

A

CHINNAIYA

v.

PARBATI

B

[SUPREME COURT, 1969 (Hammett C.J.), 17th October, 12th December]
Appellate Jurisdiction

Husband and wife—separation agreement—agreement by wife not to institute maintenance proceedings void—agreement not per se proof of connivance at husband's adultery.

Husband and wife—separation and maintenance proceedings—evidence—proof of age of spouse—contents of marriage certificate—particulars therein recorded—Births, Deaths and Marriages Registration Ordinance 1968, s.7—Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 43).

Evidence and proof—marriage certificate—judicial notice of contents—Births, Deaths and Marriages Registration Ordinance 1968, s.7.

C

A separation agreement between husband and wife does not prove the wife's connivance at her husband's adultery in the absence of evidence that at the time it was entered into the wife was aware of the adultery and that she consented to its being continued.

D

A provision in a separation agreement whereby the wife agrees not to institute any proceedings for maintenance, is void.

In proceedings under the Separation and Maintenance (Summary Jurisdiction) Ordinance judicial notice should be taken of the particulars recorded in a marriage certificate signed and sealed under section 7 of the Births, Deaths and Marriages Registration Ordinance, 1968.

E

Cases referred to: *Hyman v. Hyman* [1929] A.C.601; 141 L.T. 329; *Ross v. Ross* (1869) 1 P. & D.734; 20 L.T.853.

Appeal from orders made by a magistrate under the Separation and Maintenance (Summary Jurisdiction) Ordinance.

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B. C. Ramrakha for the appellant.

S. N. Nandan for the respondent.

The facts sufficiently appear from the judgment.

HAMMETT C.J.: [12th December 1969]—

G

In the Magistrate's Court, Labasa, the respondent wife filed a complaint against her husband, the appellant, that he had —

- (a) deserted her,
- (b) been guilty of persistent cruelty to her,
- (c) wilfully neglected to provide reasonable maintenance for her, and
- (d) been guilty of adultery with Abda Bibi d/o Saiban Hussain.

H

She applied for an order for maintenance under the provisions of the Separation and Maintenance (Summary Jurisdiction) Ordinance.

A The Court below held that the husband had been guilty of adultery and failure to maintain his wife and ordered him to pay the sum of £1 a week to the Court Officer, Labasa, for her maintenance. There were no findings on the issues of desertion and cruelty.

B After some considerable delay and the granting of extension of time within which to appeal, the respondent husband appealed against the decision of the Court below on the ground that the verdict was unreasonable and cannot be supported having regard to the weight of the evidence.

On 17th October, 1969, at the hearing of the appeal, counsel for the appelland husband sought and obtained leave to substitute for the sole ground on which the appeal had been lodged, the following grounds of appeal —

- C (1) The learned trial magistrate erred in law in not deciding the issue as what effect the parties intended the separation agreement to have between them, and in not further deciding whether or not the respondent had connived at, or by her conduct conduced or led to the adultery on the part of the appelland.
- D (2) The learned trial magistrate erred in law in deciding the matter without proof, and in acting as if the proceedings were entirely civil, and matters could be resolved both as to fact, and law, by the consent of the parties.

I have examined the judgment of the Court below and it would appear that the facts were held to be as follows :

E The parties were married on 14th August, 1956. According to their Marriage Certificate the marriage took place at Labasa and at the date of the marriage the husband was 20 years of age. The date of the birth of the wife was given on the Marriage Certificate as 12th May, 1939. This would have made her a little over 17 years of age at the date of the marriage.

F On 6th September, 1960, i.e. over four years later, they entered into a separation agreement. There were no surviving issue of the marriage. The separation agreement not only made no provision for maintenance for the wife but contained a clause whereby she agreed not to sue for maintenance.

G The evidence-in-chief of the wife was to the effect that the parties remained apart and later the husband committed adultery with Abda Bibi d/o Saiban Hussain with whom he is still living and by whom he has had three children. According to the record, just after counsel for the appelland began to cross-examine the wife, the learned trial Magistrate intervened and said —

“Is this not the true story —

- H (1) complainant left respondent because they did not get along well together,
- (2) later complainant and respondent signed Exh. B (the Separation Agreement) — she was then 16 years of age and is now 24 years of age, and
- (3) later respondent started living in adultery with another woman and is still living with her in adultery?”

Counsel for the respondent agreed this was the position and so did counsel for the complainant.

The Magistrate and both counsel then agreed, according to the record, that "the rest is law" and no further evidence was called by either side. Both counsel then addressed the Court on the effect of the separation agreement in these circumstances. After a few days adjournment the judgment was given against which this appeal is now brought.

A

The judgment is largely based upon fundamental misconceptions on both certain essential facts in this case and matters of law that flow therefrom, shared by both counsel and the learned trial Magistrate.

B

All three agreed that on 6th September, 1960, the date the wife signed the Separation Agreement, she was 16 years of age — and therefore a minor — and that on 14th January, 1969, when she gave her evidence in the Court below, she was 24 years of age. These facts were apparently accepted by counsel and the learned trial Magistrate on the basis of the oral evidence of the wife even though the record shows that she said in the course of her evidence-in-chief —

C

"I am now 22 or 23 years of age".

But on the issue of age certain presumptions of law arise from the contents of marriage certificates under the provisions of section 7 of the Births, Deaths and Marriages Registration Ordinance, 1968, which came into effect on 1st January, 1969, and which reads as follows —

D

"7. The Registrar shall sign and cause to be sealed all certificates or certified copies given in his office and all certificates or certified copies so sealed whether before or after the commencement of this Ordinance shall be received in all courts as evidence of the birth, death or marriage to which the same relate *and of the other particulars therein recorded* without further proof of such matters, and every certificate of the Registrar that any original register of births, deaths or marriages for any specified period is lost or destroyed shall be received in any court as conclusive evidence of that fact."

E

It will be seen, by reference to the Marriage Certificate, that at the date of the marriage, i.e. 14th August, 1956, the wife was aged 17 years and 3 months, having been born on 12th May, 1939. It view of section 7 of the Ordinance judicial notice should have been taken of these particulars contained in the Marriage Certificate.

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From this it is clear that at the date of the signing of the Separation Agreement, i.e. 6th September, 1960, the wife was not aged 16 years as stated by her, but aged 21 years and 3 months. Her evidence that in September, 1960, she was aged 16 years was clearly in error since this would have made her aged only 12 years at the date of her marriage in 1956.

G

At the date she signed the Separation Agreement she was not, therefore, a minor. All the arguments and deductions in the Court below based upon the understanding that she was then a minor are, therefore, of no cogency whatever. The Separation Agreement must be construed as one made between two parties both of full age.

H

The Separation Agreement contained a clause whereby, inter alia, the wife agreed not to institute any proceedings for maintenance. At the hearing of the appeal counsel for the husband conceded that such a pro-

A vision in a separation agreement is void. In doing so he may well have had in view the principle laid down by the House of Lords in *Hyman v. Hyman* [1929] A.C.601 where Lord Atkin said (p.629) —

“a wife’s right to future maintenance is a matter of public concern, which she cannot barter away”.

B The appellant does not, therefore, complain of the decision of the Court below that the wife was not barred by the Separation Agreement from suing for maintenance, a conclusion that was reached for somewhat different reasons.

He does, however, complain that according to the appellant the Court below erred in not deciding whether the wife connived at or, by her conduct, condoned the adultery of the appellant. In this respect he also complains in the first ground of appeal that the trial court did not decide what effect the parties intended the separation agreement to have.

C The agreement itself did not cover or refer to the future conduct of the parties and there is no evidence that in agreeing to separate the wife consented to the husband setting up house in the future with another woman.

D In *Ross v. Ross* (1869) 1 P. & D. 734 it was held that an agreement to separate does not prove a wife’s connivance at her husband’s adultery in the absence of evidence that at the time it was entered into the wife was aware of the adultery and that she consented to it being continued. There was no such evidence in this case.

Moreover, in his judgment the learned trial Magistrate expressly recorded that he was satisfied that the wife had not condoned, connived at, or been guilty of any conduct conducing to the respondent’s adultery.

E The first ground of appeal must, therefore, fail.

In his argument in support of the second ground of appeal counsel for the appellant complains that the finding of adultery was made, in effect, by consent, and was not proved, and that this vitiates the decision.

F The record clearly shows that the wife in her sworn testimony said that the appellant was still living with another woman. Her evidence was not contradicted and went unchallenged in cross-examination. Further the appellant’s counsel informed the Court below that these facts were not disputed. In these circumstances there was ample evidence upon which the Court below was properly entitled to hold as it did that adultery had been proved by the evidence of the complainant without the need for further corroborative evidence to be called.

G There are, therefore, no merits in the second ground of appeal.

There is no appeal against the quantum of maintenance ordered.

For these reasons the appeal is dismissed.

H I shall assess. The wife respondent is entitled to costs which, after hearing counsel,

Appeal dismissed.