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Court : Delhi

Decided On : Dec-05-1968

Reported in : 5(1969)DLT519

Judge : Hardayal Hardy, J.

Acts : Hindu Marriage Act, 1955 - Sections 9(2)

Appeal No. : First Appeal Nos. 229 and 230 of 1967

Appellant : Ram Kali

Respondent : Same Singh

Advocate for Pet/Ap. : Ram Dhan Ahuja and; S.R. Sher Singh, Advs

Judgement :

Hardayal Hardy, J.

(1) The appellant in btoh these appeals is the wife of the respondent against whom a decree for restitution of conjugal rights has been passed by Shri Sagar Chand Jain, Subordinate Judge 1st Class, Delhi on an application filed by her husband under section 9 of the Hindu Marriage Act, 1955. By the same order the wife's application for judicial separation under section 10 of the Act has been dismissed. The appellant being aggrieved by the order made by the learned Subordinate Judge has filed two separate appeals, one against the decree for restitution of

conjugal rights passed against her and toher against the dismissal of her application for judicial separation. Although two separate decrees have been framed by the trial court a.nd also two separate appeals have been filed against them, the order in btoh the cases being common, btoh the appeals have been heard together.

(2) The parties are Hindus by religion and were married at village Kerala, Delhi in the year 1958 in accordance with Hindu rites. They lived together for a few months only and thereafter according to the allegations of the husband, who will hereafter be referred to as I respondent the wife who will hereafter be referred to as appellant was taken away by her brtoher Khazan and has since then deserted the respondent. The appellant's allegations were that she lived with the respondent at his house for about 8 or 9 months after their marriage and thereafter she was turned out of the house after having been beaten by him. The trial court has disbelieved the defense set up by the appellant and has held that her allegations of cruelty and desertion have nto been proved, nor has the allegation of respondent having deserted her been established. Learned Subordinate Judge has also held that it is a fundamental principle of matrimonial law that one spouse is entitled to the society and comfort of the toher and if thereforee one spouse abandons the toher without reasonable cause, the toher spouse can obtain a decree for restitution of conjugal rights. Having hold that the respondent was entitled to succeed in the application filed by him, the learned subordinate Judge decided that the appellant's application for judicial separation had to be dismissed.

(3) At the hearing of the appeals learned counsel for the appellant placed in the fore-front of his argument the point that the entire approach of the trial court to the question arising for decision in the respondent's application for restitution of conjugal rights was wrong. The case had been decided by the trial court as if the burden of approving the negative was on the appellant. Instead of placing the burden of proof on the respondent which, according to the learned counsel, the court was bond to do in an application for restitution of conjugal rights, the onus instead had been placed on the appellant to prove want of reasonable excuse. In support of his argument, the learned counsel drew my attention to the issues framed by the trial court which read : -

1. Whether the respondent has treated the petitioner with such cruelty as to raise a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him Op 2. Whether the respondent has deserted the petitioner for a continuous period of nto less than two years immediately preceding the representation of this petition 3. Relief.

The contention urged by the learned counsel is that in an application under section 9 of the Act the husband is entitled to succeed on the strength of his own case and nto on the weakness of the defense set up by the wife. In support of his argument, reliance is placed on a Bench decision of Calcutta High Court in Smt. Rebarani Sen Gupta v. Ashit Sen Gupta. The contention urged by the learned counsel has a great deal of force. An examination of the provisions of section 9 of the Act shows that under sub-section (1), it is the duty of the petitioner to establish that the toher spouse has without reasonable excuse withdrawn from his or her society as the case may be. In a case where an application has been filed by the husband, sub-section (1) contains particulars of the duties or obligations which have to be discharged by the husband to enable the court to take a view in his favor. Sub-section (2) deals with the wife's defenses to the husband's action if he was toherwise entitled to succeed under sub-section (1). The trial court in this case appears to have concentrated its attention on subsection (2) and has dealt with the case by throwing the entire onus upon the wife. As held by the learned Judges of the Calcutta High Court in the case mentioned above the court was no doubt fully justified upon the evidence to reject the wife's defense, but to treat the case as if the onus of proving want of reasonable excuse lay entirely on the wife is something that is nto permissible under the law.

(4) The trial court's appreciation of the evidence on issues 1 and 2 also appears to be faulty. The main reason for deciding issue No. 1 against the appellant is that according to her application under section 10 of the Act, she was kept by the respondent at village Shikarpur for about t- or 9 months after marriage and thereafter she was turned out of the house after she had been mercilessly heated by him, while the evidence led by her to prove the allegations of cruelty was nto of witnesses belonging to village shikarpur but of village Parshad Nagar. According to the learned subordinate Judge, when the parties resided at Shikarpur evidence

of witness from Parshad Nagar obviously went beyond her pleadings and thereforee could nto be looked into. An examination of the file, however, shows that the assumption made by the trial court is nto correct. The appellant had nowhere stated that during the entire period of her stay with her husband she was living in village Shikarpur. The principle applied by the trial court that evidence which went beyond the pleadings of the parties had thereforee no application to the facts of the case. In that view of the matter, the evidence of two of the witnesses, namely Om Parkash (A.W.4) and Pujala (P. W.

5) who were btoh residents of Parshad Nagar and have deposed to the cruel treatment meted out to the appellant by the respondent appears to have been wrongly rejected, Om Parkash (A.W.

4) stated that in the year 1959 the parties lived in his neighborhood in Parshad Nagar for about three or four months He was on visiting terms with the respondent and used to see them quarrelling with each toher and the appellant being beaten by the respondent. According to him, in February, 1959 the respondent turned out the appellant from his house alter beating her. The witness tried to persuade the respondent to keen the appellant in his house and nto to beat her but he was told off. The witness further stated that the appellant complained to-him that the respondent was nto doing any work and had taken to evil ways. Pujala (A. W.

5) who is an employee of the Municipal Corporation, Delhi stated that the parties lived in Parshad Nagar at a distance of 50 paces from his house. Hp used to see the respondent beating the appellant and tried to remonstrate with him but the respondent did nto agree. One day the respondent turned out the appellant from his house. She had torn cltohes on her body and marks of injury on her person when she was beaten and turned out of the house, The witness further stated that the respondent did nto maintain the appellant and that was the main cause of quarrel between them. The toher witnesses whose evidence has been rejected by the trial court no doubt do nto have any direct evidence to give on the question of cruelty but their evidence has certainly a great deal of bearing on the question of desertion which is relevant for the decision of the application under section 9 of the Act. Lilu Ram (A. W.

6) is a railway employee who lives in village Kerala where the parents of the appellant are living. His evidence is material in so far as he states that in the year 1959 the appellant came weaping to her parents and stated that she had been turned out of the house by the respondent after she had been given beating. The appellant also complained that the respondent was a gambler and had nto been providing her even with food. The witness also stated that the respondent never made any attempt to persuade the appellant to return to his house. On the toher had the appellant's father and brtoher asked the witness to go and request the iespondent to keep the appellant in his house and to treat her well. The respondent however, did nto agree to keep her in her house and also told the witness who was accompanied by Prabhu (A. W.

2) and Khazan (A. W

8) that if the appellant was sent to him he would either sell or kill her. According to the witness, the respondent was under the influence of liquor as had smell was corning out of his month. The statement of this witness is supported by Prabhu (A.W.

7) and Khazan (A. W.

8) the latter is brtoher of the appellant with whom she has been living ever since her separation from her husband. According to this witness the appellant lived with the respondent for 8 or 9 days at village Shikarpur and thereafter they btoh went to live in Parshad Nagar. When the appellant came to Khazan Singh's house, he found her weaping, Prabhu, Jalu Ram Kartar Singh (Pradhan of the Gaon Sabha) and Raghbir (a member of the Panchayat) also arriveid there. In their presence, the appellant told her brtoher that the respondent indulged in excessive alcholic drinks, gambled with goondas and had sold her ornaments and cltohes. When she prtoested against his mis-behavior he beat her and turned her out of the house. He further stated that neither the respondent nor his father had come to fetch the appellant nor had they provided her with any maintenance since January 1959. The respondent had also repulsed the efforts made by Khazan to persuade him to take back the appellant and had instead filed a complaint under section 439 Indian Penal Code against him. The allegations were, however, found to be false and he

was discharged by the magistrate trying the case. In January 1966 the respondent forcibly attempted to take away the appellant from court premises for which he was arrested and is since on bail.

(5) As against the evidence led by the appellant several witnesses had been examined on behalf of the respondent. It is, however, nto necessary to refer it lengt to the statements of those witnesses as all of them have without exemption, stated that the respondent had never given beating to the appellant and that she had left the respondent's house of her own accord without the consent of the respondent. Their evidence had been believed by the trial court on the ground that all the them belonged to village Shikarpur where the parties were living after their marriage. As regards the failer of the respondent to provide maintence to the appellant during the period of separation the trial court has held that that does nto prove the act of desertion,

(6) The mere fact that the witnesses examined by the respondent belong to village Shikarpur is hardly any reason why their evidence should be preferred to that of the appellant's witnesses with the help of the learned counsel for the parties, I have gone through the evidence of the respondent's witnesses and I must say that I have nto been impressed by that evidence at all. According to those witnesses also the respondent has nto been doing any work. Gyasan (RW2) stated that the respondent was grazing cattle and was earning Rs. 10.00 to Rs. 20.00 per mensem. Jit Ram (RW3) stated on the toher hand that the respondent was earning Rs. 30.00 to Rs. 35.00 per mensem. The respondent himself did nto give any figure of his income but admitted that he was grazing cattle. Gyasan (RW2) was a co-accused in the police case resulting from forcible removal of the appellant by the respondent. Amar Singh (RW4) has no personal knowledge about Khazan having taken away the appellant from respondent's house. Paras Ram (RW-3)has also no personal knowledge of the disputes between the parties. His evidence is only to the effect that the respondent is a man of good character. All these witnesses have however staled that the appellant and the respondent were living at Shikarpur.

(7) I am more inclined to accept the statements of the appellant's , witnesses who have deposed that the parties lived together for sometime at Shikarpur and thereafter lived at Parshad Nagar. The respondent's story that he grazes cattle of the villagers appears to me to be a pure concoction. The fact of the matter is that he is an idler and is given to alcoholic drinks and evil ways, toherwise there is no reason why the appellant should leave his house.

(8) It is true that the evidence of cruelty led on behalf of the appellant is nto what is required by law, but there is sufficient evidence on record to make out a case of desertion against the respondent. Even toherwise, according to law, a husband is nto entitled to a decree for restitution of confugal rights merely because the wife has failed to substantiate the pleas in answer to the petition, mentioned in sub-section (2) of section 9. On the language of sub section (2) some courts have no doubt taken the view that reasonable excuse within sub-section (1) must be one which would afford a ground either for judicial separation or for nullity of marriage or for divorce. According to a Division Bench judgment of Andhra Pradesh High Court in Reddigari Annapuranmma v. Reddigari Appa Rao, 'What is reasonable excuse within section 9 Is indicated in section 9. It is nto open to either spouse to plead any excuse toher than those indicated in separation or for nullity of marriage or for divorce.'

(9) A different view of the section has however been taken by some toher High Courts. In Mst Gurdev Kaur v. Sarwan Singh, it was held by Grover J. (as he then was) that nto withstanding the language of sub-section (2) of section 9, confining pleas in defense only to those grounds which can be taken under sections 10, 12, and 13 of the Act, sub-section (1) itself lays down certain conditions which must be fulfillled before a decree can be granted. It will have to be seen firstly, whether the husband or wife, as the case may he, has withdrawn from the society of the toher without reasonable excuse. The second requirement is that the court must be satisfied about the truth of the statements made in such a petition. Thirdly, there should be no legal ground why the relief should nto be granted. In a case of this nature the petition shall fail nto because of any defense set up by the wife under section 9, but it cannto succeed on account of non-fulfilment of one of the essential ingredients of sub-section (1) of section 9. Take for instance, a case

where the petitions filed by the husband is un-defended. It is still obligatory on the court to be satisfied under section 23 that the petitioner is nto in any way taking advantage of his or her own wrong or disability for the purpose of such relief. This makes it clear that the court is bound to take into consideration the conduct of the petitioner. If the petitioner has by his own-misdeeds forced a spouse to leave him, he cannto be allowed to take advantage of his own wrong and ask for assistance of the court to perpetuate his own wrong doing.

(10) The view taken by Grover J. was shared by Inder Dev Dua J. (as he then was) in Gurcharan Singh v. Smt. Waryam Kaur, and also by a Division Bench of Madhya Pradesh High Court in Swt. Alopbai v. Ramphal Kunjila. In Shrimati Sau Shakuntalabai Baburoo v. Baburao Daduji Mandilik, the Punjab decisions were referred to and followed by the Indore Bench of the same High Court, although the report of that case which was decided on 9th April, 1962 does nto make any reference to the decision of the same High Court. In Smt Alopbai's case which had been decided earlier on 24th October, 1961. The same view was taken by a single Judge of Allahabad High Court in Smt. Mango v. Prem Chand, ard by Gangeshwar Prasad J. in Jagdish Lal v. Smt. Shyama Madan.

(11) I am in respect full agreement with the view expressed in the decisions of the Punjab, Allahabad and Madhya Pradesh High Courts and would prefer to follow them instead of the decision of Andhra Pradesh High Court in Pedigari Anna puranmma's case

(12) Applying the principle laid down in the afore-mentioned decisions to the facts of the present case, it is apparent that it has been established on record that the respondent is an idler. The parties are low caste Hindus who follows the avocation of sweepers. According to the evidence on record, the old father of the respondent is earning more than Rs. 100.00 to Rs. 125.00 by following his hereditary occipition. Khazan brtoher of the appellant is also earning about Rs. 180.00 per mensem. Some of the witnesses who have been examined on behalf of the respondent have also been earning about Rs. 100.00 or more and yet the respondent who is an able-bodied young man is, according to one of his own witnesses, earning Rs. 10.00 to Rs. 20.00 per mensem by grazing cattle. The

evidence of the appellan's witnesses also establishes that in spite of his low earnings the respondent is addicted to alcoholic drinks. He has also been beating the appellant. The parties were married in the year 1958 and it is their common case that the appellant has been living with her brtoher since January or February 1959. Since then the respondent has nto cared to visit the appellant and to persuade her to accompany him to his house nor has he provided her with any maintenance ; instead he is proved to have brought a false charge against the appellant's own brtoher of having enticed her away or detained her with the object that she should have sexual intercourse with toher persons. Whin proceedings relating to the false charge brought by him against the appellant's brtoher were going on in a court of law the respondent made the despicable attempt of forcibly taking away the appellant from court premises. In such circumstances, it is impossible to come to the conclusion that the respondent had nto deserted the appellant or the appellant had withdrawn from his society without reasonable excuse

(13) Arguments in these appeals were heard on 14th November, 1968, but in the course of arguments, learned counsel for the respondent had made a statement at the Bar that the respondent had since succeeded in securing a job with a foreign embassy and was earning more than Rs. 200.00 per mensem. I thereforee took time to pronounce judgment and adjourned the matter to 25th November, 1968, when I called the parties and their counsel in my chamber to make an endeavor to bring about a reconcilation between the parties. When the respondent appeared before me on 25th November, 1968, I formed an impression that he was under the influence of some intoxicant. He was hardly in a position to say anything. The appellant on the toher hand vehemently prtoested against any attempt at reconcialiation and stated that she apprehended danger to her life if she was forced to go and live with the respondent.

(14) In the circumstances there can be no doubt that this marriage is completely on the rocks. Disagreeing with the learned Subordinate Judge thereforee I hold that the respondent's application for restitution of conjugal rights merited dismissal, while on the toher hand the appellant having proved the ground of desertion, was entitled to succeed in her application for Judicial separation. The result is that btoh

the appeals filed by the appellant are allowed and the decree passed by the trial court in btoh the cases is reversed and set aside. In the circumstances of this case however, I do nto propose to make any order as to costs.

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