

T. Srinivasan Vs. T. Varalakshmi

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Court : Chennai

Decided On : Apr-25-1990

Reported in : I(1991)DMC20

Judge : K.M. Natarajan, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 9, 13(1A), 23(1) and 23(1A)

Appeal No. : A.A.A.O. No. 39 of 1981 and S.A. No. 2237 of 1981

Appellant : T. Srinivasan

Respondent : T. Varalakshmi

Advocate for Def. : S.S. Marthandam, Adv.

Advocate for Pet/Ap. : N.S. Varadhachari and ;J. Deleep Kumar

Disposition : Appeal dismissed

Judgement :

K.M. Natarajan, J.

1. These Appeals coming on for hearing on Thursday the 5th Wednesday the 11th and Thursday the 19th day of April, 1990 in the presence of the respective Advocates, and having stood over for consideration till this day, the court delivered the following Judgment:

2. These two appeals by the husband arose out of a common judgment passed by the VIII Additional Judge, City Civil Court, Madras, in A.S. No. 49 of 1981 and CM.A. No. 33 of 1981.

3. The brief facts which are necessary for the disposal of these appeals are as follows : The respondent-wife filed the suit in O.S. No. 9654 of 1977 before the V Assistant Judge for separate maintenance against the appellant. According to her, their marriage took place on 31-1-1975 at Madras and the consummation of the marriage took place on 1-2-1975. The appellant took her to his parents' house after 2 or 3 days in respondent's place. Thereafter he started teasing her alleging insufficiency of gifts by her parents and also the presence of a small congenital lump on the respondent's shoulder. Even though it was known to him even before marriage, he ignored it as inconsequential. On 13-2-1975 the respondent-wife was sent away from the house by the appellant-husband asking her to come back with larger presents and jewels. The parents of the respondent were unable to fulfil his desire. On 28-7-1975 the appellant issued a notice to the respondent alleging that she had left the house on her own accord, to which she sent a suitable reply on 2-8-1975 denying the allegations and stating she was deserted by the appellant and that she was anxious to join the appellant. The appellant issued a rejoinder. Thereupon, he filed a petition for restitution of conjugal rights in O.P. No. 430 of 1975. The respondent in her counter submitted that she was willing and anxious to join the appellant by narrating the circumstances under which she was deserted by her husband. On 21-2-1977 the court allowed the petition and granted a decree for restitution of conjugal rights on the basis of the averments made in the counter filed by the respondent. Thereafter on 8-3-1977 the respondent wife sent a notice through her Counsel to the appellant that she was willing, to join with the appellant and lead a conjugal life with the appellant and requested him to send some relation to take her back to his house. The appellant did not send any reply. Again, on 19-5-1977 she sent word to the appellant that she would be returning to him on 23-5-1977. The appellant sent a reply through the emissary that final orders have not been passed by court and that he would lock up the house and go away on 23-5-1977. The respondent who went to the house of the appellant on 23-5-1977, was not allowed to enter the house by the appellant and his mother. Thereupon she issued a notice on 28-5-1977 setting out the facts and the appellant's refusal

to take her back. The respondent made two more attempts on 7-8-1977 and 28-9-1977 to join the appellant, but in vain. On 15-10-1977 she along with her parents went to the appellant's house, but she was not allowed to enter the house by the appellant. Thereupon the respondent gave a complaint at the Elephant Gate Police Station. At the police station the appellant gave in writing that he declined to take her back to his house. Hence, she claimed maintenance under Section 18 of the Hindu Adoptions and Maintenance Act at the rate of Rs. 300 and also past maintenance, as the appellant is employed as Upper Division Clerk in the Police Department drawing a salary of Rs. 500 p.m., and also getting income from the undivided joint family property of himself and his father.

4. The suit was resisted by the appellant and in the written statement he admitted the marriage and submitted that the respondent and her parents played a deception on him by not disclosing a large lump on the back of the respondent which was discovered by him only on the nuptial night. He would further state that the respondent agreed to remove the lump by surgery and hence she went to her parents' house on 13-2-1975. He denied having illtreated the respondent on the inadequacy of gifts etc. He would state that all his attempts to get back his wife, the respondent, proved to be of no avail. Hence he filed O.P. No. 420 of 1975 for restitution and obtained a decree. But in spite of the decree, she did not care to join him. Hence, he filed O.P. No. 271/78 for divorce on the ground that she has not joined him for more than one year after the decree for restitution of conjugal rights. He stated that he was not liable to pay any maintenance to the respondent. The respondent is running a nursery school and earning Rs. 500 per mensem. He would state that he was getting Rs. 375 as clerk in the police department. O.P. No. 271 of 1978 which is the subject matter of C.M.A. No. 33 of 1981 was filed by the appellant under Section 13(1A)(ii) of the Hindu Marriage Act, for a decree of divorce on the ground that though he obtained a decree for restitution of conjugal rights on 21-2-1977 in O.P. No. 420 of 1975, the parties have not lived together. According to him, since one year has lapsed from the date of the decree and that there has been no restitution between the parties, he is entitled to the said relief. The said application was resisted by the respondent who would state that it is only the appellant who deserted her without reasonable or probable cause and all attempts made by her to go and live with him after the decree for restitution have

become futile and as such, he is not entitled to a decree for divorce.

5. The trial Judge after holding a joint trial, in a common judgment came to the conclusion that it is only the appellant who deserted the respondent without reasonable or probable cause and the respondent-wife is entitled to maintenance at the rate of 100 per mensem and also past maintenance at the above rate for 6 months. However, trial Court negatived the claim for a charge over the property as the property was not specified. The trial court also dismissed O.P. No. 271 of 1978 holding that it was only the appellant who had rejected the offer of the respondent to come and live with him and that there was a fault on the part of the respondent to give restitution of conjugal rights. Aggrieved by the same, A.S. No. 49 of 1981 and C.M.A. No. 33 of 1981 were filed and the appellant was unsuccessful. Hence these two second appeals. They were admitted on the following substantial questions of law :

C.M.S.A. No. 39 of 1981

1. Whether the court below failed to apply the principle laid down in Section 13(1A) of the Hindu Marriage Act, 1959 ?
2. Whether a decree for divorce should automatically follow on the expiry of the period of one year from the date of decree for restitution of conjugal rights ?
3. Whether the Court below is justified in refusing a decree for divorce for the appellant on the basis of Section 23(1) of the [Hindu Marriage Act, 1955](#) ?

S.A. No. 2237 of 1981

1. Whether the plaintiff is entitled to maintenance even after a right to seek divorce under the provisions of Hindu Marriage Act has accrued to the appellant ?
 2. Whether the respondent is entitled to separate maintenance ?
 3. Whether the quantum claimed is correct ?
6. The learned counsel for the appellant, Mr. N.S. Varadachari, submitted that the other questions in S.A. 2237 of 1981 only follow the decision on the substantial

questions of law, 1 to 3 in C.M.S.A. No. 39 of 1981, namely, whether the appellant is entitled to the decree of divorce under Section 13(1-A) of the Hindu Marriage Act read with Section 23(1) of the Hindu Marriage Act 1955. When once it is not found in favour of the appellant, then automatically he is liable to pay maintenance as claimed by the respondent, which is the subject matter of S.A. No. 2237 of 1981 and awarded by the courts below and it cannot be said that the quantum awarded is also in any way excessive and the respondent is not entitled to any separate maintenance. Therefore, it is enough if substantial questions of law in C.M.S.A. No. 39 of 1981 are disposed of together at the first instance. Accordingly substantial questions of law 1 to 3 in C.M.S.A. No. 39 of 1981 are taken up for consideration. The learned counsel for the appellant submitted that though Section 13(1A)(ii) of the Hindu Marriage Act is controlled by Section 23(1)(a), yet mere refusal on the part of the appellant to take back the respondent will not amount to wrong so as to disentitle him to get a decree for dissolution of marriage. According to the learned counsel even accepting the case of the respondent that after the decree she attempted to join the appellant but the appellant refused to take her back, that cannot be a ground for refusing to grant a decree of divorce since one year period has lapsed from the date of the decree and the refusal would not amount to 'wrong' as contemplated in Section 23(1)(a). In support of his contention, he relies on the decisions in Dharmendra Kumar v. Usha Kumar, : [1978]1SCR315, Bimla Devi v. Sing Raj, , Madhukar Bhaskar Sheorey v. Smt. Saral Madhukar Sheorey, : AIR1973 Bom55, Soundarammal v. Sundara Mahalinga Nadar, : AIR1980 Mad294. On the other hand the learned counsel for the respondent drew the attention of this court to the finding of the courts below and submitted that those decisions are not at all helpful to the case of the appellant, as in the instant case the appellant filed the very petition for restitution of conjugal rights only to obtain a decree of divorce and with that view, even after the decree of restitution of conjugal rights was passed on his application when the respondent did not contest the same but expressed her readiness and willingness to join the appellant and in spite of many requests by means of notices through advocate and mediators and when the respondent herself went along with her parents, she was not allowed to join the appellant and in the circumstances, the appellant cannot take advantage of his own wrong and obtain a decree of divorce.

In this connection, the learned counsel drew the attention of this Court to the findings of the trial court as well as the lower appellate court. It is seen that the findings of the trial Court in para 21 are : 'Though the defendant got a decree for restitution of conjugal rights, it is evident from the evidence let in that he has got this order only to see that he gets a further order of divorce.' He further observed : 'The claim of the plaintiff that the defendant deserted her without any reasonable cause and in spite of several attempts she could not go and live with the defendant appears to be more probable.' The lower appellate court held as follows : 'it is clear from the notices that passed between the parties and also from the evidence of PWs. 1 and 2 that the plaintiff made several attempts to live with the defendant and that she has always been anxious to live with the defendant, but the defendant has not made any attempt to get back the plaintiff and live with her.' It was further observed : 'The learned counsel for the plaintiff rightly submitted that the defendant filed the said petition for restitution of conjugal rights only to claim divorce after a lapse period of one year from the date of the order.....in spite of several attempts made by the plaintiff to go and live with him, the defendant taking advantage of the order passed in his favour, Ex. B1, did not allow the plaintiff to come and live with him.' Ultimately, the lower appellate Judge held : 'I concur with the finding of the trial court that the defendant deserted the plaintiff without reasonable and probable cause and therefore she is entitled to claim separate maintenance.' According to the lower appellate court, the Court would not accept the contention that the appellant is entitled to a decree of divorce as the respondent has not joined the appellant within a period of one year from the date of the order.

7. Let us first consider the decisions relied on by the learned counsel for the appellant and see how far they are helpful to the case of the appellant. The learned counsel first cited the decision in Dharmendra Kumar v. Usha Kumar (supra). That was a case where the wife filed a petition under Section 9 of the [Hindu Marriage Act, 1955](#) for restitution of conjugal rights. On the expiry of two years, she filed a petition under Section 13(1-A) (ii) of the Act for dissolution of marriage and for a decree of divorce. The said application was resisted by the husband on the ground that there has been no restitution of conjugal rights between the parties after passing of the decree in the earlier proceedings. Further,

he made attempt to comply with the decree by writing several letters to the petitioner and otherwise inviting her to live with him. But the petitioner refused to live with him and never replied to his letters. He contended that she now wants to make capital out of her own wrong. In the circumstances it was held as follows :

'In order to be a 'Wrong' within the meaning of Section 23(1A), the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.'

In *Bimle Devi v. Singh Raj*, AIR 1977 P & H 157 (F.B.) it was held :

'The provisions of Section 23(1)(a) cannot be invoked to refuse the relief under Section 13(1-A)(ii) on the ground of non-compliance of a decree of restitution of conjugal rights where there has not been restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of decree for restitution of conjugal rights in proceedings in which they were parties. There is no provision in the Code of Civil Procedure by which the physical custody of the spouse, who has suffered the decree, can be made over to the spouse who obtained the decree for restitution of conjugal rights. Thus, merely because the spouse, who suffered the decree, refused to resume cohabitation, would not be a ground to invoke the provisions of Section 23(1)(a) so as to plead that the said spouse is taking advantage of his or her own wrong.'

In *Smt. Salna Devi v. Purushotam Giri*, : AIR1977 Delhi178 it has been held that Sections 23 and 13(1-A) of the Act have to be harmoniously construed and unless after the earlier decree, it be established that thereafter any circumstances had occurred which would be a wrong under Section 3 of the Act, relief can be obtained under Section 13(1-A) of the Act even by a wrong-doer, on mere lapse of the statutory period. The learned counsel for the appellant also relied on the decision in *Madkumar v. Saral*, : AIR1973 Bom55 . That was a case where a decree for judicial separation was passed in favour of the respondent. After a lapse of two years, the petitioner filed a petition under Section 13(1-A) of the Hindu Marriage Act praying for a decree of divorce on the ground that there has been no resumption of cohabitation as between the parties. It was held that 'in granting

relief under Section 13(1-A) the Court will and must take into consideration Section 23(1) and consider the conduct of the petitioner subsequent to the passing of the decree for judicial separation or restitution of conjugal rights and not grant relief to a party who is taking advantage of his own wrong.' But, it was observed 'It has however no reference to remedying the wrong which led to the decree for judicial separation or restitution of conjugal rights.' On the facts of the said case, it was held :

'The petitioner in such a case is under no obligation to assure the other party that his previous cruelty would cease and that he would treat her well or to ask her to come and stay with him. A fortiori there cannot be any question of his being in the wrong by not carrying out such obligation such as to disentitle him to the relief of divorce.'

It has to be noted that in the case of a decree for judicial Separation, none of the spouses is bound to cohabit with the other, as by reason of the said decree, they were prevented from doing so. Therefore, there was no desertion by one party after the judicial separation. No doubt after the decree for judicial separation, the parties may make an attempt of reconciliation between them. But, there is no obligation to make such an attempt. Hence, in such circumstances, this decision is not helpful. The lower court considered the decision of the Bombay High Court in *Madhukar v. Saral* (supra) for the proposition that in granting relief under Section 13(1-A) the Court must take into consideration under Section 23(1) and consider the conduct of the petitioner subsequent to the passing of the decree for judicial separation or restitution of conjugal rights and not grant relief to a party who is taking advantage of his own wrong. The decision of our High Court in *Soundrammal v. Sundaru Mahalinga Nadar*, : AIR1980 Mad294 , was referred by the lower appellate court. This Court came to the conclusion in the above, quoted case :

'After deep consideration, in my view, the claim of made, and which found acceptance in the Full Bench decision of the Punjab and Haryana High Court and in the decision of the Delhi High Court, that the law on the aspect of divorce has been liberalised so as to facilitate even the defaulting spouse/wrong-doer husband

to secure divorce, cannot be acceded to.'

That was a case where the husband filed the petition under Section 9 of the [Hindu Marriage Act, 1955](#) for restitution of conjugal rights and it was allowed. The petition filed by the wife for restitution of conjugal rights was later on withdrawn. The wife filed another O.P. for a declaration that the marriage is null and void or in the alternative for judicial separation. That petition was allowed and permanent alimony at the rate of Rs. 25 per mensem was ordered. After the expiry of the statutory period of two years, the respondent filed O.P. for dissolution of marriage under Section 13(1-A) of the Hindu Marriage Act. The said application was resisted by the wife on the ground that the husband cannot take advantage of his own wrong. He had with a wicked intention married another woman and lived with her and the restitution of conjugal rights asked for by him was a pretence and a farce, and that it is only the respondent-husband who made it impossible for her to lead a married life and he being in the wrong, he cannot allege his own wrong and wickedness in living with another woman as the basis for securing relief in the petition. Further, he had not paid maintenance so far. The trial court dismissed the petition on the ground that the respondent cannot take advantage of his own mistake while the appellate court allowed the appeal. This Court elaborately considered the earlier decisions of the Supreme Court and Full Bench of the Punjab and Haryana High Court and decisions of the Delhi High Court and other High Courts and held as follows :--

'The points which have come up for consideration before the High Courts of Punjab and Haryana, and Delhi in the decisions above referred to, can be resolved by holding that the two amending Acts have now enabled defaulting spouses to seek for the relief of divorce, provided he or she satisfies the Court, that Section 23 of the Act is not attracted since non-compliance of a decree for judicial separation or restitution of conjugal rights is not a 'wrong' within the meaning of Section 23(1)(a) of the Act. Thus, in all those instances in which Section 23 is not attracted, the two amending acts have enabled even defaulting spouses to get relief under Section 13(1-A) of the Act. The amending Acts (Central Acts XLIV of 1954 and LXVIII of 1976) have not enabled wrongdoers who would come within the ambit of Section 23(1)(a) of the Act to get the relief of divorce on the plea that

liberalisation had been brought about towards divorce to such an unlimited extent. In my view, the amending Acts XLIV of 1954 and LXVIII of 1976 have not enabled all sorts of defaulting spouses to get relief for divorce, which was not at all available earlier, but it would be available only in such of those instances wherein Section 23 of the Act cannot be applied. -Hence, I hold that the respondent herein, a continuing wrongdoer, cannot plead that, after the said two amending Acts, Section 23(1)(a) cannot be invoked against him, and therefore the decision of the lower appellate Court is hereby set aside.'

I am in entire agreement with the view expressed by the learned Judge. The learned counsel for the respondent drew my attention to the decision of Division Bench in *Geetha Lakshmi v. G.V.N.K. Sarveswara Rao*, : AIR 1983 AP111 where also the learned Judges after considering the decision of the Supreme Court as well as the Full Bench decisions of the Punjab, and Haryana held as follows :--

'Before and after the amendment of the Hindu Marriage Act, the provisions of Section 13 are subject to provisions of Section 23(1)(a) of the Act. The amendment to Section 13 must be limited to the extent to which the amendments have been made. They cannot be given an extended operation. Section 13 cannot be taken out of the limits of Section 23(1)(a). If it were otherwise, the Parliament would have added the words 'notwithstanding anything to the contrary' in Section 23(1)(a) or would have been suitably amended Section 23(1)(a) itself, as it was well aware of the provisions of Section 23(1)(a) when Section 13 was amended.

A decree for restitution of conjugal rights was obtained by the wife under Section 9 of the Act on the ground that the husband had without reasonable cause withdrawn from her society. A decree for restitution of conjugal rights was granted to the wife. After the decree, the husband not only, not complied with the decree, but did positive acts by illtreating her and finally drove her away from the house; It was not a case of mere non-compliance of the decree, but fresh positive acts of wrong. In such a case, the husband was not entitled to the relief under Section 13(1A) of the Act.'

Applying the ratio in the abovesaid case to the facts of this case, it is seen that the marriage between the appellant and the respondent took place on 31-1-1975 and

that the appellant and the respondent lived together in the house of the respondent for 2 or 3 days and thereafter they lived in the house of the appellant for 10 days. According to the respondent wife, the appellant husband was pressing her to get gifts from her parents' house and so she left the appellant's house on 13-2-1975. She could not return back to the house of the appellant in view of the demand. It is seen that though the wife left the house of the husband on 13-2-1975, the husband was keeping quiet till July, 1975. The case of the wife is that she was always ready and willing to live with her husband and that it was only the appellant-husband who did not allow her to live with him without getting gifts from her father. To a notice issued by the husband under Ex. A-1 on 28-7-1975, the wife immediately sent a reply Ex. A-2 denying the allegations made in Ex. A-1 that she has withdrawn from the society of her husband without reasonable cause. But, on the other hand, she has specifically stated that she was always anxious to live with her husband and she never thought of living away from the respondent. In spite of the reply, the husband filed O.P. No. 420 of 1975 for restitution of conjugal rights. In the counter, which has been marked as Ex. A-3, the wife has specifically stated that she is always ready and willing to live with the husband, that she never thought of living alone and that she is willing to join her husband. Thereupon the said petition was allowed on 21-2-1977. Within a few days, namely, on 8-3-1977 the respondent-wife sent a notice to the husband appellant wherein she has stated that she is willing to join her husband and lead a happy life and requested him to send some female relations to take her back to his house'. Though the husband received the police Ex. A-4, he did not send any reply. Again, another notice was sent on 25-5-1977 to the effect that the respondent sent one Rajabadar, who is, related to the husband on 19-5-1977 to inform the appellant about her emptying to the appellant's house on 23-5-1977. But her husband informed the emissary that he would lock up the house and go away elsewhere. In spite of the same, the wife went to the house on 23-5-1977 accompanied by her grandfather, grand-mother and others to join her husband. The husband turned the wife away and refused to allow her to enter the house. He did not also send any reply to Ex. A-5 notice. The wife sent another notice Ex. A-6 dated 13-8-1977 stating that her husband did not allow her to enter the house and deserted her without any reasonable cause and claimed maintenance, to which he sent a reply. Ex. A-8 is the rejoinder of the wife,

wherein she has reiterated her earlier stand that she was ready and willing to join her husband but the husband was never willing to take her back and on the other hand, he wantonly refused to take her back and thereby deserted her. The respondent also went to the nearest police station and requested the help of the police for joining her husband. Though the Inspector sent for the appellant and asked him to live with the respondent in his house, he refused to take her and gave in writing to the effect that he would not take her back to his house on any account. The wife had to file a suit for maintenance on 8-11-1977 within a period of one year. The husband did not deny these facts. Besides examining herself as PW 1, the respondent-wife examined her brother-in-law as PW 2 in support of her contention. Both the courts have concurrently found that it is only the husband who deserted his wife without probable and reasonable cause and the wife is entitled to claim maintenance. Further, the husband cannot take advantage of his own wrong within the meaning of Section 23(1)(a) of the Hindu Marriage Act and in view of his conduct in filing the petition for restitution of conjugal rights and subsequently not allowing her to enter into the house and join him and provide maintenance and driving her away, he is not entitled to the relief of dissolution under Section 13(1-A) of the Hindu Marriage Act. It is also worthwhile to note that the petition for dissolution of marriage under Section 13(1-A) was filed, during the pendency of the maintenance proceedings instituted by the wife and also long after the institution of the said proceedings, wherein it is alleged that the appellant wilfully neglected to maintain her and consequently deserted her without probable and reasonable cause and in spite of repeated requests and notices. The above conduct of the appellant is also relevant in deciding the question of 'wrong' as contemplated under Section 23(1-A) of the Act. It is not a case of mere failure to render conjugal rights but something more and it is a case of misconduct serious enough so as to justify negating the claim for dissolution of marriage. As rightly observed by the learned counsel for the respondent, it is clear from the materials available in the case that the appellant has got the decree for restitution of conjugal rights only to see that he gets a further decree for divorce. The finding of both the courts below is that the husband obtained the decree for restitution of conjugal rights, not to act as per the decree, and on the other hand, from the various acts attributed to him, it is clear that he deserted the wife without

reasonable and probable cause, and as such, the wife was granted a decree for separate maintenance and in spite of her attempts to join her husband, her husband refused to allow her to enter the house and on the other hand, he turned out, her request and her relations and drove her away. As observed by the courts below, it is 'not mere non-compliance of decree, but it is an act of positive wrong on the part of the husband and in view of Section 23(1-A), he is not entitled to the relief under Section 13(1-A). Hence, I answer substantial questions of Jaw 1 to 3 in C.M.S.A. 39/81 in favour of the respondent and against the appellant. As rightly observed by the learned counsel for the respondent-wife, in view of the findings on substantial questions of law and in view of the concurrent findings of both the courts below that the appellant-husband deserted the respondent-wife without reasonable and probable cause and the wife is entitled to maintenance and in view of the fact that the concurrent finding with regard to liability as well as quantum have not been' disputed in the appeal, I find that the substantial questions 1 to 3 in the second appeal S.A. 2237/81 are answered in favour of the respondent and against the appellant.

8. In the result, both the appeals fail and are dismissed. But in the circumstances of the case, there will be no order as to costs.

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