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Court : Mumbai Aurangabad

Decided On : Oct-14-2014

Judge : R.M. Borde &Amp; V.K. Jadhav

Appeal No. : Family Court Appeal No. 32 of 2004

Appellant : Arun

Respondent : Varsha and Others

Judgement :

V. K. Jadhav, J.

1. This is an appeal filed by the petitioner-husband challenging the judgment and decree passed by the learned Judge of Family Court, Aurangabad in petition No. 38 of 2001, dismissing the petition of petitioner-husband filed under Section 13 (1-A) (ii) of Hindu Marriage Act, 1955 (hereinafter for the sake of brevity referred to as the said Act), praying therein for dissolution of marriage by decree of divorce. (For the sake of convenience, hereinafter the parties shall be referred by their status before the Family Court i.e. petitioner and respondent).

2. Brief facts, giving raise to the present appeal, are as follows:-

a) The marriage between the petitioner-husband and respondentwife was solemnized on 7.6.1983 according to Hindu rites and rituals. They have a son and

a daughter out of their marital wedlock. Their marriage is still subsisting.

b) According to petitioner-petitioner-husband in the year 1988, respondent-wife on her own accord left the house of petitioner-husband with kids and started residing with her parents. Consequently, petitioner-husband was constrained to file petition for restitution of conjugal rights under Section 9 of said Act bearing H.M.P. No. 66 of 1989. On 17.8.1990, the learned C.J.S.D. was pleased to pass decree in favour of the petitioner-husband in the aforesaid proceeding of restitution of conjugal rights and directed respondent-wife to reside and cohabit with petitioner-husband. In the aforesaid proceeding, respondent-wife had appeared but failed to contest the petition which ultimately resulted into passing of exparte decree.

c) The petitioner-husband further contended that despite decree passed, respondent-wife did not resume for cohabitation. Therefore, in pursuance of decree passed in HMP No. 66 of 1989, as aforesaid, petitioner-husband had filed petition for dissolution of marriage under Section 13(1-A) (ii) of the said Act, bearing No. 79 of 1991. However, the said petition came to be dismissed on the ground that respondent-wifes application bearing MARJI No. 35 of 1991 for setting aside the exparte decree was pending. The court has observed that there is no finality of the decree passed for restitution of conjugal rights. On 16.7.1992, the learned IInd Joint C.J.S.D. was pleased to dismiss the said MARJI No. 35 of 1991 filed for setting aside the exparte decree.

d) Meanwhile, petitioner-husband being aggrieved by the judgment and decree passed in HMP No. 79 of 1991 dated 25.11.1991, preferred an appeal bearing Regular Civil Appeal No. 16 of 1992, which also came to be dismissed on the ground that the appeal against order passed in MARJI No. 35 of 1991 is pending.

The respondent-wife, who was aggrieved by the judgment and order passed in MARJI No. 35 of 1991, preferred an appeal, bearing MCA No. 177 of 1992. However, the said appeal came to be dismissed on 20.4.1996 by the Extra Joint District Judge, Aurangabad.

e) After dismissal of application bearing MARJI No. 35 of 1991, as aforesaid, respondent-wife preferred an appeal against the judgment and decree passed in

HMP No. 66 of 1989 dated 17.8.1990 with separate application for condonation of delay. The learned Extra Joint District Judge, Aurangabad was pleased to dismiss the application for condonation of delay bearing MARJI No. 217 of 1992 dated 19.4.1997.

f) Being aggrieved by the judgment and order passed in MARJI No. 217 of 1992, dated 19.4.1997, respondent-wife preferred Civil Revision Application bearing No. 935 of 1997 before this Court. Initially, this Court was pleased to issue notice before admission and in the meanwhile, decree passed in HMP No. 66 of 1989 came to be stayed. On the basis of decree passed in HMP No. 66 of 1989, the petitioner-husband had filed an application for dissolution of marriage bearing Petition No. 107 of 1997. Since decree passed in HMP No. 66 of 1989 was stayed by this Court, as aforesaid, the petition bearing No. 107 of 1997 came to be dismissed.

g) The petitioner-husband further contends that Civil Revision Application No. 935 of 1997 in which interim stay was granted by this Court to the decree passed in HMP No. 66 of 1989, was finally heard and dismissed by this Court by order dated 25.9.2000. Since Civil Revision Application No. 935 of 1997 was dismissed, interim order passed therein also stood vacated and decree passed in HMP No. 66 of 1989 has been restored. Thus, the petitioner-husband on the basis of said decree passed in HMP No. 66 of 1989 had filed petition for dissolution of marriage by decree of divorce under section 13(1-A) (ii) of the said Act. h) It is the case of petitioner-husband that respondent-wife has failed to join his company within one year or thereafter, after passing of decree for restitution of conjugal rights and thus petitioner-husband is entitled for dissolution of marriage by decree of divorce, as contemplated under Section 13 (1-A) (ii) of the said Act. The petitioner-husband accordingly filed petition No. A-38 of 2001 for dissolution of marriage and decree of divorce before the Family Court, Aurangabad.

i) The respondent-wife has strongly resisted the petition by filing written statement at Exh.15. The respondent-wife has not denied the factum of marriage and the issues born to the couple out of marital wedlock. However, respondent-wife has denied that she left the matrimonial house on her own accord. According to

respondent-wife, petitioner-husband left the respondent-wife and kids at her parents home for Dipawali festival and did not turn again to take them back. According to respondent-wife, efforts were made to resume the matrimonial life but petitioner-husband did not permit entry of respondentwife in his house at all. On the other hand, petitioner-husband has initiated proceeding for restitution of conjugal rights. According to respondent-wife, due to non attendance of matter by the counsel, who was entrusted with the brief, exparte decree of restitution of conjugal rights came to be passed against her. On receipt of notice of petition for divorce filed by the petitioner-husband, respondent-wife came to know the decree of restitution of conjugal rights was passed against her. She has challenged said exparte decree by filing proceeding before the superior court but finally failed. She has taken steps to challenge the said decree further.

j) According to respondent-wife, she sought execution of decree running against her, however, petitioner-husband has taken a stand that such decree cannot be executed. The petitionerhusband has never tried to honour the judicial verdict of restitution of conjugal rights. On the other hand, petitionerhusband has avoided restitution of conjugal rights and has not permitted respondent-wife to rejoin his company. The petitioner-husband has scuttled all efforts of respondent-wife seeking association and company of petitioner-husband.

k) The respondent-wife further contends that divorce is sought on the ground that decree for restitution of conjugal rights is not complied within statutory period of one year and she was unaware and ignorant of passing of such decree against her. The petitioner-husband neither bothered to inform her nor took any steps to execute the decree within statutory period. On expiry of said period, petitioner-husband came out with the proceeding for divorce claiming non compliance of decree for restitution of conjugal rights. A series of litigations on behalf respondent-wife to get entry in matrimonial home are countered by petitioner-husband. The petitioner-husband has not permitted respondent-wife to join his company. It is thus contended that petitioner-husband cannot be permitted to take benefit of his own wrong.

l) The respondent-wife by way of amendment in the written statement further contended that petitioner-husband, during subsistence of their marriage, has married for second time. The petitioner-husband is residing with his new wife at Nashik and has become father of a male child out of said relation. It is further contended that to cover up this illegal act, the petitionerhusband is bent upon to get divorce in his favour.

m) The respondent-wife further contended that she is ever willing to join the company of her husband; she has never disowned and neglected the petitioner. She unequivocally volunteers to join the company of petitioner-husband. In the circumstances, according to respondent-wife, petition is devoid of substance. On all these grounds, respondent-wife had prayed for dismissal of petition with costs.

n) Learned Judge of the Family Court has referred the parties to Marriage Councilor. However, the marriage Councilor by his report at Exh.10 informed that no reconciliation or settlement is possible between the parties.

o) On the basis of rival pleadings of the parties to the petition, learned Judge of Family Court has framed issues. The petitioner-husband has examined himself on oath before learned Judge of Family Court at Exh.21. He was crossexamined by respondent-wife at length. The respondent-wife did not step up in witness box. The learned Judge of Family court in para 24 of the judgment has observed that though counsel for respondent-wife orally submitted about filing of pursis, he has not filed evidence close pursis on record and argued the matter on 9.3.2004.

p) Learned in charge Judge of Family Court, Aurangabad by its impugned judgment and decree dated 24.3.2004 dismissed the petition with costs. Being aggrieved by the same, petitioner-husband has preferred this appeal on various grounds, as set out in the appeal memo.

3. Learned counsel for petitioner-husband (appellant) has submitted that after passing of decree for restitution of conjugal rights in favour of petitioner-husband in the year 1990, respondent-wife instead of joining the company of petitioner-husband, went on challenging the said decree by various proceeding up to this Court and this act of respondent-wife itself shows that she was not willing to join

the company of petitioner-husband. Learned counsel further submitted that learned Judge of Family Court has misconstrued and misinterpreted the provisions of Section 23 of the said Act and thereby arrived at an erroneous conclusion. In fact, the Family Court ought to have granted decree for divorce on the sole ground that there has been no resumption between the parties for a period of one year after passing decree of restitution of conjugal rights. Learned counsel for petitioner-husband further submitted that after passing decree for restitution of conjugal rights, in the ancillary proceedings, an attempt was made for reconciliation but it was failed from the side of respondent-wife. There is sufficient evidence on record to show that reconciliation could not be materialized because of conduct of respondent-wife. Lastly, learned counsel for petitioner-husband invited our attention to the observations recorded by this Court in Family Court Appeal No. 19 of 2000, which was preferred by respondent-wife against petitioner-husband challenging the order passed by Principal Judge, Family Court, Aurangabad in petition C-4 of 1996 under sections 18 and 20 of Hindu Adoption and Maintenance Act 1956. Learned counsel for petitioner-husband has submitted that appeal deserves to be allowed by setting aside the judgment and decree passed by the learned in charge Judge, Family Court, Aurangabad on 24.3.2004 in petition No. 38 of 2001 and the petition may be allowed and the marriage between the petitionerhusband and respondent-wife be dissolved by decree of divorce under Section 13(1-A) (ii) of the said Act.

4. The learned counsel for respondent-wife has submitted that petitioner-husband has not made any attempt to execute the decree for restitution of conjugal rights. The petitioner-husband has failed to take any steps for restitution of conjugal rights and simply initiated proceedings for divorce after expiry of statutory period. Learned counsel for respondent-wife has further submitted that petitionerhusband is taking benefit of his own wrong and the learned Judge of the Family Court has therefore, rightly dismissed the petition for divorce. Lastly learned counsel has submitted that the appeal devoid of any merits and thus, liable to be dismissed with costs.

5. After hearing the parties at length, the following points arise for our consideration and we have recorded our findings thereon for the reasons

mentioned below:-

i) Whether the petitioner-husband is entitled for dissolution of marriage by decree of divorce as provided under section 13 (1-A) (ii) of Hindu Marriage Act 1955? In the affirmative

ii) What order? ... As per final order

REASONS

6. In the present case, two questions arise for consideration, firstly I) whether the petitioner-husband is entitled for dissolution of marriage by decree of divorce on the ground that there has been no restitution of conjugal rights between the parties for a period of one year or upwards after passing of decree for restitution of conjugal rights and secondly, whether the petitioner-husband has taken advantage of his own wrong as provided under Section 23 (1) of the said Act.

7. We therefore, refer to Section 13 (1-A) (ii) and Section 23 (1) (a) to (e) of the said Act, which quoted below:-

13. Divorce.-

(1) ....

(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground

(i) ....

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of (one year) or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

23. Decree in proceedings.-

(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied- (a) any of the grounds for granting relief exists and the petitioner (except

in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or subclause (c) of clause (ii) of section 5), any way taking advantage of his or her own wrong or disability for purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (I) of sub section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and

(c) the petition (not being a petition presented under section 11) is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary improper delay in institution the proceeding, and

(e) there is no other legal ground why relief should not be granted, then and in such a case, but not otherwise, the Court shall decree such relief accordingly.

8. The respondent-wife has strongly resisted the petition for divorce on the ground that the petitioner-husband did not take any step to execute the decree for restitution of conjugal rights and on the next day of expiry of the statutory period, the petitioner-husband has initiated proceeding for divorce claiming non compliance of decree of restitution of conjugal rights. Thus, respondent-wife on these basis contended that petitioner-husband could not be permitted to take benefit of his own wrong. It is also the contention of the respondent-wife that she is ever wiling to join the company of her husband and her existence and identity as wife solely rests with the company, association, care and companionship of her husband. However, the respondent-wife did not step in witness box nor examined any witness.

9. The learned Judge of the Family Court, Aurangabad in para 24 of the judgment has given reference to certain admissions given by the petitioner-husband in his

cross examination. It has recorded that the petitioner-husband has admitted that after exparte decree of restitution of conjugal rights passed in his favour, he did not make any effort to bring respondent-wife back to matrimonial home nor issued any notice to her to join his company. It has also recorded that petitioner-husband further admitted that he has not filed any execution proceeding before the Court. Lastly, the learned Judge of the Family Court has given reference to the admission of petitioner-husband that the petitioner-husband did not think that respondent-wife should join his company. The learned Judge of the Family Court in para 45 of the judgment on the basis of aforesaid admissions, concluded that it is the petitioner-husband who did not want to cohabit with the respondent-wife. The learned Judge of the Family Court has further observed that petitioner-husband did not make any effort to bring her back to the matrimonial home and immediately on expiry of the statutory period, on the next day filed petition for dissolution of marriage. Learned Judge on the basis of the above observations has lastly concluded that the petitioner-husband wanted to take advantage of his own wrong and Section 23 of the said Act is applicable in present case.

10. Learned Judge of the Family Court has failed to consider that inspite of decree of restitution of conjugal rights passed in favour of petitioner-husband, the respondent-wife had not gone back to the petitioner-husband and on the other hand fought the litigation with tooth and nails upto this Court for setting aside the decree of restitution of conjugal rights passed in favour of petitioner-husband. The respondent-wife did not step up in witness box before the learned Judge of the Family Court, Aurangabad to show that even though she had tried to set aside the decree for restitution of conjugal rights by filing petitions and further proceeding before the appellate forum, she was always willing to join the company of her husband.

11. There is no obligation cast by the statute on the party praying for the relief of dissolution of marriage that he/she should call upon other party against whom decree of restitution of conjugal rights has been passed to satisfy the decree and that being so, it cannot be said that the party asking for divorce on such ground has committed wrong if he is not followed the said course. In order to constitute the wrong, within the meaning of Section 23 (1) (a) of the said Act, it has to be

something more than mere disinclination of the petitionerhusband to agree to or an offer of re-union after filing of divorce petition. The alleged misconduct must be serious enough to justify the denial of the relief to which the petitioner is otherwise entitled to. The word wrong envisaged under Section 23 (1) (a) of the Act has to be a wrong of a kind different from a mere conduct of refusing to resume conjugal relationship after passing the decree of restitution of conjugal rights. In our considered opinion, the learned Judge of Family Court, Aurangabad has thus taken a wrong view that refusal of petitioner-husband to take back respondent-wife after institution of divorce proceeding and not taking any steps for restitution of conjugal rights during or after the statutory period is over, would constitute a ground for refusing decree of divorce. There is nothing on record to show that after passing decree of restitution of conjugal rights and before making petition for divorce, the petitioner-husband had created obstruction in complying with the decree by the wife or that the petitioner-husband wanted that the decree should not be complied with so that he may obtain divorce on the basis of said decree for restitution of conjugal rights. In our considered onion, the petitioner-husband is not in any way taking advantage of his own wrong in this case. Thus, we are not inclined to hold that the petitioner-husband has resorted to proceeding for restitution of conjugal rights only as device to obtain the decree of divorce.

12. Learned counsel for the petitioner-husband has placed on record copy of judgment and order passed by this Court in Family Court Appeal No. 19 of 2000. On perusal of the same, we find that being dissatisfied with the order passed by the learned Principal Judge, Family Court, Aurangabad in petition No. C-4 of 1996, under Section 18 and 20 of the Hindu Adoption and Maintenance Act 1956, the respondent-wife had preferred the said appeal. This Court by order dated 20.9.2006 dismissed the said Family Court Appeal with observations that the respondent-wife was not eager and willing to go and live with the petitioner-husband. This Court in para 16 of the said judgment has made observations that it was the wife who had withdrawn from society of the petitioner-husband willfully due to her suspicion.

During pendency of the said maintenance proceeding, the respondent-wife has made allegations against petitioner-husband that he had illicit relations with his

sister-in-law and he was giving monetary help to her in view of their relation. According to her, due to the said reason she was abandoned. On the backdrop of these allegations, this Court in the said appeal No. 19 of 2000 has observed that respondent-wife had moved an application with the office of petitioner-husband reiterating the allegations therein of the petitioner-husband having illicit relations with his sister-in-law. This Court has further observed that while showing desire for reconciliation and at the same time complaining to the superior officers of the petitioner-husband making defamatory allegations clearly shows that there were no bonafides in the offer made by respondent-wife to go and live with the petitioner-husband. It has observed that there was no real desire for reconciliation on the part of respondent-wife.

13. It would not be out of place to mention here that in the present case the respondent-wife had filed an application for amendment whereby she wanted to add in her written statement that petitionerhusband has performed second marriage and is also having a child out of the said marriage. It was suggested to the petitioner-husband in his cross examination that he has performed second marriage and has a male child aged about 4 years. It has also suggested to the petitioner-husband in his cross examination that he had brought a lady from Shinde family as his second wife and that she is widow and sister of his friend. We have serious doubts that by making such allegations initially about development of illicit relations with sister-inlaw and in the present divorce proceeding about performing of second marriage, whether respondent wife is really eager and willing to join the company of her husband. On the other hand, respondent-wife remained absent when this Court has referred the matter for mediation. The mediator has informed this Court that even though the notices were issued to the respondent-wife informing her to remain present for mediation, she remained absent and considering the reluctance of the respondent-wife mediation in this case was failed.

14. Learned counsel for respondent-wife has placed reliance on the judgment of Hon'ble Supreme Court in the case of Chetan Dass vs. Kamla Devi reported in 2001 Law Suit (SC) 675, wherein the Hon'ble Supreme Court in para 14 has made following observations:-

14. Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by Statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well knit, healthy and not a disturbed and porous society. Institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of irretrievably broken marriage as a straight jacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case.

In this case, the defence of respondent-wife for having justified reason to live away from the husband has been found to be correct. However, in the present case, the facts are altogether different.

15. The petitioner-husband has proved that there is no resumption and cohabitation for more than one year or upwards after passing decree of restitution of conjugal rights in his favour . We do not find that the petitioner-husband wanted to take advantage of his own wrong, as provided under Section 23(1) of the said Act. We accordingly answer the point No.1 in affirmative.

16. Accordingly, the appeal is hereby allowed. The judgment and decree passed by the In charge Judge, Family Court, Aurangabad dated 24.3.2000 in Petition No. 38 of 2001 is hereby quashed and set aside. The petition No. 38 of 2001 is hereby allowed and the marriage between the petitioner-husband Arun Narayanrao Marathe and respondent-wife Varsha Arun Marathe is hereby dissolved by decree of divorce. Decree be drawn up accordingly.

17. In the circumstances, there shall be no order as to costs.

18. At this stage, learned counsel appearing for respondent-wife prays for direction to stay the operation of this judgment for a period of four weeks. However, for the reasons recorded in the judgment, request need not be considered. Oral request

made stands rejected.

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