divorce was allowed to succeed. Such a result cannot be easily countenanced because it is well settled that a petitioner must succeed or fail on the case set up by him.

9. With the greatest respect it appears to me that on this specific point *Smt. Jiwan Lata's case* does not lay down the law correctly and is hereby overruled.

10. In fairness to the learned counsel for the respondent, Mr Chandra Singh, we must notice that in the alternative he had gone to the extreme length of contending that anything pleaded by way of defence in a written statement by a respondent cannot be made a ground for attack by the petitioner. To put it in legal terminology it was suggested that the averments in the written statement

including allegation of adultery would be privileged in the sense that the petitioner cannot take any advantage thereof. To epitomise in slightly picturesque language the stand was that a shield cannot be turned into a sword.

11. I regret my inability to subscribe to this extreme proposition. Even when pressed learned counsel could cite no authority in support of this stand. On principle, it appears to us that countenancing such an extreme position may well work great public mischief. In substance it would imply that the defending spouse could raise the foulest allegation of adultery or other matrimonial offences against the other without any fear of any retribution.

12. The falsity of the aforesaid stand is also manifest when examined from another angle. The law seems to be settled that an earlier or collateral allegation of adultery, if false, would immediately give a cause of action to the offended spouse. If that be so, a second petition would obviously lie by a spouse against whom false allegation of adultery has been raised in an earlier petition. Indeed this position was not very fairly controverted by the learned counsel for the respondent. If in a second petition the allegation of adultery made in the earlier could be made as a cause of action, one fails to see why such an accusation in the written statement in the same proceeding should be on a different footing. Subscribing to the view canvassed on behalf of the respondent can only tend to lead to a multiplicity of proceedings which it is always the intent of the law to avoid. I am, therefore, unable to subscribe to any abstract theory of a complete privilege to the allegation of adultery made in a written statement.

13. Once the aforesaid conclusion has been arrived at that a mere allegation of adultery without more does not amount to legal cruelty it is manifest that in order to succeed on this ground the petitioner must establish the falsity of such an allegation. The burden of proof, however, being a negative burden would in the initial stage be a light one. It would, therefore, become necessary that the petitioner in such a situation would have to amend the petition and plead the false allegation of adultery amounting to cruelty as a specific ground for matrimonial relief. It is only when this has been made a ground of attack that the petitioner can

possibly take advantage of such an allegation, if proved false. Unless the truth or falsity of such allegation made in the written statement is put to trial in the manner aforesaid and it is established one way or the other no legal consequences can flow therefrom for the purpose of section 13(1)(ia) of the Act. It is therefore, necessary in such a situation that not only the requisite amendment should be made but a specific and clear issue with regard thereto be framed so that the parties should go to the trial thereon with their eyes open. We cannot but view with disfavour the framing of rather omnibus issue in matrimonial matters as appears to be the situation in the solitary issue framed in this case.

(14) It is elementary that in order to succeed in a petition the burden of establishing cruelty under section 13(1)(ia) is on the spouse who alleges the same. However, in a case of the present nature where such an allegation has been made in defence in the written statement it would be a negative burden which can easily be discharged by merely averring that the allegation of adultery is false. It would then be for the spouse alleging the adultery to substantiate the same.

We must now pointedly notice that Mr. Ashok Aggarwal, the learned counsel for the appellant has forthrightly prayed that on the aforesaid view of the law which we have taken he should now be allowed to amend the petition and expressly make the false allegation of adultery made in the written statement as a ground for claiming divorce. In view of our overruling *Smt. Jiwan Lata's* case,—Learned counsel for the appellant seems to be on impeccable ground in contending that having acted in accordance with the law as it then existed, he is now more than entitled to seek an amendment of the aforesaid nature. We would, therefore, remand the case to the trial Court with the direction that the appellant be allowed to amend his petition, a specific issue thereon be framed, and thereafter to proceed to try the same.

(15) The appeal is allowed in the aforesaid terms.

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