

Shridhar Dada Kate (Dr.) Vs. Usha Shridhar Kate

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Court : Mumbai

Decided On : Jul-30-1986

Reported in : 1986(3)BomCR676; 1987MhLJ81

Judge : Sharad Manohar, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1A) and 23

Appeal No. : Second Appeal No. 930 of 1980

Appellant : Shridhar Dada Kate (Dr.)

Respondent : Usha Shridhar Kate

Advocate for Def. : B.P. Apte, Amicus curise

Advocate for Pet/Ap. : M.L. Dudhat and ;Pramod N. Joshi, Advs.

Judgement :

Sharad Manohar, J.

1. This is a petition for divorce filed by the petitioner/husband (who was the petitioner also in the trial Court, but was the respondent in the earlier matrimonial proceedings between the same parties).

For the sake of convenience, the parties will be referred to hereafter as 'husband' and 'wife'.

2. The facts are not at all in dispute and they have been very well stated in the Para 2 of the judgment of the trial Court.

Briefly speaking, the facts are that the marriage between the two spouses took place on 12-5-1956 according to the Hindu rites. There was no issue from the marriage and ultimately the marriage went on the rocks with the result that the wife had to file Hindu Marriage Petition No. 75 of 1976 in the Court of the Civil Judge, (S.D.), Ahmednagar for obtaining decree for restitution of conjugal rights. The petition was contested but ultimately the decree for restitution of conjugal rights was passed in favour of the wife. There is no dispute that the decree has been final and conclusive.

The husband did not comply with the decree and it can be said without any dispute at this stage that he did not allow his wife to stay with him. On the other hand, after the statutory period of one year, he filed the instant Matrimonial Petition No. 30 of 1979 in the District Court, at Ahmednagar, and the same came to be tried by IInd Extra Asstt. Judge, Ahmednagar. The contention of the husband was that since the decree for restitution of conjugal right had not been complied with for a period of one year, as contemplated by the statute, he was entitled to a decree for divorce from his wife.

3. The wife resisted the petition mainly on the ground that on applying for a decree for divorce, the husband was taking advantage of his own wrong. According to her, the wrong was two fold:---

(a) that he deserted his wife and denied to her the matrimonial rights without any cause before the decree for restitution of conjugal rights; and

(b) that he continued to do so even after the decree for restitution of conjugal rights.

She relied particularly upon the provisions of section 23(1)(a) of the Hindu Marriage Act, the relevant portion of which is already set out in its judgment by the lower Appellate Court. Point is that according to her, the husband's petition for divorce amounted to 'taking advantage of his own wrong for the purpose

of such relief'.

4. The trial Court negated the wife's contention and held that after the amendment of the Hindu Marriage Act, by the introduction of section 13(1-A) it could not be said that there was any obstacle in the way of the husband in applying for divorce after expiration of the period of one year after the wife had obtained a decree for restitution of conjugal rights. The petition was, therefore, decreed by the trial Court and a decree for divorce was passed in favour of the husband.

5. In appeal, the learned Extra Asstt. Judge who heard the appeal, disagreed with the view of the trial Court. He held that when the decree for restitution of conjugal right was passed in favour of the wife and when the husband refrained from complying with the decree, without any fault on the part of the wife and still filed the petition for divorce, he had taken advantage of his own wrong within the contemplation of section 23(1)(a) of the Hindu Marriage Act.

The Appeal was, therefore, allowed and the decree for divorce was set aside by him.

6. Mr. Dudhat, instructed by Mr. Pramod N. Joshi, appeared for the appellant. There was no appearance for respondent/wife. However, Mr. B.P. Apte, appeared for the respondent/wife as *amicus curiae*.

I have no doubt that the view taken by the learned Extra Asstt. Judge in Appeal cannot be sustained and that the view of the trial Court in this connection is the correct one. The view taken by the learned Asstt. Judge would have been a correct view but for the amendment effected in section 13 of the Old Hindu Marriage Act. By the amendment, section 13(1-A) was incorporated in the statute and the difference in the language used by the amendment section leaves no room for doubt that even if decree for restitution of conjugal right was obtained by the wife at the expiration of the period of one year, the right to obtain a decree for divorce is available for both the spouses and not only for the spouse obtaining the decree for restitution for conjugal right.

7. I would have discussed the position with reference to the principle if the question was *res integra*. But, to my mind, it is unnecessary to discuss the principle upon which this decision has to be based, because a large number of judgments of various High Courts, including this Court, have been brought to my notice by Mr. Dudhat, the learned Counsel appearing for the appellant.

In 1981, Maharashtra Law Journal Page 917, Mr. Justice Mohta was dealing with the identical situation and he has held that in such cases even the defaulting spouse is entitled to decree for divorce. He has based his decision more on the question as to whether the wrong committed prior to the decree for restitution of conjugal right could be said to be relevant for the purpose of considering whether he has been taking advantage of his own wrong. But, to my mind, it is possible to take the view that the conduct of the husband is not complying with the decree of restitution of conjugal right amounts to a wrong within the contemplation of the Act and that would be wrong subsequent to the passing of the decree for restitution. But to my mind, the ultimate judgment of the learned Judge is one with which I fully agree, although I would base my judgment on the principle that when the statute itself provides for a right to both the spouses to obtain a decree for divorce on the ground that the decree for restitution of conjugal rights at the instance of one of the spouses has not been complied with by the other spouse, invoking the principle of law contained in section 23(1)(a) is futile.

8. There are a large number of other authorities which have taken the identical view.

In *Anil Jayantilal Vyas v. Sudhaben*, : AIR1978 Guj74 a learned Single Judge of the Gujarat High Court has held that mere non-compliance by the husband of the decree for restitution of conjugal rights would not, per se, amount to taking advantage of his own wrong and this being the position the husband is not precluded from claiming divorce after the expiration of the period of one year from the date of the decree of restitution obtained by the wife.

In *Smt. Bimladevi d/o Bakhtawar Singh v. Singh Raj s/o Dasondhi Ram*, a Full Bench of the Punjab & Haryana High Court has taken the identical view. In that case, a decree of restitution of conjugal rights was passed against the wife in

favour of the husband and it was the wife who was guilty of not complying with the decree with the result that there was no restitution of conjugal right as between them for more than 2 years, after which period it was the wife who filed the petition for decree for divorce and the Full Bench of the High Court held that having regard to the amendment of the statute contained in section 13(1-A) of the Hindu Marriage Act, the wife was fully entitled to file such a petition for divorce.

Identical view has been taken by the Delhi High Court in *Smt. Gajnadevi v. Purshotam Giri*, : AIR1977 Delhi178 in identical situation.

9. Mr. Dudhat also relied upon the judgment of the Punjab & Haryana High Court reported in *Smt. Gurmeet Kaur v. Harbans Singh*, in support of the same proposition. In that case, the husband obtained a decree for restitution of conjugal rights against the wife. After the decree was passed, the wife was ready to comply with decree and wanted to live with the husband. But it was the husband decree-holder who himself prevented her from staying with him and for performing the matrimonial obligation and after the expiry of the period of one year, he filed a petition for divorce. The High Court upheld his claim holding that the reluctance of the husband in the matter of the conjugal rights to be restored did not amount to any 'wrong' within the contemplation of section 23 of the Hindu Marriage Act.

I have grave doubt about the ultimate conclusion arrived at by the learned Judge. That was, to my mind, a certain and clear case of the husband taking advantage of his own wrong after the passing of the decree for restitution of conjugal rights. To my mind, the proceedings for restitution of conjugal rights cannot be construed as a stepping stone towards the ultimate decree for divorce. If the decree is obtained by the husband for restitution of conjugal rights, the husband had got to remain all the time ready and willing to accept the wife. If he does not accept his wife and does not allow her to stay with him and perform the matrimonial obligations, it would be difficult to hold that he has not committed any matrimonial wrong. The omission on his part to accept his wife would be a wrong also in other sense. In the ultimate analysis the picture was that it was he himself who had persuaded the Court to pass a decree for restitution of conjugal rights in his favour by making a representation to the Court that he was always ready and willing to accept his wife

but that she herself was not prepared to perform the matrimonial obligation. With this representation, he persuaded the Court to grant a decree for restitution of conjugal rights in his favour and after he obtained the decree he refused to take the wife to the matrimonial home. By doing this, he exposed himself to the charge of having taken the Court for a joy-ride and of having made the Court's process a mockery. To my mind, this would certainly be a wrong committed by him upon the statute, upon the Court and upon his spouse. To my mind, he would, therefore, not be entitled to a decree for restitution of conjugal rights in those given circumstances and hence I am unable to agree with the view taken by the learned Judge of the Punjab & Haryana High Court.

However, whatever that may be, point is that the said judgment of the Punjab & Haryana High Court need not be relied upon by the present appellant because all the other authorities referred to above are absolutely unequivocal on this point, viz. that after the advent of the relevant amendment in section 13 of the Hindu Marriage Act either of the spouses is entitled to a decree of divorce after the expiration of the period of one year from the date of the decree for restitution of conjugal rights obtained by either of the spouses.

10. The Appeal is, therefore, allowed. The decree passed by the lower Appellate Court is set aside and this one passed by the trial Court is restored.

Mr. Dudhat fairly stated that he would not press for the costs and hence, there is no question of passing any decree for costs.

Mr. B.P. Apte appeared on behalf of the respondent/wife as amicus curiae on the request of the Court. The Court is indebted to him for the valuable help given by him to the Court in this appeal.