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Court : Madhya Pradesh

Decided On : Feb-04-2008

Reported in : 2008(4)MPHT376

Judge : U.C. Maheshwari, J.

Appellant : Virendra

Respondent : Rajni

Advocate for Def. : Shri. A.D.Mishra

Disposition : Appeal allowed

Judgement :

U.C. Maheshwari, J.

1. The appellant/husband has preferred this appeal under Section 28 of the Hindu Marriage Act 1955 (for short `the Act') being aggrieved by the judgment and decree dated 25.8.2003 passed by the First Addl. District Judge, Betul in Civil Original Suit No. 41-A/02 passing the decree against him under Section 9 of the Act for restitution of conjugal rights.

2. The facts giving rise to this appeal in short are that the respondent filed the petition under Section 9 of the Act contending that she got married with the appellant on dated 28.1.01 in accordance with the rites and rituals of the Hindu

community at Arya Samaj, Chicholi. Subsequent to marriage, she was kept by the appellant in good atmosphere for two months but thereafter he harassed her on account of demand of dowry and ultimately she was left by the appellant at her parental home saying that he will bring her back after managing his family members to keep her in his family. It is further contended that on facing the cruelty, she lodged the report under Section 498A against Mamta and Jugal Kishore the relatives of the appellant. She also signed some stamp papers on asking by the appellant and his brother-in-law said Jugal Kishore. Later on, she came to know that same are misused by them for preparing the papers of divorce. The family members of the appellant were used to say that they could not get the dowry because the marriage took place in Arya Samaj. With these averments, she expressed her wish to reside with the appellant and prayed the decree for restitution of conjugal rights.

3. In the written statement of the appellant, the averments of the petition are denied. It is denied that the alleged marriage took place between the parties. In addition, it is pleaded that in their community the marriage is solemnized as per rites and rituals of the community in which various rites like Lagun, Mandap, Phaldan, Barat and Saptpadi etc are carried out for Kanyadan. It is also pleaded that as per custom prevailed in their community, the marriage may be dissolved by mutual consent without intervention of the court. The appellant being agriculturist, is educated only upto 8th standard, while the respondent, being postgraduate, is involved in medical profession. It is further pleaded that on developing the love affair with the respondent he was insisted by her family members to reside with them. During that period, against his wish, the alleged marriage was solemnized in a dramatic manner. Subsequent to such marriage, when his father ousted them from his family and was interested to dispose of his property. On such event the respondent tried to snatch his property with different ideas and in continuation of it made a complaint against the appellant for the offence under Section 498A of the IPC. Besides this, she also filed the petition under Section 125 of the Cr.P.C for maintenance. The same was dismissed by the trial court, against which a revision was filed by her. Inter alia, it is stated that respondent is not his duly married wife, hence she could not get the decree as prayed. Besides this, the dismissal of the petition is also prayed on the ground that divorce took place between them as per

custom of the community.

4. In the light of the pleadings of the parties, as many as four issues were framed and evidence was recorded. On appreciation, by holding the respondent to be a duly married wife of the appellant and deserted by him without any sufficient excuse, allowed the petition and passed the decree for restitution of conjugal rights against the appelant. The same is under challenge at the instance of the appellant/husband.

5. Shri P.R.Bhave, learned Senior Advocate assisted by Shri Bhanu Yadav Advocate, assailed the impugned decree on the ground that the solemnization of the alleged marriage has not been proved by admissible evidence with all probabilities. He also referred the recorded evidence in this regard and firstly prayed for setting aside the impugned decree on this ground. In alternative, he said that even on affirming the findings of the trial court holding the respondent was duly married with the appellant, in view of the available evidence they separated and resided separately with their mutual consent after taking divorce with each other in writing as per prevailed custom of the community then the findings of the trial court holding that appellant deserted the respondent without any sufficient excuse and did not perform the duties of marital relationship, are liable to be set aside. By elaborating his arguments, he said that the papers (Ex.D/1 and D/2) relating to consent of divorce are proved to be voluntarily executed by the respondent herself. The affidavits Ex.D/1 and D/2 are proved by the independent witness, the Notary concerned. There was no occasion before the trial court to hold that such papers are prepared contrary to the wish of the respondent. He further said that looking to the educational qualification of the parties, it could not be assumed that she signed the papers without having knowledge of its contents. The evidence in this regard has not been property appreciated by the trial court in holding that the appellant left the company of the respondent without any sufficient excuse. On relying such documents and the evidence in this regard, it is apparent that they decided to reside separately by taking divorce as per their community custom. Since then their marital relationship has come to an end, hence the impugned decree could not be passed. For the sake of arguments, if such papers are not sufficient to draw the inference that

alleged divorce took place between them, even then, the same are sufficient to draw the inference that appellant has not left the company of the respondent without any sufficient excuse but they are residing separately with consent on account of their differences and disputes. In such circumstances, the impugned decree is not sustainable and prayed for setting aside the same by allowing this appeal.

6. On the other hand, Shri A.D.Mishra, counsel for the respondent, by supporting the impugned judgment and decree said that same is based on proper appreciation of evidence and is in conformity with law. The contention of the appellant regarding alleged divorce are not reliable unless the decree of divorce is passed by the competent court. So far community custom relating to divorce is concerned, he said that the same has not been proved by any admissible and reliable evidence. Even the concerned person who took the divorce as per custom of the community has not been examined on behalf of the appellant, hence the findings of the trial court in this regard cannot be disturbed at this stage. He also said that in the available circumstances, it has been proved that the appellant has deserted the respondent without any sufficient excuse and prayed for dismissal of this appeal.

7. Having heard the Learned Counsel, I have carefully gone through the entire record and also perused the impugned judgment and decree. I am of the considered view that the trial court has not committed any error in holding that the respondent is the duly wedded wife of the appellant. But it committed an error in holding that the appellant left her company or deserted her without any sufficient excuse. In view of the available evidence they started to reside separately with mutual consent,in such situation, the decree for restitution of conjugal rites could not be passed. My aforesaid view is based on following reasons.

8. So far the alleged marriage is concerned, the Rajni Bai (AW 1) the respondent herself. While recording her statement, she stated that she got married with the appellant on the aforesaid date at Arya Samaj, Chicholi. Her version is further supported by their the then neighbor Ramshankar (AW 2). It is also supported by the Priest of Arya Samaj Komal Prasad Jaiswal (AW 3) who by stating the facts of

the marriage proved the marriage certificate from the record of Arya Samaj Chicholi. He also stated in para-2 of his deposition the procedure of marriage in which Saptpadi and Chatus Parikshana Paddhati are stated by him. He further stated that certificate of marriage is issued by taking the consent of bride and groom on oath. Although, as per deposition of the appellant Virendra (N.A.W 1), he stated that under compulsion and inducement, his marriage was performed with the respondent but in his cross-examination, he stated that he did not make any complaint of it to any public authority, police or other person. Such conduct of the appellant is sufficient to draw the inference that he got married with the respondent with consent and on developing differences and disputes between them he is denying such marriage. Besides this, as per the case of the appellant, the alleged divorce took place between them as per their prevailed community custom, for which affidavits were sworn by them and got notarized the same. In such circumstances, on examining the case from all corners, without any hesitation it could be said that the respondent is duly wedded wife of the appellant and the trial court has not committed any error in holding the same, therefore, the findings of the trial court in this regard, are hereby affirmed.

9. Coming to the question whether the alleged divorce took place between the parties, it is undisputed fact on record that the appellant being from the family of agriculturist, is educated only upto 8th standard, while the respondent is postgraduate and also serving in medical profession. No doubt, in comparison of the appellant she is highly educated, therefore, it could not be inferred that she signed the papers (Ex.D/1 and D/2) the affidavits, without her wish or under compulsion. She admitted her signatures on all the papers in her deposition with the explanation that the signatures were taken under the assurance for registration of the marriage. While the other witness Ramshankar (AW 2) stated in para-3 of his deposition that he was told by the respondent that the appellant had taken her signatures on some papers for taking some loan. Such inconsistency in the deposition of the respondent and her witness indicates towards her conduct and falsity. Besides this, such joint affidavit (Ex.D/1), the compromise divorce by mutual consent of the parties and the independent affidavit (Ex.D/2) of the respondent, are also notarized by the Public Notary Awadh Hjare Advocate (N.A.W3) who categorically stated that such affidavits were signed by the parties

in his presence and thereafter the same were attested by him. Accordingly, both the affidavits are proved by the admissible and reliable evidence with all probabilities. In such premises, the findings of the trial court holding that those documents were not signed by the respondent voluntarily, are not sustainable, hence, by setting aside the same it is held that the papers (Ex.D/1 and D/2) are signed by the respondent voluntarily having full knowledge of its averments.

10. On perusing the aforesaid affidavits, it is apparent that after solemnization of the marriage, some differences were developed in between them and they decided to take divorce from each other and resided separately. In pursuance of it, voluntarily they started to reside separately according to their wish and left the company of each other with mutual consent. So it could not be assumed that the appellant was the only person who left the company of the respondent without any sufficient cause or excuse. In fact, it appears to be the joint cause and decision of both the parties, therefore, the approach of the trial court holding that the appellant left the company of the respondent without any sufficient excuse, is not sustainable. Hence by setting aside the same it is held that both the parties got separated voluntarily with mutual consent because of their differences as stated above.

11. Coming to the third question raised on behalf of the appellant that divorce took place between them as per custom prevalent in their community, a document Ex.D/3 contending that divorce took place between one Rajendra Patel S/o Radhelal Patel R/o Somalwada Khurd and Gita Bai D/o ShyamLal R/o Pathrota, as per custom of their community is produced and exhibited by Omprakash Verma (N.AW 2) who was not party of such document in any manner. On going through his cross-examination, his version does not appear to be reliable to hold that such custom is prevalent in the community of the parties. The draftsman of such document Shri Anand Mehto (N.A.W4) stated that aforesaid Ex.D/3, the document of mutual divorce between Rajendra and Gita was drafted by him and after taking such divorce each of them got remarried. Firstly, in the absence of the statement of Rajendra Patel and Gita Bai, such document Ex.D/3 could not be relied to draw any inference or form any opinion holding that such custom is prevalent in their community. Besides this, I have not found any reliable evidence on record

showing that such custom is prevalent in their community from time immemorial. In the lack of such evidence, it is held that no such custom or divorce is prevailed in the community of parties. It is noted that after commencement of the Hindu Marriage Act,1955, in the absence of the proved prevalent community custom or the decree of divorce from the competent court, the dissolution of marriage could not be inferred. Therefore, the findings of the trial court that the respondent is duly wedded wife of the appellant, does not require any interference at this stage. Hence, such finding is hereby affirmed.

12. Under the aforesaid premises, it is established that the respondent is duly wedded wife of the appellant and such marriage has not been dissolved by any competent court or authority. Simultaneously, it has also been established that they have left the company of each other voluntarily on account of their differences. In such circumstances, it could not be said that the appellant is the only person who left the company of the respondent without any sufficient cause and did not perform the duties of marital relationship.

13. In view of the aforesaid, the impugned decree for restitution of conjugal rites, is apparently perverse and contrary to the record. The same is not sustainable, therefore, by allowing this appeal, the impugned judgment and decree is hereby set aside and in pursuance of it, the petition filed by the respondent under Section 9 of the Hindu Marriage Act is hereby dismissed. In the facts and circumstances of the case there shall be no order as to the cost.

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