

Hardev Singh and others Punjab Act II of 1920. At any rate, even if the adoption had not been proved, Inder Singh had expressed a clear and unequivocal intention to designate or nominate the respondent as his heir and consequently on both these grounds the suit of the collaterals was bound to fail. The appeal is, therefore, dismissed, but owing to the nature of the points involved, the parties will be left to bear their own costs.

Cardial Singh
Grover, J.

D. K.
Mahajan, J.

DAYA KRISHAN MAHAJAN, J.—I agree.
B.R.T.

APPELLATE CIVIL

Before Shamsheer Bahadur, J.

BHAGWAN SINGH,—Appellant.

versus

AMAR KAUR AND ANOTHER,—Respondents.

First Appeal From Order No. 39(M) of 1959

Hindu Marriage Act (XXV of 1955)—Sections 10 and 13—Adultery—When constitutes a ground for divorce for and when for judicial separation—Proof of adultery—Nature of—Condonation of adultery—When takes place.

1960

Oct., 19th

Held, that in order to entitle a spouse to obtain divorce on the ground of the adultery of the other spouse, it has to be proved that the offending spouse is living in the matrimonial offence of adultery about the time the petition for divorce is filed. It is not enough to prove that the other spouse was living in adultery some time in the past. To obtain a decree for dissolution of marriage a wider and more expansive adultery has to be proved than what is required for a decree for judicial separation. A single act of adultery would suffice for a decree for judicial separation whereas a continuous course of adultery is an essential prerequisite for a decree for dissolution of marriage on this ground. A decree for judicial separation can be passed on the ground of a single act of adultery

committed in the past where a decree for dissolution of marriage cannot be passed on that ground.

Held, that it is never necessary to prove adultery or even a single act of adultery by direct evidence. Such evidence is generally discredited when it is produced. Adultery has to be inferred from circumstances which exclude any presumption of innocence in favour of the person against whom it is alleged.

Held, that condonation is the reinstatement in his or her former marital position of a spouse, who has committed a matrimonial wrong of which all material facts are known to the other spouse, with the intention of forgiving and remitting the wrong, on condition that the spouse whose wrong is so condoned does not thenceforward commit any further matrimonial offence. Condonation, therefore, consists of a factum of reinstatement and an *animus remittendi*. The resumption of cohabitation involves a bilateral intention on the part of both spouses to set up a matrimonial home together. Where the resumption of cohabitation is denied by both the spouses, the mere averment in the plaint that they had lived together and cohabited is not enough to prove condonation. If cohabitation takes place after an act of adultery is committed, it is necessary to prove that the innocent spouse had knowledge of the act of adultery committed by the other spouse before cohabitation was resumed in order to substantiate the plea of condonation.

First Appeal from order of the Court of Shri Harish Chander Gaur, Sub-Judge Ist Class, Muktsar, dated the 24th day of August, 1959, dismissing the application of the petitioner with costs.

A. M. SURI, ADVOCATE, for the Appellant.

J. S. WASU, ADVOCATE, for the Respondent.

JUDGMENT

SHAMSHER BAHADUR, J.—This is a husband's appeal from the judgment of the Subordinate Judge, Muktsar, dismissing his petition for dissolution of his marriage with his wife, Amar Kaur, respondent, under section 13 of the Hindu Marriage Act.

Shamsher
Bahadur, J.

hagwan Singh
v.
Amar Kaur and
another

Shamsher
Bahadur, J.

The parties were married to each other at village Chipli of Tehsil Dipalpur, District Montgomery (now in Pakistan) on 20th of August 1940. Three issues were born out of this union; two daughters on 2nd of December 1941 and 8th of January, 1946, respectively, and a son on 10th of November, 1948. A decree for divorce was sought on the ground of adultery committed by the respondent-wife with co-respondent, Sucha Singh, on or about 21st of October, 1955, in Gulshan Hotel, Bhatinda, and at Kot Bhai from 16th of January, 1954 to 31st of May, 1956 and with unknown person at Abul Khurana from 8th of January, 1958 to 31st of March, 1958. The petitioner-husband made an allegation that his wife as a result of her adulterous conduct had been expelled from the Education Department where she had been employed as a teacher till 31st of March, 1958. Reliance was placed in the petition on the general reputation which the respondent-wife had at the various places she was posted as a teacher. The petition was presented on 27th of August, 1958 and it was asserted that it had not been induced by collusion or connivance nor had the adultery been condoned by the petitioner at any stage.

The petition was contested by the respondent Amar Kaur, who pleaded that she had been turned out of the house by her husband after he had taken away her ornaments in the month of January, 1953. While admitting that she worked as a teacher in different schools, she denied the charge of adultery levelled against her. According to her, the petition for divorce was by way of retaliation to the application which she had presented for maintenance under section 488 of the Criminal Procedure Code. In order to invest the Ferozpur Court with jurisdiction, the petitioner

averred in paragraph 3 that he last resided and cohabited with his wife at Malout Mandi up to 26th of June, 1958. The wife denied this position altogether and stated that while they were married in Pakistan, she never lived with her husband in Malout Mandi. The jurisdiction of the Ferozepur Court to try the petition for divorce was challenged. Though the plea of jurisdiction appears to have been raised, the only issue which has been framed is as under:—

Bhagwan Singh
v.
Amar Kaur and
another

Shamsher
Bahadur, J.

“Whether the applicant is entitled to get divorce on account of adultery?”

The trial Court holding that adultery is not proved, decided the issue against the petitioner. He also held that the husband must be deemed to have condoned the adultery by the admission which he made in paragraph 3 of the petition that he and his wife resided and cohabited together in Malout Mandi till 26th of June, 1958. The petition having been dismissed, the husband has come in appeal to this Court.

Though I agree with the appraisal made by the trial Court with regard to the evidence of general repute and character against the respondent, I have formed an impression that the specific act of adultery committed by the wife with the co-respondent at Gulshan Hotel, Bhatinda, on 21st of October, 1955, has been established.

Teja Singh A.W. 1 who is a member of the Panchayat at Kot Bhai stated that in the month of October, 1955, he had gone to the police station and he was told by one Balbir Singh that Mahant Sucha Singh had been caught in a compromising position with Amar Kaur respondent at Gulshan Hotel, Bhatinda. He placed the matter before the Panchayat which dealt with the matters relating to

Bhagwan Singh
v.
Amar Kaur and
another

Shamsher
Bahadur, J.

education, to which department the respondent belonged. As Amar Kaur was transferred from Kot Bhai, the matter does not appear to have been pursued. This act of adultery is concluded by the evidence of police witnesses, Rattan Chand Moharrir A.W. 5 and Gurnam Singh A.W. 6. Rattan Chand brought the police register to prove the entry made on 21st of October, 1955, with regard to Sucha Singh Mahant of Gurdwara Kot Bhai being found in compromising position in the same bed in Gulshan Hotel, Bhatinda, with respondent Amar Kaur. The entry which has been proved by Gurnam Singh A.W. 6 is to this effect:—

“Mst. Amar Kaur was found lying in Gulshan Hotel with Sucha Singh, s/o Sardara Singh of Kot Bhai. She told that he is her brother-in-law and she was accompanying to Ferozepur. But the above-mentioned circumstances are suspicious one. Please intimate about their antecedents.”

Amar Kaur as R.W. 9 admitted that she had been transferred from Kot Bhai in the year 1956. She denied, however, that the transfer took place as a result of the incident in Gulshan Hotel. She admitted that she was with Sucha Singh at Gulshan Hotel on 21st of October, 1955. She further admitted that the police came to the hotel at about 9-0 P.M. and she and Sucha Singh were found in the same room. She, however, disclaimed knowledge of the fact whether they were found in the same bed. The equivocal nature of her statement leads me to the conclusion that Amar Kaur was found lying in the same bed with Sucha Singh as reported in the police entry. No reason has been shown to exist why a false entry should have been fabricated against the respondent. This

conclusion receives documentary support from the hotel entry. Exhibit P.W.7/A, where Sucha Singh is shown to be accompanied by a woman. According to the evidence of Hari Chand of Gulshan Hotel, Bhatinda, who produced the hotel register, Sucha Singh and the woman who accompanied him were living in the same room. A sum of Rs. 2-8 was recovered by way of rent. Sucha Singh was described as a man of 50 and considering all the evidence together, it is impossible to resist the conclusion that on 21st of October, 1955, he and Amar Kaur aged 34 committed adultery. The evidence of the Sub-Inspector (A.W. 10) who arrested the respondent and the co-respondent from Gulshan Hotel leaves no room for doubt regarding the intention of the respondents. The Sub-Inspector stated that they were found in a compromising pose on one charpoy. True, these words were not used in the entry but in the language of the Sub-Inspector, "decency" had to be maintained and the writer was content to state merely that they were found together in suspicious circumstances. I need not advert to the other witnesses who have appeared to support the case of the petitioner. Their evidence is vague and can be rejected on the ground that it is mere hearsay. According to the petitioner, his wife wherever she went gathered the reputation of a person living in continuous adultery. The persons have not been named and it would be very unsafe to rely on evidence of this character. As regards the specific act of adultery in Bhatinda it is worth mentioning that Sucha Singh has neither filed a written statement nor has he appeared as a witness to repudiate the allegation which has been made against him.

Bhagwan Singh
v.
Amar Kaur and
another

Shamsher
Bahadur, J.

It is never necessary to prove adultery or even a single act of adultery by direct evidence. Such

Bhagwan Singh
v.
Amar Kaur and
another

Shamsher
Bahadur, J.

evidence is generally discredited when it is produced. Adultery has to be inferred from circumstances which exclude any presumption of innocence in favour of the person against whom it is alleged. In my opinion, the evidence with regard to the act of adultery committed in Gulshan Hotel is conclusive. The requirements of the test are amply met by the probative statements of witnesses mentioned aforesaid.

Still, there are two impediments in the way of the petitioner. The first is the bar of condonation. It has been contended by the counsel for the respondent that the petitioner having admitted cohabitation with the respondent after she had committed adultery with co-respondent in Gulshan Hotel must be regarded to have condoned the matrimonial offence of adultery. As stated by Rayden on Divorce (6th edition) at page 177:—

“Condonation is the reinstatement in his or her former marital position of a spouse who has committed a matrimonial wrong of which all material facts are known to the other spouse, with the intention of forgiving and remitting the wrong, on condition that the spouse whose wrong is so condoned does not thenceforward commit any further matrimonial offence. Condonation therefore consists of a factum of reinstatement and an *animus remittendi*.”

The averment made in paragraph 3 of the petition has to be read with paragraph 5 in which it is stated that the petitioner never condoned the adulterous acts of his wife. The respondent herself denied in her written statement that she cohabited with her husband at Malout Mandi and

the evidence of both parties is to the effect that they had never lived together since 1953. The pleadings read as a whole and the evidence, induce me to accept the contention of Mr. A. M. Suri that the statement made in paragraph 3 of the petition was only meant to invest the Ferozepur Court with jurisdiction. Paragraph 10 of the written statement of Amar Kaur, where the fact of cohabitation is denied and the jurisdiction of the Ferozepur Court where the petition has been filed has been questioned, supports the submission which has been made by the learned counsel. Moreover, there is no evidence to show that cohabitation between the parties, if ever committed in 1958, was with full knowledge of the petitioner that his wife had committed adultery with the co-respondent in Gulshan Hotel on 21st of October, 1955. There is not a scintilla of evidence to show that after the alleged cohabitation the husband reinstated the wife in her previous position. Indeed, the evidence is to the effect that the parties have not lived together as husband and wife since 1953. Even assuming that the parties cohabited together before the filing of the petition, this would not be enough to constitute condonation according to the decision of the Court of appeal in *Perry v. Perry* (1), where it was held that "though sexual intercourse was beyond doubt a most important incident in the marital relationship, an act, or two or three acts, of intercourse could not be regarded as proof of the resumption of marital relationship where a wife, though participating in such acts, in all other respects repudiated the relationship.....". In the written statement, the wife has denied cohabitation and in fact had repudiated it. There cannot, therefore, be said to have been any resumption of marital relationship. As said by

Bhagwan Singh
v.
Amar Kaur and
another

Shamsher
Bahadur, J.

(1) (1952) 1 All. E.R. 1076.

Bhagwan Singh
v.
Amar Kaur and
another

Shamsher
Bahadur, J.

Lord Justice Asquith (as Lord Asquith then was) in *Bartram v. Bartram* (1), "having regard to those and other proved circumstances in the case, it seems to me wrong to hold that the three years period was interrupted by any resumption of cohabitation, for such resumption involves, in the language of Lord Merriman, P., in *Mummery v. Mummery*, a bilateral intention on the part of both spouses to set up a matrimonial home together. In my view, the facts proved in this case negative any such intention on the part of the wife who was not a free agent but was acting under the spur of necessity". A bare assertion of cohabitation must, therefore, be regarded as ineffective to constitute cohabitation in the instant case where the wife has denied the suggestion and there is no question of any "bilateral intention on the part of both spouses to set up a matrimonial home together".

My conclusion on this aspect of the case, therefore, is that the petitioner's solitary statement made in paragraph 3 of the petition contradicted by his subsequent statement that he never condoned the adultery and unsupported by any evidence on record is insufficient to constitute an act of condonation. If any cohabitation between the petitioner and respondent No. 1 took place after 21st of October, 1955, there is no proof that this was done in knowledge of the adultery between the two respondents and that it did not result in the resumption of a matrimonial home.

This brings me to the remaining point in this case, whether a decree for dissolution of marriage can be granted under the provisions of section 13 of the Hindu Marriage Act. Sub-section (1) of section 13 says that "any marriage solemnized, whether before or after the commencement of this

(1) (1949) 2 All. E.R. 270;

Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

Bhagwan Singh
v.
Amar Kaur and
another

(i) is living in adultery; or
* * *

Shamsher
Bahadur, J.

It has been rightly argued by the counsel for the respondent that it must be shown right up to the date of petition and even till the date of the decree that the offending respondent is living in the matrimonial offence of adultery to entitle the aggrieved spouse to claim a decree for dissolution of marriage on this ground. Apart from the fact that the language used in the section is clear and unambiguous, there is authority to support the proposition which has been advanced by Mr. Bindra, the learned counsel for the respondent-wife. In *Rajani Prabhakar Lokur v. Prabhakar Raghavendra Lokur and another* (1), (Vyas and Miabhoy, JJ.) it was held that " 'living in adultery' means a continuous course of adulterous life as distinguished from one or two lapses from virtue." Vyas, J., observed at page 267 that to give meaning to the words "is living" in clause (i) of subsection (1) of section 13 "it would not be enough if the spouse was living in adultery sometime in the past, but had seceded from such life for an appreciable duration extending to the filing of the petition. It would not be possible to lay down a hard and fast rule about it since the decision of each case must depend upon its own merits and turn upon its own circumstances.....it must be shown that the period during which the spouse was living an adulterous life was so related, from the point of proximity of time, to the filing of the petition that it could be reasonably inferred that the petitioner

(1) A.I.R. 1958 Bom. 264.

Bhagwan Singh had a fair ground to believe that when the petition was filed, she was living in adultery.”
 J.
 Amar Kaur and another

Shamsher
 Bahadur, J.

Having held that only one act of adultery has been proved on record, namely, on 21st of October, 1955, a decree for dissolution of marriage cannot obviously be granted to the husband whose petition was presented in 1958.

Although the petitioner did not ask for the relief of judicial separation, it has been urged by his learned counsel that he is entitled to it under section 10 of the Hindu Marriage Act. In contrast to the requirement of section 13, a judicial separation under section 10(1)(f) can be granted if the offending spouse “after the solemnization of the marriage, had sexual intercourse with any person other than his or her spouse”. That the act of adultery committed by the respondent with the co-respondent would be sufficient to entitle the petitioner to a decree for judicial separation appears to be manifest from the language of section 10. The question which I have to ask myself is whether the failure of the petitioner to have claimed an alternative relief disentitles him to it in the present proceedings? Under section 21 of the Hindu Marriage Act, all proceedings under this Act “shall be regulated, as far as may be, by the Code of Civil Procedure, 1908”. The proceedings under the Hindu Marriage Act have to be in accordance with the Code of Civil Procedure. The relief of judicial separation on ground of adultery is not inconsistent with what was actually prayed for in the petition for dissolution of marriage. To obtain a decree for dissolution of marriage, a wider and more expansive adultery has to be proved than what is required for a decree for judicial separation. The relief contemplated in clause (f) of subsection (1) of section 10 can truly be called a lesser

relief than the one envisaged in clause (i) of subsection (1) of section 13. A single act of adultery would suffice for a decree for judicial separation whereas a continuous course of adultery is an essential prerequisite for a decree for dissolution of marriage on this ground. Under Order 7, rule 7 of the Code of Civil Procedure, though every plaint shall state specifically the relief which the plaintiff claims, it "shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for". So long as the "other relief" to which a petitioner is entitled is not inconsistent with the original relief asked for and is based on the same cause of action and is not different from it, it is generally granted even when not asked for. In *Mr. Glorious Jacob v. Mrs. Rosie Jacob* (1), a Division Bench of Sir James Addison and Ram Lall, JJ., held that "where in a petition for dissolution of marriage under the Indian Divorce Act, a case for dissolution of marriage is not made out but there is a case for granting judicial separation and the court has failed to consider this aspect of the case, there is ground for review and the court may grant judicial separation on an application for review being made". In that particular case, the District Judge who dismissed the petition for dissolution of marriage was moved in a review petition for granting a decree for judicial separation. The District Judge acceded to the prayer made in review and his action was confirmed by the Division Bench of the Lahore High Court. The principle of law relied upon, in my opinion, is equally applicable to the facts of the present case.

In my judgment, there is no impediment in the way of the petitioner being granted the relief for judicial separation and I would, accordingly, allow

Bhagwan Singh
v.
Amar Kaur and
another

Shamsher
Bahadur, J.

(1) 1939 P.L.R. 337.

Bhagwan Singh v. Amar Kaur and another

this appeal and grant a decree for separation of marriage to the petitioner. In the circumstances of the case, I would make no order as to costs.

Shamsher Bahadur, J.

B.R.T.

CIVIL MISCELLANEOUS

Before Tek Chand and P. C. Pandit, JJ

MANSHA RAM AND OTHERS,—Appellants

versus

TEJ BHAN,—Respondent

Civil Miscellaneous No. 894-C of 1958

in

Regular First Appeal No. 60 of 1958

Court-fees Act (VII of 1870)—Section 7(IV) (f) and Article 1 of Schedule 1—Suit for accounts—Final decree passed for a specific amount—Judgment-debtor filing appeal from that decree—Decree-holder filing cross-objections alleging that more amount is due to him than decreed and paying court-fee on notional value of Rs. 200—Court-fee—Whether sufficient—Courtfee payable on cross-objections—Whether ad valorem on the subject-matter in dispute—Interpretation of Statutes—Casus omissus—Whether can be supplied by a court of law—clerical error, judicial error and Casus omissus—Difference between.

1960

Oct., 19th

Held, that Article 1 of Schedule 1 of the Court fees Act is the only place in the Act where cross-objections are mentioned. Consequently cross-objections must bear an *ad valorem* court-fee calculated on the amount or value of the subject-matter in dispute. Where in a suit for accounts a final decree is passed for a specific amount and the judgment-debtor files an appeal against that decree and the decree-holder files cross-objections claiming that if accounts are properly taken, more amount than what has been decreed in his favour will be found due to him, he must stamp the cross-objections with *ad valorem* court-fee calculated on the amount or value of the subject-matter in dispute according to Article 1 of Schedule 1 of the Court-