

Dropdi Devi @ Dropa Devi Vs. Om Prakash

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Court : Allahabad

Decided On : Nov-28-1996

Reported in : I(1997)DMC486

Judge : Binod Kumar Roy and ; S.N. Tiwari, JJ.

Acts : Hindu Marriage Act, 1956 - Sections 13(1A)

Appeal No. : First Appeal No. 521 of 1994

Appellant : Dropdi Devi @ Dropa Devi

Respondent : Om Prakash

Advocate for Def. : C.D. Bahuguna, Adv.

Advocate for Pet/Ap. : Rahul Sripat, Adv.

Disposition : Appeal allowed

Judgement :

Binod Kumar Roy, J.

1. This is wife's appeal under Section 19(1) of the Family Courts Act attacking the validity of the judgment and decree granting divorce.

FACTS

2. The relevant facts for the purpose of disposal of this appeal are in a narrow compass:

The marriage between the parties was solemnised in March, 1982. The relationship, however, ceased to be cordial. According to the husband-respondent, the appellant deserted him, as a result of which on 30th July, 1988, he filed an application under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. His application was allowed by order dated 7.1.1991 against which no appeal was preferred. Despite the directions contained in the aforementioned order, the marital relationship between the parties could not be re-established. An attempt was made by him in that regard but it proved futile. Since the marital relationship was not established from 7.1.1991 till 17th January, 1992, hence his application seeking divorce.

This appellant resisted the allegations on the grounds, inter alia, that she never intentionally refused to cohabit with her husband; that her husband did not keep her at his house nor has allowed her to enter the house, despite the fact that she was all along willing to go to the house of her husband; that in this regard she sent four letters to her husband; out of whom three were sent under certificate of posting on 27.4.1991, 22.8.1991 and 12.12.1991 respectively which, however, were not even replied by her husband; that her father, as well as relations went to her husband and requested him to take her to his house but her husband on the pretext of the illness of his father, never came to take her or became ready to keep her with him and thus she has not violated the order in question; that her husband is himself guilty of not complying with the order granting restitution of conjugal rights; that on 22.6.1993 when her father, uncle and brother went to her husband for the last time, they were disclosed by her husband for the first time that he has filed the instant case.

Both sides were afforded opportunity to engage Counsel of their choice. Following two issues were framed by the learned Judge :

'1. Whether the respondent did not comply with the decree for restitution of conjugal rights passed by the 1st Additional Civil Judge, Bareilly in Suit No. 417 of 1988 on 7.1.81, if so, its effect?

2. To what relief, if any, is the petitioner entitled ?'

The learned Judge, answered these two issues by recording following findings :

(1) 'Since the evidence of the petitioner on the point that the respondent did not comply with the decree for restitution of conjugal rights passed in H-M.No. 417/88 on 7.1.1991 and the respondent too has not succeeded in establishing that she made any sincere and effective efforts to comply with the decree, the petitioner has become entitled to a decree for divorce under Section 13(1-A) Clause (ii) of the Hindu Marriage Act, as a period of more than one year had elapsed after the passing of the decree dated 7.1.1991 when the present petition was filed on 18.1.1992. The petitioner is accordingly entitled to claim divorce. The issue is accordingly answered in the affirmative.'

(2) 'In view of my findings above that on account of non-compliance with the decree of restitution of conjugal rights passed in H.M. No. 417/ 88 passed by the learned 1st Additional Civil Judge, Bareilly on 7.1.1991 for over a period of one year, the petitioner become entitled to a decree for divorce under Section 13(1-A) Clause (ii) of the Hindu Marriage Act and the issue is answered accordingly.'

The Submissions :

3. According to Mrs. Ramo Devi Gupta, the learned Counsel for the appellant on 11.5.1994 the appellant filed seven documents as per the list but on that day, the learned Judge was on leave. On 20th May, 1994, the case was adjourned to 15th July, 1994. On 15th July, 1994 the respondent examined himself as PW 1. The learned Counsel of the appellant was not present and she went to call him but after she returned back, though without her Counsel, the Court had already made an endorsement on the deposition 'Cross-Nil' and thereafter in the absence of her Counsel the appellate was asked certain questions by the learned Judge to which she gave answers which were noted and thereafter she was cross-examined and discharged and without hearing the parties 1.9.1994 was fixed for judgment. The appellant had also come along with her witnesses who were sitting at the Lawyer's table. Even though the appellant had answered to the Court question stating that she was ready to go along with her husband and she is still ready to go along with

him, there was no cross-examination in that regard and thus the finding is vitiated. The letters which were written by her to the husband shows her willingness to go out erroneously interpreted. The Court having allowed the appellant to have the advantage of legal assistance of the Counsel, due to his absence ought to have adjourned the proceedings and in not doing so vitiated the further proceeding and the judgment. It has further committed an error in rejecting the petition filed by the appellant on the very next day as well as on 1.8.1994 requesting the Court to permit cross examination and leading of further evidence. The Court has failed to appreciate that the husband-respondent has not said a word in his examination-in-chief that the assertions made by the wife-appellant in her rejoinder are incorrect. Since reasonable opportunity of hearing was not afforded to the appellant the trial stood vitiated and consequently the judgment under appeal is liable to be set aside on this ground.

4. According to Mr. Chakradhar Bahuguna the learned Counsel for the respondent, it was for the appellant to comply with the decree granted in restitution of conjugal rights proceedings directing categorically the appellant to - reside alongwith the respondent which she failed, and that no wrong was committed in deciding the proceedings and recording the findings. Since the letters were not proved and exhibited by the appellant, reliance was correctly not placed on them.

5. Mrs. Gupta in reply reiterated that the appellant was all along ready to reside with her husband and for achieving that end, the father or other relatives of the appellant went to the respondent, so that she could be brought at the residence of the husband and by no stretch of imagination, it can be held that the appellant was guilty of non compliance of the directions made in the decree granting restitution of conjugal rights. Section 9 of the Hindu Marriage Act should be interpreted in such a way which may not result injustice to the destitute wives inasmuch as having a marital relationship is depended on the co-operate attitude of the husband which he failed to extend.

Our findings :

6. From the application dated 7.7.1993 filed by the appellant this much is clear that the appellant was not aware of law and she had made a prayer to have the

services of Mr. Subhash Chand Kankar and Mr. Rakesh Kumar, Advocates as per Counsel. Her prayer was allowed by the Court itself vide its order dated 7.7.1993 permitting her to engage a Counsel at her own cost. It further appears that after the respondent was examined in examination-in-chief, the learned Judge has made the following endorsement- 'Cross -Nil'. There is no endorsement that the appellant or her Counsel had declined to cross examine the respondent. There is nothing to suggest that this endorsement was made in the presence of the appellant or her Counsel. The Family Court Act is a social piece of legislation for the benefit of destitute wives. True it is that the proceedings arising therein should be disposed of at the earliest and that as per Section 13, no party as of right is entitled to have a Counsel to conduct the proceedings but the learned Judge having himself allowed the appellant to have the services of a Counsel, it does not appear proper to us as to why the proceedings were not adjourned on 15th July, 1994 even SMO motu, so that complete justice could be done to the appellant. We have gone through the letters of the appellant which show her all along willingness to go and reside with her husband. The Court below has not refused to reply on them on the ground as urged by Mr. Bahuguna. In fact in view of the specific provision of Section 14 of the Act whether or not the same would be otherwise relevant or admissible under the Evidence Act, the learned Judge had proceeded to consider them by observing' that does not absolve her from the non-compliance of the divorce for restitution of conjugal rights.' All the three letters were written by the appellant within one year of the divorce and were required to be considered at length and objectively.

7. Even though as per Order XXII, Rule 1, CPC which was applicable in view of Section 10 of the Act after the case was heard, though in the instant case there was no hearing after closer of evidence, the judgment is required to be pronounced in open Court either at once or every endeavour is required to be made by the Court to pronounce judgment within fifteen days from the date on which the hearing of the case was concluded and in the event of non pronouncement it has to be done within thirty days from the date on which the hearing of the case was concluded, after recording the reasons, for such delay, the learned Judge had proceeded to fix 1.9.1994 for pronouncing the judgment. It is somewhat surprising as to why the judgment was directed to be

delivered/pronounced after six weeks.

8. We also find that on the very next date i.e. on 16th July, 1994 the appellant filed an application stating categorically that in order to cross-examine the applicant (respondent herein), she had gone to call her Lawyer but when she returned back found that the Court has made an endorsement 'Cross-examination-Nil', and it will be necessary in the interest of justice to cross-examine the applicant and an opportunity be afforded to hear. The learned Judge, however, was pleased to be reject her prayer stating on the petition itself to this effect:

(In English translation) 'The applicant was afforded an opportunity to cross-examine but neither her Counsel came nor does she put any question in the cross-examination and now an opportunity to cross-examine cannot be afforded.' On 2nd August, 1994, the appellant put yet another application supported by her affidavit repeating her request to afford an opportunity to cross-examine her husband, adduce evidence, oral and documentary, and to make submissions through her Counsel but this prayer was again rejected by the learned Judge on 2nd August, 1994, itself after passing an order on her application itself which was to this effect:

(In English translation).

'The statements made by the appellant were recorded and the other side was afforded an opportunity to cross-examine her. Since a date of judgment has been fixed, hence there is no necessity of affording such an opportunity'.

9. We also find that according to the appellant's affidavit/filed in the Court below, the Court itself had put certain questions to the appellant which she answered, to which no rejoinder was filed by the respondent. One of the statement of her examination-in-Chief was to this effect.

'That after passing of the decree, her father had gone to convey to her husband that he should call her but her husband did not come to call her.'

This statement made by her was not tested by any cross-examination of the husband and has escaped the consideration of the learned Judge. In view of the nature of the order, which we propose to pass, we do not want to record any

finding in these regard nor in regard to the submission of Mr. Bahuguna that the respondent's statements made in his examination-in-chief not having been cross-examined was correctly relied upon and we should also accept the same notwithstanding the non cross examination by the respondent of the aforesaid statement.

10. We find substance in the contention of Mrs. Gupta that in the peculiar facts and circumstances, there was no fair trial inasmuch as the appellant was not aware of law and simply because the date of judgement was fixed, there was no legal impediment in affording further opportunity of hearing to the appellant. We are satisfied that in this case, rejection of the aforementioned prayers of the appellant by the learned Family Judge, was not proper. Consequently, we set aside the aforementioned orders dated 16.7.1994 and 2.8.1994 and allow the prayer of the appellant made therein. The Court below will permit the appellant to proceed to cross-examine the respondent and give her a further opportunity to lead further evidence. As a necessary consequence, the respondent, if he so likes, shall be given an opportunity to further cross-examine the appellant and other witnesses, after her further examination-in-chief is conducted in the Court below.

11. In view of our findings aforesaid, we need not express ourselves in regard to other submissions made by one or the other learned Counsel.

12. For the reasons aforementioned and as a necessary consequence, the impugned judgment is set aside and the case is remitted back.

13. In the result, we allow this appeal. Cost to abide by the result of the proceedings.

14. As the proceeding has remained pending for several years, we direct the parties to appear before the Court below on 27th January, 1997 alongwith their witnesses etc.

15. We also direct the officer to despatch the records of the Court below alongwith a copy of our judgment forthwith.

