

**Shushil Kumar Dang Vs. Prem Kumar Dang**

**Shushil Kumar Dang Vs. Prem Kumar Dang**

**SooperKanoon Citation :** [sooperkanoon.com/684305](http://sooperkanoon.com/684305)

**Court :** Delhi

**Decided On :** Feb-11-1977

**Reported in :** 13(1977)DLT279

**Judge :** Avadh Behari Rohtagi, J.

**Acts :** [Hindu Marriage Act, 1955](#) - Sections 9

**Appeal No. :** First Appeal No. 73 of 1974

**Appellant :** Shushil Kumar Dang

**Respondent :** Prem Kumar Dang

**Advocate for Pet/Ap. :** Vijay Kishan and; B.J. Nayar, Advs

**Judgement :**

**Avadh Behari Rohatgi, J.**

(1) This is a wife's appeal from the decree of restitution of conjugal rights passed by the Additional District Judge on January 30, 1974, against her.

(2) The appellant Sushil Kumari was married to the respondent Prem Kumar on February 25, 1970. The husband is 32 years of age. Nearly same is the age of the wife. Both of them are lower division clerks. They are getting about Rs. 400/ or Rs. 450/per month as pay.

(3) The husband and wife lived together till July 15, 1970. This is admitted on all hands. The case of the husband is that on July .16, 1970, the wife left his house in the morning to join her duties at .the office. She did not come back to his house in the evening. Thereafter she never came back to the matrimonial home.

(4) At the time the wife left the house on July 16, 1970, she was in the family way. In February 1971, when the husband and wife were living apart a daughter was born to the. .wife. That girl today is five years of age. She is living with her mother.

(5) On July 13, 1971, the husband filed a petition for restitution of conjugal rights under s. 9 of the Hindu marriages Act (the Act). The husband alleged that the wife left the house against his consent on July 16, 1970, and that she is living separately without just cause and refuse to come to him inspire of his efforts

(6) The wife opposed the petition. Her main defense was that on July 16, 1970, she was beaten and turned out of the house by the husband. She pleaded that her husband was cruel to her and that she had an apprehension in her mind that it will be harmful and injurious for her to live with him. She also said that the petition has been made mala-fide and that the husband had no intention to live with her. The husband filed a replication. The following issues were framed:

1. Whether the respondent has withdrawn from the society of the petitioner without any sufficient and reasonable cause as alleged in the petition ?
2. Whether the petitioner has treated respondent with such cruelty as to cause a reasonable apprehension in her mind that it would be unsafe and injurious for her to live with the petitioner
3. Relief.

(7) The trial judge held that the wife left the matrimonial home without any reasonable excuse and that her allegation of cruelty was false. He granted the husband a decree of restitution of conjugal rights. Now the wife appeals to this court.

(8) To complete the sequence of event it may be mentioned here that after the husband had obtained a decree for restitution of conjugal rights on January 30, 1974, from the court of the Additional District Judge he filed another proceeding a petition for judicial separation under section 1 of the Act on February 8, 1974, in the court of the Subordinate Judge. Subsequently on an application of the wife these proceedings for judicial separation were stayed on October 15, 1974, as the wife had brought her appeal to this court in the mean while.

(9) In her evidence the wife said that she was living separately from the husband for a just cause. She enumerated those causes in her evidence. Firstly, she said that the husband used to come drunk in the house; secondly she said that he brought a girl with him sometimes ; thirdly her complaint was that the husband took away her entire salary and left a pittance of five or ten rupees for her; fourthly she testified that the husband wanted to appropriate her entire dowry and for that purpose he wanted her to give the key of the place where those articles of dowry were kept and on her refusal the husband slapped her. Fifthly she narrated the incident of November 11, 1970, when according to her husband and his brother-in-law Govind Ram with a third person, a friend of the husband, Ranjit by name, came to her father's house where she was living. She said that the husband beat her and gave blow on her belly, tore her blouse and after that all of them fled away.

(10) As to the main incident of July 16, 1970, the wife testified that the husband turned her out of the house as he wanted her to bring a sum of Rs. 10,000.00 from her father and this she refused. This. was her defense as disclosed in evidence

(11) The husband on his side examined his mother, a friend Madan Lal and his own brothers-in-law Govind Lal and Krishan Chand, another friend. The husband himself appeared in the witness box. On behalf of the wife Shankarlal, an officer of the office where the wife is working, namely Mr. Veeraswamy and the wife herself as own witness appeared in the witness box.

(12) The trial judge believed the evidence of the husband. He discarded the evidence of the wife. He reached the conclusion that the husband's case was more reliable and it was the wife who left the husbands' house and there was no

reasonable excuse for the wife to keep away from the company of the husband.

(13) I need not analyze the evidence over again as I am in agreement with the trial judge's assessment of evidence of the parties.

(14) The main ground on which the wife's evidence can be rejected is that though she narrated as many as five acts of cruelty in her evidence which I have enumerated above, none of these finds any place in her written statement. Except for the incident of July 16, 1970. on which she was specific that it was the husband who had turned her out of the house. She did not plead any other act of cruelty which she mentioned in her evidence. I am in broad agreement with the trial judge on the main question, namely, that the wife has failed to show a just excuse for living away separately from the husband.

(15) The counsel for the wife has mainly taken two points on the merits of the case. Firstly he said that there is no evidence worth the name from the side of the husband to show that he ever made any effort to bring the wife back from her parents house. For this submission he relies on Sm. Reharani Ashit : AIR1965 Cal162 .

(16) In my opinion there is no substance in this submission. The wife in her statement before the Additional District Judge at the commencement of the case on February 5, 1972 when attempt to bring about reconciliation was made told the court that she was not prepared to go to the husband's house and that if the husband wanted her company he should come to her parents home and stay there with her. Secondly in her statement as her own witness she plainly said that she was not willing to go back to the husband in his house where his mother, brothers and sisters are staying. The suggestion was that she was not prepared to stay with the relations of the husband. If that was the attitude of the wife it was idle for the husband to make attempts to bring back the wife for she was not willing to stay with him in his house with his mother, brothers and sisters.

(17) Secondly, the counsel submitted that on July 14 and 15, 1970, the wife was sick and she had taken medical leave from the office. On July 16, also, it was said, she was unwell and there was no question of going to the office. The wife pleaded

this in clear terms. But I think she has failed to substantiate her allegations as she did not examine anybody from her office to show that she was ill. However these matters of merit need not detain me for I am of the view that this appeal must succeed on other grounds.

(18) The first ground on which I think the wife is entitled to succeed is this. The wife pleaded in her written statement that the husband's petition was mala fide as there was no genuine intention on the part of the husband to live with her. In order to succeed in a petition for restitution of conjugal rights it is necessary that the husband must be sincere. A decree for restitution may be refused if the court finds that the petition is not presented bona fide and that there is an ulterior motive other than the sincere desire for a resumption of cohabitation : Halsbury's Laws of England, Third Edition Vol. 12 page 285.

(19) It will be appreciated, therefore, that this remedy of restitution of conjugal rights is aimed at preserving the marriage and not at disrupting it as in the case of divorce or judicial separation. The court cannot enforce sexual intercourse, but only cohabitation, and restitution of conjugal rights cannot be ordered where the respondent refuses sexual intercourse but continues to cohabit with the petitioner. (See Jackson v. Jackson (1924) P 19.

(20) In order to succeed the petitioner must show that he is 'sincere' i.e. that he has a bona fide desire to resume matrimonial cohabitation and to render the rights and duties of such cohabitation, and a petitioner who is sincere in that sense is entitled to a decree even though the parties may not have any affection for each other (See Tolstoy-. The law and Practice of Divorce, Sixth Edition page 99).

(21) In Lacey v. Lacey (1931) 146 L.T. 48, Lord Merrivale said :

'A demand or request for resumption of cohabitation must be sincere'.

(SEE also Syal v. Syal (4) . and Joginder Kaur v. Shiv Charan Singh (5) A.I.R. 1965 J&K.; 95

(22) In this case the husband has accused the wife of illicit relations with one Lalit Nayyar. The counsel for the wife says that in the face of this allegation it is not

possible for any wife to go back to her husband and live with him. The object of a decree for restitution of conjugal rights no doubt is that the husband and wife should live together. The foundation of a right to bring a suit for restitution of conjugal rights is the fundamental rule of matrimonial law that one spouse is entitled to the society and comfort-consortium of the other spouse. If the husband brings a charge or an accusation of adultery or illicit sexual relationship with another man might not the court refuse the husband the decree for restitution of conjugal rights

(23) With regard to the relations with Lalit Nayyar the husband in his petition said this in para 3 :

'the respondent is living with her parents against the wishes of the petitioner under the ill-advice of her parents and one Shri Lalit Nayyar, who have their own interest to keep her away from the petitioner.'

(24) In her written statement the wife denied this allegation. She said that Lalit Nayyar is her brother. In his replication the husband repeated :

'THE respondent refused to live with the petitioner as the respondent was not prepared to leave her association with said Shri Lalit Nayyar.'

(25) The wife appeared as her own witness. She was cross examined. One of the questions put to her was about her intimacy with Lalit Nayyar. That was the suggestion. To this suggestion the wife answered ;

'L.K. Nayyar is not my real brother but he is my dharam bhai and he manages the entire affairs of my parents household and he also did the entire work at my marriage. He lives at 69, National Park, Lajpat Nagar, New Delhi, and does not live in the house of my parents. It is wrong to suggest that I have intimacy with him.'

(26) The last words are quite important. The suggestion is that she is having an illicit sexual intercourse with Lalit Nayyar. This is what I understand from the question. The term intimacy as defined in Shorter Oxford Dictionary means 'illicit sexual intercourse'. This is a euphemistic use of the term. The context shows that

this is what it was meant to suggest. To that the wife returned a categorical answer. She said : No.

(27) The matter was not allowed to rest here. The counsel for the husband forcefully argued this point before the trial judge. He seems to have suggested that the relationship between the two was illicit and this is the reason why the wife was refusing to come back to the husband. On this aspect the trial judge said:

'THOUGH nothing categorical can be stated about the relations of the respondent with L.K. Nayyar, the contention of the Learned counsel for the petitioner that there is some sort of illicit intimacy between the respondent and L.K. Nayyar cannot be ruled out altogether especially when he had been visiting her parents' house since 1960 and she has no real brother and he has been coming to the court along with the respondents.'

(28) This is surprising. The trial judge seems to be of the view that there is some sort of illicit intimacy between the wife and Nayyar and for this conclusion he also took into account the fact that Lalit Nayyar had been coming to his court Along with the wife. This, I think, was not necessary for the decision of the case. Nor is this conclusion well founded. And having returned this finding it is still more surprising that the judge has granted a decree for restitution of conjugal rights to the husband.

(29) The counsel for the wife has argued that from the pleading, evidence and arguments it is clear that the imputation against the wife is that she is guilty of adultery as she is living with Nayyar and refuses to come to the husband. Commission of adultery is a serious matrimonial offence. The husband will find it intolerable to live with an adulterous wife. If a charge is brought such as in this case and persisted in till the stage of evidence and arguments it cannot be said that there is no reasonable excuse for the wife to refuse to come back to the husband.

(30) It seems to me that the stand of the husband is inconsistent. On the one hand he is claiming a decree for restitution of conjugal rights and on the other he is making an imputation of illicit relations with Nayyar. In the petition the reference no

doubt is veiled. It is an oblique hint. It is in the nature of an innuendo. In the replication it is in plain terms. There the word 'association' is used. The suggestion is the clearest in the cross-examination of the wife where the husband suggested this to the wife and she said :

'IT is wrong to suggest that I have intimacy with him.' Then this matter seems to have been argued before the trial judge and I have set out his view on this matter.

(31) The husband's claim is incongruous. He cannot claim that the wife must live with him when he suspects her fidelity. The two claims, namely, restitution as well as an accusation of adultery cannot stand side by side. They are incompatible. Whoever has heard of a man claiming restitution against his wife whom he charges with infidelity. A charge of adultery makes the marriage state impossible to be endured. Life itself becomes unendurable and the discharge of marriage duties impossible.

(32) Restitution aims at the preservation of marriage. An accusation such as this strikes at the very foundation of matrimony. It destroys that close and intimate union we call marriage. Marriage is union of one man and one woman for life to the exclusion of all others.

(33) The husband claim, it seems to me, is chimerical. It is a facade. He does not really want the company of the wife. He wants to use the decree as a stepping stone for an ultimate divorce. The court will refuse to pass a decree for restitution of conjugal rights in such circumstances. If the judge is satisfied that the object is not to live together but to attain some other ulterior purpose he might refuse the husband the assistance of the court and call for the strong arm of the law to force his wife under pain of imprisonment to resume cohabitation.

(34) Section 23 of the Act says that the judge has to be satisfied on a preponderance of probabilities of matters mentioned in clauses (a) to (e) of that section. It confers power on the court to pass a decree if it is satisfied on those matters. Even if the husband has succeeded in proving his case on merits but the court is not satisfied that he is entitled to a decree for restitution on the ground that he has no genuine desire for the resumption of the married life the court will be

entitled to refuse a decree for restitution. This is clear from the words 'and in such a case, but not otherwise, the court shall decree such relief.' The legislature has emphasised that if the court is satisfied of grounds (a) to (e) then the relief may be granted; See *Dastane v. Dastane*. : [1975]3SCR967 .

(35) thereforee, it comes to this. The husband is claiming restitution as well as charging the wife with illicit sexual intercourse sometimes concealed words and sometimes in the plainest of terms. He has not pleaded any forgiveness. It is true that in his examination in chief the husband said that he was prepared to take back the wife without any conditions but he has not said that he is no more interested in persisting in an old groundless charge.

(36) The husband's invitation to the wife for recohabitation does not spring from a sincere desire that these people should live together as man and wife. Finding that the grounds of divorce under section 13 were not available to him the husband started proceedings for restitution of conjugal rights as a convenient handle to cut the martial bounds. It was the husband who was keen to snap vinculum matrimony. The proceedings under section 9 were resorted to as a device for attaining his purpose, namely, to obtain divorce from a wife by the husband against whom he was not prepared to bring a charge of adultery as a substantive ground of attack.

(37) In *Mst Gurdev Kaur v. Swaran Singh* . Grover J. said:

'THE Court would refuse to order restitution where it has become a practical impossibility for the parties to live together.'

(38) In this case also there is little hope that the parties will ever come together. I should be happy if they do. But it seems to me that the husband's choice of remedy was unfortunate. He elected for the wrong relief. Instead of suing for judicial separation he sued for restitution for reasons best known to him. Matrimonial law ought not be made the pawn for selfish gains unconnected with matrimonial home in the hands of one spouse to the detriment of the other. One would think that the court might well refuse to afford its assistance to one who acted thus.

(39) The remedy of restitution is not to be treated as a fiction, a halting place as it were on the onward journey to a dissolution of marriage. The legislature bids us treat it as a reality, as an opportunity for the parties to allow their passions to cool down and return to the conjugal folk and rebuild, the broken home, if they can.

(40) The concept of the existence of the court's power to give the relief of restitution of conjugal rights was borrowed from the English law. Matrimonial causes in English were formerly beared and determined by Ecclesiastical Courts and the earlier English statutes which give jurisdiction to the King's courts directed the judges to determine causes as far as possible on the principles of Ecclesiastical law. The legislature did not alter the Cannon Law except in a few matters and the judges who administered the law were bound by precedents established in the Ecclesiastical courts.

(41) The law enforced in this respect in England was described as barbarous by Lord Herschell in *Russel v. Russel* (1897) Ac 395. But there have since been considerable changes effected in that law. The Matrimonial Causes Act, 1950, rendered petitions for restitution comparatively rare in England.

(42) Now the Matrimonial Proceedings and Property Act, 1970, has abolished the remedy of restitution of conjugal rights following Law Commission Report. (See 8.0 of the Act of 1970).

(43) The counsel for the husband has argued that the husband's charge of illicit relations has never been the case of the wife. He invited my attention to her written statement, the issues and her evidence. It is true that the wife did not at any stage plead that she was refusing to go back to the husband because he is leveling unfounded charge of adultery against her. Nor did she say anything about it in her examination-in-chief. But in my opinion she is not disentitled to build an argument on the husband's admitted case. She need not have taken any specific plea in her defense. Nor was it necessary for her to prove it for that is the avowed case of the husband. He himself leveled a charge against her. In my opinion she is entitled to take advantage of this stand of the husband and say to the court: 'There is no case for me to answer'. If the husband says that the wife is guilty of illicit relations the wife can say that the husband is not entitled to a decree for restitution

of conjugal rights against her.

(44) The counsel for the husband said that the case must be decided on the pleading of the parties. In the pleadings the wife has not taken this point. But generally she has taken the point that the husband is maltreating her and that the petition is mala fide. As an instance of cruelty and mala fide she can show from the husband's own case that she is being charged with having taken sexual liberty. The husband has not been able to prove the charge on the record. At any rate with this charge on his lips he is not entitled to a decree for restitution.

(45) There is yet another reason why the husband must fail. On February, 8, 1974, the husband brought a second petition. This time he used for judicial separation. Having succeeded in the claim for restitution of conjugal rights he did not rest content. He went to court a second time. In the second petition he pleaded:

'THE respondent's attitude is that she will never perform her matrimonial duties and would keep the relationship suspended in such manner'.

(46) This second proceeding launched by the husband is indicative of his attitude of mind. In a case for restitution of conjugal rights as in any other case the court has to see the conduct of the parties and their attitude of mind In *Gollins v. Gollins*, 1964 A.C. 644 Lord Reid said :

'A judge does, and must try to read the mind of the parties in order to evaluate their conduct. In matrimonial cases we are not concerned with the responsible man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better'.

(47) In law the husband was bound to wait for a period of 2 years to give the wife a chance to join him and obey the decree of restitution of conjugal rights passed against her. S. 13(IA) it says that a husband is entitled to present a petition for a decree to divorce on the ground.

'that there has been no restitution of conjugal rights between the parties to the marriage for a period of two years or upwards after the passing of decree for restitution of conjugal rights in a proceeding to which they were parties'

(48) The husband did not wait for two years. Hardly 7 days passed. He brought another case against the wife. This is a circumstance which has to be taken into account. By bringing the proceedings for judicial separation he was closing the doors to the wife for resumption of conjugal rights. In fact he did not want her to come to him even if the wife were minded to resume cohabitation. It seems to me that the period of two years must elapse before it can be said that the wife is not willing to perform her marital obligations and is not willing to live with husband. This is my reading of the husband's mind and his conduct as shown in these proceedings.

(49) The counsel for the wife has made an application Cm 1586. In this application the wife said that by reason of the subsequent proceedings brought by the husband against her for judicial separation. The husband's petition for restitution of conjugal rights was liable to be dismissed on that short ground alone. He has argued that by the subsequent proceeding the decree itself, has been nullified.

(50) I do not agree. But this is certainly an event and a factor which can be taken into account for judging the sincerity of the husband and for finding out whether he was really interested in the wife.

(51) The counsel for the husband has not been able to tell me what useful purpose would a second proceeding serve after the husband has obtained a decree for restitution of conjugal rights. Non-performance of a decree for restitution of conjugal rights is one of the grounds for obtaining a decree of divorce. Similarly non-resumption of cohabitation for a period of two years or upwards after the passing of the decree for judicial separation is another ground for divorce. A husband need not obtain both types of decrees in order to bring a petition for divorce, one is good enough.

(52) The counsel for the husband lastly argued that he was prepared to withdraw the charge of illicit connection with Nayyar and he was also prepared to withdraw the petition for judicial separation which the husband has filed and which is now pending.

(53) I do not think this can be allowed. Even if the husband is allowed to withdraw the charge and the subsequent petition this will hardly make any difference for he has not given an opportunity to the wife to comply with the decree of restitution even if she wanted to put herself in the right by making a bona fide offer to return and remedy the wrong.

(54) In *Ishwar Chandra Ahlawalia v. Pamilla Ahluwalia* where after a decree for restitution of conjugal rights had been passed the husband proceeded with a petition for annulment of marriage under section 12(1)(e) of the Act. After its dismissal and after expiry of the period of two years from the date of the passing of decree for restitution of conjugal rights, he filed a petition for dissolution of marriage under section 12 on the ground of non-compliance of the decree by the wife. *Falshaw C.J.*, held that it was quite-impossible for the wife to make any effort to comply with the decree for restitution of conjugal rights, as long as the husband was proceeding with a petition for nullity of the marriage and that it was doubtful whether any sincere efforts were made on behalf of the husband to get his wife to comply with the decree. The husband's petition was dismissed.

(55) For these reasons I would allow the appeal and set aside the decree of the trial judge. The petition for restitution of conjugal rights is dismissed In the circumstances the parties are left to bear their own costs.