

Devram Bilve Vs. Smt. Indumati

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Court : Madhya Pradesh

Decided On : Mar-29-1995

Reported in : II(1995)DMC267

Judge : U.L. Bhat, C.J. and ; D. Verma, J.

Acts : [Special Marriage Act, 1954](#) - Sections 22, 27(1) and 35; ; Code of Civil Procedure (CPC) - Order 8

Appeal No. : L.P.A. Nos. 2 and 3 of 1994

Appellant : Devram Bilve

Respondent : Smt. Indumati

Advocate for Def. : B.A. Nigam, Adv.

Advocate for Pet/Ap. : M.G. Upadhyaya, Adv.

Judgement :

D. Verma, J.

1. These two Letters Patent Appeals have been filed by the husband, who was non-applicant in the Trial Court, against his wife, who was applicant in the Trial Court against the judgment and decree dated 18.11.1993 passed by the learned Single Judge in F.A. No. 113/92 (Smt. Indumati Bilve v. Dewaram Bilve), arising

out of the judgment and decree dated 1.5.1992 passed by the Addl. Judge to the Court of the District Judge, Indore, in Special Marriage Case No. 411/91, whereby the applicant's (respondent herein) application for restitution of conjugal rights filed by her under Section 22 of the Special Marriage Act (for short 'the Act') was rejected and the non-applicant's (appellant here in) counter claim for divorce under Section 27(1)(d) read with Section 35 of the Act, was allowed.

2. The facts of the case, in brief, compass are mentioned herein below. Parties to the litigation were married on 2.11.1982 before the Marriage Officer i.e. the Additional Collector, Khargone. They lived as husband and wife together for sometime. Wife (applicant) was already working as a Teacher. At that time the husband was not appointed in Government service but he subsequently got his appointment as Naib Tehsildar on 13.12.1982 and was posted at Biora. According to her averments made in the petition the parties lived together as husband and wife upto 27.12.1984 even though they were posted at different places. She has averred that on 27.12.1984 she was turned out from her matrimonial home by her husband. After she was turned out, she had made complaints to the police and other various superior officials of her husband. After exchange of notices between the parties, as nothing fruitful materialised, she filed a petition claiming restitution of conjugal rights in the Indore Court on 19.4.85.

3. The appellant (herein) was noticed. He appeared and filed his written statement. He also made a counter claim and claimed a decree of divorce on the ground that his wife had been guilty of committing acts of cruelty on him inasmuch as that she had been repeatedly sending complaints to his superior officers making certain false and baseless averments. On account of this he was subjected to several enquiries and has undergone severe stress and strain. According to him this amounts to committing of cruelty by wife on him, entitled him for a decree of divorce as mentioned above.

4. On the written statement being filed, the wife filed additional reply to the counter claim of the husband and submitted that the husband cannot be granted any decree of divorce as he cannot be rewarded for his own faults and accordingly the prayer made by the husband is liable to be rejected.

5. On the strength of the pleadings of the parties the learned Trial Court framed issues and gave opportunities to parties to lead evidence. Wife examined Nathu as A.W. 1 and Bhikya as A.W. 2 who have deposed that they had seen the parties living together as husband and wife. Rajaram (A.W. 3) who is the father of the wife-applicant and Smt. Indubai (A.W. 4) herself have been examined.

6. As against this the appellant has examined himself as non-applicant (N.A.W. 1).

7. Both the parties had filed correspondence between them after marriage and even during the pendency of the proceedings in the Trial Court as also the complaints made by the wife and the action taken on those complaints by the department against the husband.

8. The learned Trial Court after recording evidence and hearing arguments delivered judgment and passed a decree dismissing the claim for restitution of conjugal rights filed by the wife; but a decree of divorce was passed in favour of the husband on the ground that the acts of the wife amounted to committing of cruelty. Being aggrieved by the said judgment and decree the wife Filed first Appeal No. 113/92.

9. The learned Single Judge by his judgment dated 18.11.1993 has allowed the appeal, set aside the judgment and decree of the Trial Court and instead has granted a decree for restitution of conjugal rights in favour of the wife. Feeling aggrieved by the said judgment and decree of the learned Single Judge, the husband-appellant has preferred these two L.P. appeals against the one judgment and decrees and has impugned the same.

10. The appellant has filed two appeals as according to him the respondent-wife should have filed two first appeals against the judgment and decree of the Trial Court, since the Trial Court had dismissed her petition for restitution of conjugal rights but had allowed the counter claim of the husband and had granted him a decree of divorce. Thus, the contention of appellant was that one single appeal against the same was not maintainable as the other had already attained finality. It appears that only on this ground the husband chose to file there two L.P. Appeals against one judgment and two decrees passed by the learned Single Judge.

11. We have heard the learned Counsel for the parties at length and have also perused the records of the case.

12. According to the learned Counsel for the appellant-husband the learned Single Judge has failed to appreciate that the wife was not entitled to any relief; as having committed cruelty on the appellant, she herself had withdrawn from the company of the husband. He submitted that desertion is a permanent withdrawal of conjugal relations and it requires an act as well as an animus and he further submitted that the mental element necessary under Section 22 of the Act is entirely different from the mental element required under Section 27(1)(d) of the Act. According to him 'withdrawal from the society of the other' used in Section 22 of the Act is entirely different from the word 'deserted' appearing in Section 27(1)(d) of the Act.

13. However, we do not find much difference in the words 'withdrawal' from the society of the other and 'desertion' as used in the Act. Learned Counsel for the appellant was unable to pin-point the basic difference in the meaning and content of these words.

14. We have examined with a microscopic view the correspondence exchanged between the parties. It is true that the wife had been repeatedly asking her husband for permission to go to the place of his posting but in view of the fact that the wife had written several letters to the superior officers of the appellant-husband, he was apprehensive that if she comes she might create a scene and some untoward incident might take place. Thus, with an intention to avoid such confrontation he had been suggesting to meet her at some common place. The tenor of the letters written by the husband to his wife clearly establishes that the same were written in response to the letters sent by the wife. Even the telegram dated 31.1.89 (Ex.P.17) makes it clear that the same was sent in pursuance of the letter dated 27.1.1989 (Ex. P. 16). Bulk of the correspondence had taken place between the parties during the pendency of the proceedings in the Trial Court. Probably, it was working in the minds of the parties that the marriage being a solemn promise between the two should not be allowed to break on such misunderstanding and slender grounds and their endeavour was to make a happy married life.

15. It may be mentioned here that during the pendency of the proceedings the husband had come to Indore and then both the husband and the wife had stayed together in Sagor Hotel, Indore, Even there is no definite evidence that they had stayed in the same room or that they had established their conjugal relations. However, it can be reasonably presumed that while coming from outstation to Indore and staying in a hotel they must have stayed together in the same room. It can also be reasonably assumed that during their stay in Sagor Hotel together they must have revived normal conjugal relations and each of them must have discharged their marital obligation.

16. Thus, any cruelty committed by either party upto their stay at Sagor Hotel stands condoned. In such a situation only cruelty after this act of condonation can be taken into consideration. However, there is absolutely no subsequent pleading by the husband that even after their joint stay in Sagor Hotel, the wife had in any way treated him with cruelty. Where either of the party to the marriage without any reasonable excuse or cause withdraws from the society of the other, the aggrieved party has a cause to apply for restitution of conjugal rights before the Competent Court.

17. It is also now well-settled that the burden of proof of reasonable excuse for keeping away or from withdrawing from the society of the other, shall be on the person who has withdrawn from the society. From the various letters written by the wife to her husband it is clearly made out that she has always been ready and willing to live with her husband and to discharge her duties as a sincere and faithful wife in matrimonial home. But it was the husband who always tried to dissuade her from doing so.

18. The order sheets of the Trial Court as well as of the first appeal in the High Court clearly show that reconciliation proceedings were initiated by the Courts in which the wife had always shown her willingness and readiness to live with her husband and it was the husband (appellant) who had refused to take her back as his wife.

19. Thus a very strong burden lay on the husband to prove to the satisfaction of the Court that there had been a reasonable excuse for withdrawing from her

society and further that he had been treated with cruelty by her wife.

20. As mentioned above since there is absolutely no subsequent pleading regarding committing of any cruelty by the wife on him after their joint stay in Sagor Hotel, the fact of cruelty cannot be accepted. Consequently the finding of reasonable excuse for withdrawing from the society of the wife also does not appear to be correct.

21. We have a land mark judgment of the Apex Court reported in Dr. N.G. Dastane v. Smt. S. Dastane (A.I.R. 1975 S.C. 1534) with regard to cruelty and codonation.

22. From the facts and circumstances mentioned above it can be said that the respondent-wife was guilty of cruelty; but the appellant-husband had condoned it and the subsequent conduct of the respondent is not such as to amount to a revival of the original cause of action.

23. Thus the necessary conclusion is that in the instant case cruelty, if any, on account of the complaint made by the wife, stands condoned.

24. In this view of the matter, the appellant-husband could not have asked for divorce at his sweet will and accord. In our considered view the appellant has failed to make out good and sufficient grounds from withdrawing from the society of the wife and has also failed to make out grounds claiming a decree of divorce.

25. Learned Counsel for the respondent has relied upon a decision reported in Devidas v. Smt. Gyanwati @ Sheelrani (A.I.R. 1993 M.P. 14) = I (1994) DMC 131 as also on the judgment of the Supreme Court referred to above. However, there is no dispute with regard to ratio decided in these judgments.

26. The learned Counsel for the appellant further submitted that the wife's single appeal against the judgment and decree of the Trial Court was not maintainable; inasmuch as her petition for restitution of conjugal right was rejected; whereas the counter claim of the husband for a grant of decree of divorce was allowed. Therefore, the wife should have filed two independent separate appeals and not having done so, there is bar of res judicata. It may be pointed out here that the husband did not file a counter suit which was registered as a separate suit; but

only made a counter claim as required under the provisions of Order 8 C.P.C. There was only one suit before the Trial Court in which only one decree was passed. Naturally only one appeal was competent. It may also be mentioned that perusal of the said appeal clearly shows that the wife had specially prayed the following reliefs :

(i) that this appeal may kindly be allowed and setting aside the judgment and decree passed by the lower Court, she be granted the decree of restitution of conjugal rights;

(ii) that the decree passed in favour of the respondent regarding divorce under Section 17(1)(d) of the Act be set aside;

(iii) that the appellant be allowed the costs of this appeal from the respondent.

27. A perusal of the reliefs shall show separate reliefs were asked for by the wife, though the appeal as against one decree and for this reason it was not necessary to file two independent and separate appeals against one judgment and decree. The judgment relied upon by the learned Counsel for the appellant reported in Premier Tyres Ltd. v. Kerala State Road Transport Corporation (A.I.R. 1993 S.C. 1202) has no application to the facts of the present case. In that case two independent and separate suits were filed, whereas in this case there was only one suit in which the counter claim was made. Thus, the ratio of the decision of Supreme Court is not at all applicable to the facts of the present case.

28. In this view of the matter the appeals filed by the husband-appellant are hereby rejected and dismissed. The judgment and decree passed in F.A. No. 113/ 93 dated 18.11.1993 are hereby confirmed. The net result is that the wife shall be entitled to a decree for restitution of conjugal rights and husband's counter claim seeking a decree of divorce stands dismissed.

Counsel's fee Rs. 500/- in both the appeals, if certified.