

Daya Rani Vs. Krishan Gopal

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Court : Delhi

Decided On : Oct-11-1984

Reported in : 27(1985)DLT176

Judge : J.D. Jain, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 9 and 9(1)

Appeal No. : First Appeal No. 182 of 1981

Appellant : Daya Rani

Respondent : Krishan Gopal

Advocate for Pet/Ap. : Vijay Tandon and; S.S. Malhotra, Advs

Judgement :

J.D. Jain, J.

(1) The facts leading to this appeal succinctly are that the marriage between the appellant and the respondent was solemnised in accordance with Hindu ceremonies and rites on 9th, December 1978 at Ghaziabad to which place the parents of the appellant belong. Thereafter, the parties lived together at Delhi as husband and wife upto 8th August 1979 on which date the appellant is stated to have gone to her parents' house for performing Raksha Bandhan ceremony. However, she did not return despite efforts allegedly made by the respondent and

his father etc. repeatedly to bring her back. Thereupon, in February 1980 the respondent moved a petition under section 9 of the Hindu Marriage Act (for short the Act) for restitution of conjugal rights. The appellant did not file any written statement in the said petition as the efforts on the part of the Court to bring about reconciliation bore fruit. So, on 22nd of May 1980 the appellant joined the company of the respondent and went back to the matrimonial home Along with him from the court premises itself. However, resumption of cohabitation by them was only short-lived as, according to the respondent on 22nd June 1980 again the appellant left the matrimonial home without any rhyme or reason and without informing any member of the household. Since, she had left stealthily at about 9.CO P.M. the respondent and members of his family felt worried and in their anxiety the respondent sent a telegram to his in-laws at Ghaziabad. On the next day the appellant returned to her matrimonial home Along with her father after being reprimanded by her father. However, on 14th July, 1980 again she departed from the matrimonial home in the Company, of her father without any rhyme or reasons. Thereupon, the respondent moved a fresh petition for restitution of conjugal rights on the very next day, viz. 15th July 1980. He inter alia, contended that the appellant's father did not have the courtesy of approaching the respondent and his father even formally, rather he reported the matter to the police and took her away. Thus, according to him, the appellant had deserted him and withdrawn from his society without any reasonable and sufficient cause.

(2) The petition was resisted by the appellant primarily on the ground that the respondent and members of his family especially his mother and sister had been treating her with great cruelty. She was tortured not only physically but even mentally. Her life was made a hell and on occasions she was not provided even with bare necessities of life like food and clothing and she was made to work like a domestic servant from 4.00 A.M. till late at night. Moreover, the respondent and her mother-in-law used to taunt her about inadequacy of the dowry. She denied that she had withdrawn from the society of the respondent without any reasonable cause and asserted that in fact the respondent himself had no genuine desire to keep her as during her stay with him she was through out treated with cruelty by her mother-in-law and sister-in-law etc. As for the previous petition for conjugal rights, she admitted having returned to her matrimonial home but asserted that

even after reconciliation she was treated with grave cruelty, degree of which was severer than that of previous cruelties. Under the compelling circumstances, therefore, she had to write to her parents but even they were not allowed to enter her matrimonial home by the respondent and his mother. Thereupon, her father sought police protection and she was got released by her parents with police help. The learned trial Court framed the following issues on the pleadings of the parties :

1. Whether there is reasonable excuse for withdrawal from the society of the petitioner by the respondent 2, Whether the petition has not been verified according to law as alleged If so, its effect 3. Relief.

(3) The learned Additional District Judge found issue No. 1 against the appellant and awarded a decree for restitution of conjugal rights in favor of the respondent vide his judgment dated 28th March 1981.

(4) While commenting upon the evidence of the appellant rather adversely the learned Additional District Judge has observed that the letter Ex. R.W. 1/1,3,5,6,7 and 10 which were allegedly written by the appellant to her father were silent on the point that she was being ill-treated in the house of her in-laws because of inadequacy of dowry as alleged in the written statement. He further observed that the appellant did not lodge any report with the police with regard to the beating given to her by the respondent and she did not examine any witness of the locality. He also took note of the denial of the respondent in this behalf. From the frame of issues it is self-evident that the learned Additional District Judge took the factum of withdrawal by the appellant for granted and, therefore, he framed issue No. 2 placing the burden of proving reasonable excuse for withdrawal from the society of the respondent on the appellant. Obviously he seems to have overlooked the provisions of sub-section (1) of section 9 which entitles a spouse to claim a decree for restitution of conjugal rights where the other spouse has without reasonable excuse withdrawn from his or her society. Thus, it postulates two essential ingredients viz. (i) withdrawal from society ; and (ii) such withdrawal being reasonable excuse. The initial onus of proving that the appellant had withdrawn from the society of the respondent obviously rested on the respondent. It being a question of fact in each case, it cannot be readily presumed that the mere fact of

departure from the matrimonial home by the wife was tantamount to her withdrawing from the society of the husband. It is only after the husband is able to establish the factum of withdrawal by the wife that the latter can be called upon to prove that she had a reasonable excuse or just cause for withdrawing from the society of the husband. The insignificance of the initial onus being on the husband in a case like the present must be understood in the light of the interdict contained in section 23(l)(a) of the Act that before granting relief in any proceeding under the Act the court must be satisfied that the petitioner is not in any way taking advantage of his or her own wrong. If the petitioner were not to lead any evidence then he would not be in a position to get any relief from the court because the court has to be satisfied of the truth of the statements made in the petition and that the ground for granting relief exists. It is so whether the proceeding is defended or not. I am fortified in the view I have taken by a number of reported decisions, viz. *Bai Kanchangauri Chhagan Lai v. Chandulal Virjibhai Tank*, : AIR1973 Guj275 , *Ratnaprabhabai v. Sheshrao Shankarrao Bhore*, : AIR1972 Bom182 and *Karnail Singh v. Mukhtiar Kaur* (1981) 2 Dmc 304. Obviously, the appellant has been materially prejudiced on account of the erroneous approach of the trial court in not addressing himself to the question whether the circumstances of the case warrant an interference that the appellant had withdrawn from the society of the husband. The initial burden being on the respondent he ought to have led evidence to establish the averments on which the relief was sought. It was only thereafter that the onus of proving reasonable excuse could have shifted on to the appellant.

(5) As stated above, the appellant specifically pleaded in the written statement that her parents had to seek police help to rescue her because she was treated with grave cruelty by the respondent. Surely this assertion cannot be construed as amounting to admission on her part that she had withdrawn from the society of the respondent. Pertinently this very allegation was repeated by the appellant when she was in the witness-box as R.W. 1. Similarly, her father Kailash Chand too deposed as R.W. 2 that his daughter had sent a letter to him secretly, upon which he went to the house of the respondent but he was insulted. He then went to the Police Station and lodged a report there. Thereafter, the appellant was taken by him to his house with the assistance of police. Significantly this part of his testimony was allowed to go unchallenged. Even the father of the respondent

admitted in his deposition that the father of the appellant had lodged some report with the police and he had taken the appellant from the matrimonial home and after that she never joined the respondent. No doubt, both the respondent and his father denied having taunted, scolded, maltreated or beaten the appellant but it passes one's comprehension that the appellant's father would have taken recourse to police help without any rhyme or reason. Thus there can be little doubt that something serious must have been happened on that day which compelled her father to seek police help in order to rescue her. Unfortunately, the learned Additional District Judge seems to have conveniently overlooked this circumstances which is undoubtedly grave and weighty.

(6) That apart, the learned Additional District Judge has not given any cogent reason for disbelieving the sworn testimony of the appellant. She deposed in no uncertain terms that the mother and sisters of the respondent and even the respondent used to beat her. As for the incident 22nd of June 1980, she explained that her mother-in-law had thrown away her clothes in the street ; that she complained of the same to the respondent when he returned home in the evening but he told her that they would live in their other house. He took her there and returned to his parents' house at Karampura after shutting her in a room there. It is true that she has travelled beyond pleadings to some extent but that would be no ground to throw her entire deposition over-board unceremoniously. She explained that she used to be given beating even prior to 22nd of May, 1980 but she did not lodge any report because the marriage of a Hindu woman takes place only ones in her life time. So, she went back with the respondent on 22nd May, 1980.

(7) The learned Additional District Judge seems to have been very much swayed by the fact that the various letters produced by the appellant were silent on the point of her being ill-treated in the house of her in-laws on account of inadequacy of dowry as was alleged in the written statement. Be that as it may, the maltreatment on account of inadequacy of dowry was only one aspect of her version. The gravamen of the charge made by the appellant in the written statement as well as in her deposition as R.W. I is that she was being maltreated, taunted and even beaten by her husband at the instance of his mother and his sister. She asserted that she was given beating with a pair of fire tongs and scar of the same

was still visible on her forehead. Strangely enough the only rebuttal of this evidence is to be found in the denial by respondent and his father that she was never scolded maltreated or taunted much less beaten. This denial would have surely gone home had they taken care to explain the conduct of the appellant in frequently leaving her matrimonial home. However, no such Explanationn is forthcoming. It is incomprehensible that the appellant would have behaved in such an erratic and unpredictable manner for no rhyme or reason. It does not appeal to reason that she would have called the police through her father for being rescued from the house of her in-laws just after two months of her having returned to the matrimonial home as a sequel to conciliation proceedings in the previous petition for restitution of conjugal rights for no rhyme or reason. It is in nobody's case that she is of whimsical and capricious nature. This circumstance too will, therefore, lend credibility to her version that she was meted out maltreatment by her husband and her in-laws. Of course, she absolves her father-in-law of any harshness towards her. Sub-section (1) of section 9 entitles a spouse to restitution of conjugal rights if the other spouse without reasonable cause withdraws from his or her society. There is now umpteen authority for the proposition that even where conduct of a spouse falls short of cruelty or any other matrimonial offence but it is harsh and unbearable, it may justify a spouse in leaving the other. In *Edwards v. Edwards* (1949) 2 All E.R. 145, Bucknill, L.J. quoted the following well-known passage of Lord- Greene, M.R. in *Buckler v. Buckler* (1947) 1 All E.R. 319 with approval :

'...BUThe (counsel for the husband) eventually found himself compelled to agree that conduct short of an actual matrimonial offence might be sufficient. In this I agree with him.....'

Bucknill, L.J. also cited the following passage of Asquith, L.J. appearing in the same judgment i.e. *Buckler v. Buckler* (supra) :

'.....TOafford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery.'

(8) In *Timmins v. Timmins* (1953) 2 All E.R. 187, Denning, L.J. observed:

'Since that time it has been repeatedly held, by some of the most eminent judges exercising this jurisdiction that conduct which for one reason or another falls short of cruelty may, nevertheless, afford good cause for leaving and be a defense to a suit for restitution. ..In my opinion, domineering conduct comes within this principle,.at any rate, when it is such as to be likely to cause a mental breakdown.....'

The learned Law Lord proceeded to say :

'In considering whether one party has good cause for leaving the other, much depends on whether the conduct complained of is of a grave and weighty character or not.'

Several decisions of Indian High Courts too have expressed view more or less similar to it. In *Anjani Dei v. Krushna Chandra and another* : AIR1954 Ori117 , it was observed by Mohapartra, J :

'Apart from the question of physical cruelty, torture or assault by any member of the family if the circumstances are such that it is not possible for the wife to live as a wife with self-respect and dignity in the house of the husband. Indeed she is entitled to separate maintenance and residence.'

(9) Similarly in *Mst. Gurdev Kaur v. Sarwan Singh*, Grover, J. said that :

'Where the husband is guilty of conduct which falls short of legal cruelty in the sense that it is not cruelty of the kind mentioned in section 10(D(b) of the Hindu Marriage Act, but his misbehavior or misconduct is such that the wife is fully justified in separating herself from him, the husband cannot succeed in his petition under section 9 as it will not be possible for the Court to say that the wife has withdrawn herself from his society without reasonable excuse. In a case of this nature the petition shall fail not because of any defense set up by the wife under section 9(2) but it cannot succeed on account of the non-fulfilment of one of the essential ingredients of sub-section (1) of section 9. Apart from the provisions of section 9(1) even if a proceeding is undefended it is obligatory on the Court to be satisfied under section 23(1)(a) that the petitioner is not in any way taking

advantage of his or her own wrong or disability for the purpose of such relief. This makes the position clearer that the Court is bound to take into consideration the conduct of the petitioner. If the petitioner has by his own misdeeds forced his spouse to leave him, he cannot be allowed to take advantage of his own wrong and ask for the assistance of the Court of perpetuate his own wrong doing.'

The learned Judge further observed that:

'If the petitioner has by his own misdeeds forced his spouse to leave him, he cannot be allowed to take advantage of his own wrong and ask for the assistance of the Court to perpetuate his own wrong doing.'

These observations were quoted with approval in *Kama @ Mahalakshmi Ammal v. Krishnaswami Achari*, : AIR1972 Mad247 .

(10) It may also be noticed that prior to the amendment of section 9 by marriage Laws (Amendment) Act 68 of 1976 there existed sub-section (2) which stated 'nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.' The said sub-section has since been repealed and the Explanationn has been added which casts the burden of proving reasonable excuse on the person who has withdrawn from the society. This change in law too lends support to the view that even if the conduct of a spouse, which for one reason or another falls short of cruelty or any other matrimonial offence but is otherwise intolerable it would afford reasonable excuse for leaving of withdrawing from the society of that spouse and be a defense to a suit for restitution of conjugal rights.

(11) Lastly, in a petition for restitution of conjugal rights the petitioner must show that he is sincere i.e. he has a bonafide desire to resume matrimonial cohabitation and discharge his matrimonial obligations and duties of a husband sincerely. The onus of proving sincerity too rests on the petitioner. The appellant in the instant case offered to return to her matrimonial home again provided she was not mal-treated by her husband and she was provided with food and clothing and was maintained with self-respect. Unfortunately for her, the trial court did not apply its mind to this offer of hers. In this court too the appellant expressed her willingness

to go back her matrimonial home with the respondent and live with him peacefully. However, she gave vent to her apprehension that he might not maltreat her. Upon this offer being made by the appellant, the respondent took a rather strange stand. He stated that he was not prepared to take her with him now in view of their strained relations. He asserted that the appellant had declined to return to her matrimonial home when the petition for conjugal rights was filed by him and even after the decree for restitution of conjugal rights was passed she did not bother to comply with the same. Instead he was insulted by her brother at Ghaziabad where he had to go in connection with an application filed by her under section 125, Code of Criminal Procedure, in the court of Judicial Magistrate. So, he categorically stated that he was no longer prepared to take her back and resume matrimonial relations. Even then the appellant re-affirmed that she had been always ready and willing to go back to her matrimonial home provided, of course, her husband did not maltreat or beat her.

(12) The stand taken by the respondent in this behalf seems to me to be absolutely indefensible. It would appear that after obtaining the decree for restitution of conjugal rights he never evinced any desire on his part to take his wife back to the matrimonial home. As observed by Tek Chand J, in *Captain B R. Syal v. Smt. Ram Syal*, :

'The essence of a decree for restitution of conjugal rights is that the husband desiring the company of the wife makes an effort through the court for its assistance in order to restore his wife back to him so that they may be able to lead conjugal life.....The significant feature of petition for restitution of conjugal rights is that it is a remedy aimed at preserving the marriage and not at dissolving it, as in the case of divorce, or judicial separation. The court cannot enforce sexual intercourse but only cohabitation. That being the purpose of the petition for restitution of conjugal rights, the petitioner must show that he is sincere in the sense, that he has a bona fide desire to resume matrimonial cohabitation and to render the rights and duties of such cohabitation. The petitioner who is sincere in that sense is entitled to a decree even though the parties may not evince any affection for each other. A petitioner has, therefore, to satisfy the court of his sincerity in wanting to resume cohabitation with the respondent.'

The learned Judge adverted to the following observations of Lord Merrivale in *Lacey v. Lacey* (1932) 146 LT 48 in this context :

'A demand or request for resumption of cohabitation must be absolutely sincere. In this case what is honestly desired, for unselfish and praiseworthy motives is not in my view a sincere desire for re-cohabitation. The proposal does not spring from a simple desire that these people should live together as man and wife.'

These observations have been quoted with approval by Avadh Behari, J. in *Smt. Sushil Kumari Dang v. Prem Kumar Dang*, : AIR1976 Delhi321 , as also by Ganesan, J. in *Kama a Mahalakshmi Ammal's case* (supra). It is thus abundantly clear that a decree for restitution of conjugal rights postulates that the parties will make an endeavor to live together peacefully and happily. So the petitioner must show that there is a bona fide desire to resume matrimonial cohabitation and to render the rights and duties of matrimonial life. It is only when the petitioner is sincere in that sense that he can seek the relief but not otherwise. Moreover, conjugal right can be enjoyed only under congenial conditions and circumstances, each one of the spouses accepting, dealing and behaving with the other in true spirit of material love and affection. The appellant is, therefore, justified in insisting that her husband will treat her with conjugal kindness and she will be shown due respect and regard befitting her status as wife. Looked at from this angle too, the entire conduct of the respondent betrays woeful lack of sincerity of purpose on his part and it would appear that the proceeding for restitution of conjugal rights is not founded on a sincere desire for resumption of cohabitation on the part of the respondent. On the contrary, the object of the respondent in filing the petition for restitution of conjugal rights appears to use the same as a lever for eventually obtaining a decree for divorce under section 13(IA) which lays down that either party to a marriage, whether solemnised before or after the commencement of the Act, may obtain a decree for divorce on the ground that there has been no restitution of conjugal rights between them for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties. Indeed, I am told that a petition for divorce on the said ground has already been made by the respondent and it is pending trial. Hence, want of sincerity on the part of the respondent to resume cohabitation

even after obtaining a decree for restitution of conjugal rights and to use the same as a subterfuge for eventually obtaining a decree for divorce would, in my view, be in itself a sufficient ground for declining the relief prayed for in the instant case.

(13) The upshot of the whole discussion, therefore, is that this appeal succeeds, the impugned judgment and decree are set aside and the petition for restitution of conjugal rights is dismissed with costs throughout.

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