

indumati Vs. Dewaram

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Court : Madhya Pradesh

Decided On : Nov-18-1993

Reported in : I(1994)DMC476

Judge : R.D. Shukla, J.

Acts : [Special Marriage Act, 1954](#) - Sections 22, 27(1) and 34(1)

Appeal No. : F.A. No. 113 of 1992

Appellant : indumati

Respondent : Dewaram

Advocate for Def. : M.G. Upadhayaya, Adv.

Advocate for Pet/Ap. : G. Hardiya, Adv.

Disposition : Appeal allowed

Judgement :

R.D. Shukla, J.

1. This appeal is directed against to judgment and decree dated 1.5.1992 of the Addl. Judge to the Court of District Judge, Indore passed in Special Marriage Case No. 411/91 whereby the plaintiff's petition for restitution of conjugal rights has been dismissed and the prayer ,of respondent for divorce has been granted.

2. The admitted facts of the case are that the parties were married on 2.11.1982 under the Special Marriage Act. They were living together for some time.

3. The contention of the petitioner is that the respondent has deserted her from 27.12.1984 onwards and has refused to take her back as his wife.

4. The respondent had denied the contention of the petitioner and pleaded that the petitioner herself refused to carry out the marital obligations of conjugal rights and she made false complaint against him to his superior officers including the complaint for demand of dowry and contracting second marriage. The same was inquired but later on the petitioner withdrew her complaint and thereafter again made false complaints. This has caused mental agony to him and therefore, he sought a decree of divorce.

5. Learned trial Judge after hearing the parties has rejected the contention of the plaintiff-appellant while accepting the contention of the respondent granted a divorce. Hence this appeal.

6. The contention of the learned Counsel for the appellant is that since appellant and respondent lived together upto 1984 and, therefore, any cruelty prior to that would stand condoned and under such situation no decree for divorce can be granted.

7. The contention of the learned Counsel for the respondent is that making a false complaint to the superior authorities of respondent amounts not only to cruelty but at the same time it creates ill-will between the parties and the same has happened in this case.

The second contention of the learned Counsel for respondent is that marriage in fact has irretrievably broken and therefore the divorce is the only remedy.

8. The petitioner examined Nathu as P.W. 1, Bhikya P.W. 2, Rajaram P.W. 3 and Indumati the petitioner herself in support of her contention while the respondent has examined himself alone in support of his contention.

9. From the evidence of Nathu, Bhikya. Rajaram and Indumati herself, it is proved that petitioner and respondent lived together as husband and wife till 1984, The respondent has also admitted that they lived together as husband and wife upto December, 1984 and the dispute started in the year 1984 and the petitioner made a report in the Police against the respondent.

10. Learned Trial Judge has taken into consideration the complaints made by the petitioner to the superior officers of the respondent and that has been taken to be a ground for cruelty as the allegation in the complaint must have caused mental agony to the respondent.

11. Learned trial Judge while appreciating the evidence adduced by the parties in para 5 has observed that the parties lived together till 27.12.84 and there was no dispute till then but she made complaints during this period i.e. Ex. D/2 to Ex. D/6 in 1983 it shows that the petitioner wife intended to cause harassment to the respondent husband which amounts to cruelty.

12. The petitioner Indumati appearing as P.W. 5 has stated in para 8 of her statement that she went to Beora on 13th May, 1983 but the respondent refused to keep her alongwith him. There is no challenge to this statement.

As against it the respondent himself has admitted in para 1 of his statement that petitioner Indumati came to him at Beora but he did not keep her alongwith him as there was paucity of accommodation. This explanation does not appear to be correct. the complaints Ex. D/2 to Ex. D/6 have been sent between 23.5.83 to 26.7.83.

13. The petitioner has further stated in para 8 of her statement that there was a compromise between them and thereafter they lived together during Dipawali vacation which falls between October and November thus it may have been October-November, 1983 and thereafter they lived together during summer vacation which may have fallen between May and June, 1984. This is not in dispute that petitioner again went to respondent at Beora but she was not permitted to live alongwith respondent.

14. If during the period, she was not permitted by her husband to live with him, any complaint has been made by her to the superior officers of the respondent, alleging the cruel behaviour and desertion; the same cannot be said to have been made for causing harassment. Any application or complaint made to superior officer of a person who is a Government employee for compelling him to keep his wife alongwith him or for compelling him to maintain his wife or children and that not being false will not amount to cruelty in any way.

15. The similar appears to be the position in this case also.

16. As observed by learned Trial Judge that they lived as wife and husband prior to 27-12-1984 with certain intervals the cruelty if any will be deemed to have been condoned.

Sexual relations between husband and wife plays a very important role between them and if they live together there is a normal presumption that they are maintaining normal sexual relations as well, unless it can be demonstrated and proved that despite their living together under the same roof they had no such relations.

Any cruelty prior to such sexual relations will be deemed to have been condoned. Since admittedly the parties lived together as husband and wife till December, 1984 even if any complaint was made by the petitioner to the superior officers of the respondent regarding this dessertion or cruel treatment to her, that would be deemed to have been condoned.

17. Section 34 of the Special Marriage Act provides as follows:--Section 34, Duty of Court in passing decrees,

(1) In any proceeding under Ch. V. or Ch. VI, whether defended or not, if the Court is satisfied that :--

(a) ...

(b) Where the petition is founded on the ground specified in Clause (a) of Sub-section (1) of Section 27, the petitioner has not in any manner been accessory to

or connived at or condoned the act of sexual intercourse referred to therein, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty.'

18. The plain reading of this section shows that even if there had been some dispute between the parties and a party has committed cruelty on the other but if both have lived together as husband and wife and there has been sexual intercourse between them the cruelty would be deemed to have been condoned.

19. The respondent has admitted in para 13 of his statement during cross-examination that there was correspondence between him and the petitioner during the pendency of the case and that both of them lived together and stayed in 'Sagar Hotel'.

20. This again goes to show that during their stay in Sagar Hotel together they must have maintained a normal conjugal relations and each of them must have discharged their marital obligations. In such a situation only cruelty after this can only be taken into consideration. There is no pleading that after their joint stay in Sagar Hotel the petitioner had in any way treated him with cruelty.

21. Where either of the party to the marriage without reasonable excuse withdraws from the society of the other the aggrieved party may apply for restitution of conjugal rights before the competent Court.

22. Where a question arises whether there has been reasonable excuse for withdrawal from the society the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

23. Thus, during the reconciliation proceedings in the Trial Court and even in this Court (order sheet dated 19.3.93) the petitioner has always shown her willingness to live with the respondent and it is the respondent who has refused to take her back as his wife and, therefore, the burden lies on him to show that there is a reasonable excuse for withdrawing from her society and further that he has been treated with cruelty by the petitioner.

24. Since there is no pleading regarding cruelty after their joint stay in Sagar Hotel, the fact of cruelty cannot be accepted and consequently; the finding of reasonable excuse for withdrawing from the society of the wife petitioner also does not appear to be correct.

25. Learned Counsel for the respondent has submitted that the petitioner has wrongly alleged for demand of dowry. But letters Ex. P/2 to Ex. P/5 written by the brother of the respondent goes to show that there was some demand of dowry in Ex. P/3. The petitioner was suggested to take advances from her G.P.F. Account and further as grain advance and festival advances. It is not understandable as to why the suggestion for withdrawal of various advances was made unless there was a demand of dowry. Similar indications have been given in Ex. P/4 by stating that we (respondent's family) are not in a position of meeting the expenses and the money would be required. The similar suggestion has been given in Ex. P/5 where too it has been asserted that whatever goods and other articles are given in marriage that will be hers (i.e. the petitioner's).

26. The statement of P.W. 3 Rajaram becomes relevant in the back ground of the letters referred above, and therefore, the statement of petitioner that there was a demand of Rs. 5000/- and some gold appears to be probable.

However, these demands appear to be prior to the marriage. There is no specific evidence that any part of settled dowry remained out-standing or there was a specific demand for the same.

27. Of course, this possibility cannot be ruled out that the respondent's refusal to keep the petitioner as his wife on 27.12.1984 may have been because of the non-fulfillment of the demand of dowry but as observed above, there was no reasonable excuse for withdrawing from the society of the petitioner and any cruelty, caused by the complaint, stands condoned because of their living together as husband and wife prior to 1984 and thereafter during the pendency of the case also as referred above.

28. Learned Counsel for the respondent has referred a case reported in AIR 1985 SC 935, (Ms. Jorden Dtengdeh v. S.S. Chopra) whereby their Lordships have

suggested divorce where there has been irretrievable breakdown of marriage but that has not been introduced by amendment in the law and, therefore, the same cannot be given effect to.

29. Learned Counsel for the respondent has referred to two cases (1) AIR 1988 All. 239 (Smt. Aruna Jalan v. Capt. (now Major) Rameshchand Man) and (2) AIR 1987 Delhi 266, (M.K. Malhotra v. Smt. Kirti Malhotra), and submitted that the complaints about the husband's entanglement with other woman would amount to cruelty if it is found false. There is no dispute as to the legal aspect of this observation. But in this case it could not be proved that there was any false complaint of the petitioner for such entanglement. Whatever allegations about contracting second marriage were made in letters Ex. D/2 to D/6 the same stands condoned as they were withdrawn by the petitioner during enquiry, the withdrawal of complaint by the petitioner has been admitted in para 3 of the written-statement filed by respondent and as observed above the same was done after May, 1983 and before the summer, 1984.

30. The learned Counsel thereafter submitted a case reported in AIR 1975 SC 1535, (Dr. N.G. Dastane v. Mrs. S. Dastane) and submitted that the standard of proof for establishing cruelty as not that of a criminal case (i.e. proved beyond reasonable doubt).

31. I agree with that proposition. But in this case the cruelty, because of the complaints, stands condoned.

32. Learned Counsel thereafter has referred to a case in AIR 1984 SC 1562 (Smt. Sarojani v. Sudarshankumar Chadha), and submitted that since there has not been cohabitation between the parties for more than one year the prayer of husband for divorce should be accepted.

33. The observations of their Lordships was in a different context. The respondent husband now after condonation cannot ask for divorce at his own sweet will and the same can not be granted on mere asking.

34. Learned Counsel for the respondent has referred to a case reported in AIR 1990 SC (Sanatkumar Agarwal v. Smt. Nandini Agarwal) and submitted that in view of the strained relations between the parties and as they are living separately the divorce ought to be granted.

In that case there was a desertion by the wife, husband and wife were living separately for last ten years and both parties had adjusted to their new mode of life and in that situation the divorce was granted. But, here the case is different. The respondent himself wants to desert the wife and further wants to take advantage by praying for divorce. This may not be out of place to mention here that a person cannot be allowed to take advantage of his own fault.

35. In view of the discussions above the desertion by the respondent stands proved and cruelty if any because of the complaint by the petitioner against the husband stands condoned because of their joint living thereafter.

36. Learned Counsel for the respondent has, thereafter, submitted that two appeals ought to have been filed as the petition for restitution of conjugal rights filed as the petition for restitution of conjugal rights filed by the petitioner rights was dismissed and the prayer of respondent husband for divorce was accepted the Trial Court. I do not agree with this contention of the learned Counsel as proceedings were one before the Trial Court and it started with the petition for restitution of conjugal rights filed by the petitioner wife. The respondent, husband filed written statement and denied the allegations and as per the provisions of Order 8 C.P.C. made prayer for divorce. There was only one case and the proceedings taking into consideration the divergent contentions of the parties continued and the same was disposed of by one judgment. As such the petitioner-wife was entitled to raise both the points in one appeal alone.

37. As a result, the appeal succeeds with costs. The decree of divorce granted in favour of respondent is set-aside and a decree for restitu-of conjugal rights in favour of the petitioner-appellant and as against the respondent is granted.