

P. Rajeshkumar Bagmar Vs. Swathi Rajeshkumar Bagmar

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Court : Chennai

Decided On : Nov-28-2007

Reported in : AIR2008Mad36; II(2008)DMC696; (2008)1MLJ575

Judge : A. Kulasekaran, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 9, 9(1), 9(2) and 23A; Evidence Act - Sections 101 to 104; Code of Civil Procedure (CPC) - Sections 115 - Order 17, Rule 1 - Order 18, Rule 1

Appeal No. : C.R.P. (PD) No. 3006 of 2007 and M.P. No. 1 of 2007

Appellant : P. Rajeshkumar Bagmar

Respondent : Swathi Rajeshkumar Bagmar

Advocate for Def. : Sugumaran, Adv. for M.S. Kandasamy, Adv.

Advocate for Pet/Ap. : R. Sundarrajan, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

A. Kulasekaran, J.

1. Heard both sides. The facts involved in this case is that the revision petitioner herein has filed O.P. No. 600 of 2001 on the file of Principal Judge, Family Court, Chennai against the respondent herein for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, hereinafter referred to as Act. The respondent herein has filed counter claim under Section 23A of the Hindu Marriage Act in I.A. No. 228 of 2007 for the relief of dissolution of marriage. The petitioner had raised a preliminary issue that the respondent, as a deserted spouse should begin the case. The court below passed an order dated 05.09.2007 directing the petitioner herein to begin the case, hence, the present civil revision petition.

2. Mr. Sundarrajan, learned Counsel appearing for the petitioner submitted as follows:

On 17.06.2000, the respondent left the matrimonial house without intimation and during her stay in her parents house, she delivered a female child on 07.01.2001. After the respondent left the matrimonial house, the petitioner and his parents requested her to come back but she refused without any valid reasons. Even the panchayats arranged not yielded any result since the respondent was influenced by the ill advise of her parents. The act of the respondent in withdrawing from the petitioner's society without any reasonable excuse has caused serious matrimonial loss of discomfort and consortium of the child, hence, the petitioner was forced to file a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. Section 9 of the Act clarifies that burden of proving reasonable cause for withdrawing from the society shall be on the person who withdrawn from the society of the other, while so, directing the petitioner to begin the evidence is unsustainable in law. When the Petition is filed for restitution of conjugal rights and the respondent/wife pleads ill-treatment and cruelty, she should be called upon to begin the evidence first. In the instant case, the respondent not only resisted the conjugal rights sought for by the petitioner but also seeks counter-claim for dissolution in the same proceedings. As per Order 18 Rule 1 CPC and under Sections 101 to 104 of Evidence Act, she should have been called upon to begin the evidence. The decision relied on by the respondent reported in Jyothi Pai's case AIR 1987 Karnataka 24 cannot be made applicable. The court below failed to

note the difference between burden of proof and onus of proof. In support of this contention, the learned Counsel for the petitioner relied on the below mentioned decisions:

i) Keshavlal Durlabhasinbhai's Firm and Anr. v. Shri Jalaram Pulse Mills : AIR1995 Guj166 wherein a learned single Judge of the Gujarat High Court held in Para-9 thus:

9. In the present case, though this procedure is not followed and though the stage of framing of issues has passed, the trial court has on correct appreciation of the rival contentions of the parties come to a proper conclusion that the defendant should lead the evidence first. This order is perfectly legal and proper and no interference is called for on any of the grounds canvassed by the learned advocate for the petitioner. Though the defendant has chosen to deny the claim of the plaintiff in totality, that is a denial without any substance in view of the other admitted facts of receipt of goods, part payments, issuance of cheques and a claim of having made further payments and, therefore, onus lies on the defendant. The denial of registration of partnership is also prima facie frivolous. The plaintiff has given the registration number of the partnership firm of the plaintiff.ii) Ram Narain Prasad v. Seth Sao : AIR1979 Pat174 , wherein in Para Nos. 4, 5 and 7, it was held thus:

4.On a perusal of the above mentioned paragraph in the written statement, it is clear that the case of the defendant was that he had paid the electric charges for the period in question (between Jan., 1972 and Nov., 1972).

5. On these facts, the court below relying on Order 18 Rule 1 of the Civil P.C. (hereinafter referred to as the Code) was of opinion that the onus is on the defendant to begin with the case.

7...In the present case, the court below directed the defendant to begin with the case for the simple reason that the defendant admitted the facts alleged by the plaintiff and the defendant also pleaded certain additional facts which compelled the Court to direct him (defendant) to begin with the case. In our opinion, the Court below was justified in exercising the discretion.....The order simply directs the

defendants to begin with the case on the basis of Order 18 Rule 1 of the Code. In our opinion, if the order is allowed to stand, it would not occasion a failure of justice nor cause irreparable injury to the defendant. Hence, we hold that the court below was justified in exercising the jurisdiction which was vested in it and we shall not interfere with the impugned order because it does not come within the purview of the proviso to Section 115 of the Code.

iii) *Bama v. Mrs. Rukiyal Bivi* : AIR2004 Mad243 wherein, I held in Para Nos. 13, 14 and 15 thus:

13. In a case where the execution of document is admitted, a presumption was raised in favour of the plaintiff that the said document was made for consideration and the presumption was raised, it had the effect of shifting the burden on to the defendant to establish that there was no consideration.

14. The trial court found that the suit was filed even before the expiry of the time stipulated in the agreement and that the balance sale consideration of Rs. 1.00 lakh was also deposited into the Court.

15. Considering all the above said facts, the trial court has rightly come to the conclusion and dismissed the application. Therefore, I do not find any reason to interfere with the order passed by the court below.

iv) *Sarkars Civil Court of Practice Procedural Manual 10th Edition - Page No. 181*

In case of pleadings by traversal, it is the plaintiff who is to begin. When in a suit for restitution of conjugal rights by the husband, the defendant wife pleads ill-treatment and cruelty, the defendant should be called to begin (1971) 1 Cut WR 5381. When in a money suit, the defendant admits the claim but comes with a plea of payment, the defendant is to begin the evidence first (AIR 1979 Pat 174).

3. Mr. Sugumar, learned Counsel for the respondent submitted that the petitioner and his family members ill-treated the respondent and demanded more jewellery, cash for starting a business, kinetic honda scooter; that the petitioner stopped the servant maid and extracted all works from her, with the result, she fell ill; that the respondent was physically assaulted on 13.06.2000, hence, she left the

matrimonial house on 15.06.2000; that during the stay of the respondent at her parent's house, she delivered a female child but the petitioner not even visited the child except on one occasion in the hospital that too after persuasion; that the said act of the petitioner amounts to cruelty, which was a reasonable cause for her to leave the matrimonial home. When the husband filed petition for restitution of conjugal rights on assertion that wife had withdrawn from the society without any reasonable cause, the burden of proving those averments of assertion made by the husband lies on him. Explanation to Section 9 would not make any difference in this proposition of law. In support of this contention, the learned Counsel for the respondent relied on Smt. Jyothi Pai v. P.N. Pratap Kumar Pai AIR 1987 Karnataka 241, wherein a learned single judge of the Karnataka High Court held in Para No. 2 thus:

2. The learned Civil Judge appears to have thought that in a proceeding like this for restitution of conjugal rights brought under Section 9 of the Hindu Marriage Act, by reason of explanation appended to the section, the burden lies on the petitioner herein of proving her case of reasonable excuse for withdrawing from the society of her husband and, therefore, she must begin first. This appears to be wholly erroneous. The respondent herein, i.e., the husband who has brought the proceedings for restitution of conjugal rights made assertion that the wife, the petitioner herein, had withdrawn from his society without any reasonable excuse and that he was therefore entitled to a decree of restitution of conjugal rights. The wife in her objection statement, while refuting these assertions made by her husband, has contended that not only the husband was treating her with cruelty, but he had also driven her out of his house and therefore she had to seek shelter in the house of her parents. Therefore, the husband having come to the Court for a judgment and decree in his favour on the assertion that the wife had withdrawn from his society without any reasonable excuse, the burden of proof in the proceedings lies on the husband to prove those statements of assertion made by him to have a decree in his favour and that is exactly what Section 9 of the Hindu Marriage Act also says. It provides that when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the Court for restitution of conjugal rights and the Court on being satisfied of the truth of the statements made in such petition and

there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. The explanation appended to the said section does not make any change in this position of law. All that it says is that where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society. In other words, when the petitioner, husband or wife as the case may be, adduces proof regarding the withdrawal from the society of another without reasonable excuse, then the burden lies on the other side of proving reasonable excuse, if any, for withdrawal of the society. Here in the case on hand, the husband having come to the Court with a statement of facts asserting that the wife has withdrawn from his society without reasonable excuse, the burden lies on him to prove that statement made by him in the petition, and, therefore, it is for the husband-petitioner in MC No. 1/83 to begin the case by opening and adducing the evidence and not the wife.

The learned Counsel for the respondent further submitted that the petitioner seeks restitution of conjugal rights. In order to get a decree he has to prove that the respondent has withdrawn from his society and such withdrawal has been without reasonable excuse. Under Sections 101, 102 and 103 of the Evidence Act, the burden of proving the aforesaid two conditions rests on the petitioner and he has to succeed on the strength of his own case and cannot take advantage of the weakness of the defence. In support of this contention, he relied on the decision *Sadhu Singh Balwant Singh v. Smt. Jagdish Kaur Sadhu Singh* wherein a learned single Judge held in Para-14 thus:

14. In order to appreciate the points in controversy, it will be useful to set out the law on the point as contained in Section 9 of the Act. Sub-section (1) indicates that the petitioner seeking restitution of conjugal rights, in order to get a decree, has to prove two things: (i) that the respondent has withdrawn from the society of the petitioner and (ii) that such withdrawal has been without reasonable excuse. The word 'excuse' appears to have been advisedly used. It is something less than 'justification', and something more than a mere whim, fad, or brain-wave of the respondent. It is a fact which has to be determined with reference to the respondent's state of mind in the particular circumstances of each case. The

scope of the word 'excuse' is not restricted to the grounds which under Sub-section (2) of the section can be taken in answer to a petition for restitution of conjugal rights, because in view of Sections 101, 102 and 103 of the Evidence Act, the burden of proving the aforesaid twin conditions in Sub-section (1) rests on the petitioner. He has to succeed on the strength of his own case. He cannot take advantage of the weakness of the defence. The learned Counsel for the respondent further submitted that in the present case, the petitioner has brought the proceedings for restitution of conjugal rights on the false ground that the respondent withdrawn from his society without any reasonable cause, hence, the court below placed the initial onus of proof on the petitioner to prove the said allegation as the right to begin follows onus probandi. To substantiate this contention, he relied on the decision of the Honourable Supreme Court reported in *Anil Rishi v. Gurbaksh Singh* : AIR 2006 SC1971 wherein the Honourable Supreme Court, in Para Nos. 9 and 19 held thus:

9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways; (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102, the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those

circumstances, if any, which would disentitle the plaintiff to the same.

4. This Court carefully considered the argument of the counsel on both sides, the citations relied on by them, perused the pleadings of the parties and the relevant provisions of law. Now, we look into the relevant provisions of law.

The [Hindu Marriage Act, 1955](#)

Section 9: Restitution of conjugal rights: When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation--Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

23-A. Relief for respondent in divorce and other proceedings In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the Court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

Indian Evidence Act:

101. Burden of Proof: Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies.- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. Burden of Proof as to particular fact.- The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on a particular person.

Civil Procedure Code

Order XVII Rule 1 CPC: Right to begin.- The Plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

5. In the case on hand, the proceedings is brought in by the petitioner complaining of the respondent herein without any reasonable excuse withdrew from his society where the defence of the respondent in her counter-claim is the petitioner herein treated her with cruelty, demanded dowry and beaten her, with the result, she was forced to leave the matrimonial house, hence, she is entitled to dissolution of marriage.

6. The procedure to be adopted at trial is laid down in Order 18 Rule 1 CPC which says that only where the defendant has admitted some of the averments made in the plaint, then the defendant can be required to lead evidence first. In this case, no such admission by the respondent in respect of the allegations made by the petitioner that the respondent withdrew from his society without any reasonable excuse. The petitioner cannot contend that he is not required to prove an essential fact constituting his cause of action unless the facts are admitted in the pleadings of the respondent. A fact not admitted in the pleadings of the respondent, the petitioner is bound to prove the essential fact to substantiate his case. In other words, the burden of proving the fact rests on the party who substantially asserts the affirmative of the issue and not the party who denies it.

7. The right to begin or the privilege of opening the case is decided by Rules of evidence. The general Rule is that the party on whom onus probandi lies should begin. The strict meaning of the term onus probandi is if no evidence is given by the party on whom burden is cast, the issue must be found against him. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the earlier stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side. Burden of proof is used in three ways (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later (ii) to make that of establishing a proposition as against all counter evidence and (iii) an indiscriminate use in which it may mean either or both of the sides. The elementary rule in Section 101 is inflexible. In terms of Section 102, the initial onus is always on the plaintiff and if he discharge the onus and makes out a case which entitles him to a relief, the onus shift to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same. Followed para-19 of Anil Rishi v. Gurbaksh Singh : AIR 2006 SC1971 .

8. Where however evidence has been led by the contesting party, abstract consideration of onus are out of place and truth or otherwise must always be adjudged on the evidence led by the parties. Kalwa Devadattam and Ors. v. Union of India and Ors. : [1963]49ITR165(SC) .

9. It is also open to the plaintiff to say that although he has a right to begin, he may rest content with relying upon the averments made in the written statement and may say that he does not propose to adduce further evidence but the plaintiff should make this statement before the defendant is called upon to adduce evidence. Followed Para-5 of Balakrishna Kar and Anr. v. H.K. Mahatab : AIR1954 Ori191 . In this case the petitioner has not made any statement that he does not propose to adduce further evidence or relying upon the averments made in the counter claim of the respondent.

10. Section 9 of The [Hindu Marriage Act, 1955](#) provides that when either of the spouse, without any reasonable cause withdrawn from the society of the other, the aggrieved party may apply by petition for restitution of conjugal rights and the

Court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted may decree restitution of conjugal rights accordingly. The explanation to the said section speaks that where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society. The explanation means that the spouse alleges reasonable excuse has to prove it. I endorse the view expressed by the learned single judge in the case reported in Smt. Jyothi Pai v. P.N. Pratap Kumar Pai AIR 1987 Karnataka 241 that explanation to Section 9 does not make any change and that initial burden to prove the allegation on the basis of which restitution of conjugal rights is sought is on the person who comes to the Court. In this case, the petitioner, who approached the Court for a judgment and decree in his favour on the assertion that the respondent had withdrawn from his society without any reasonable excuse. The burden of proof in the proceedings lies on the petitioner to prove those averments made by him to get a decree in his favour. Hence, the petitioner who alleges withdrawal without reasonable cause failed to lead evidence, he may not be in a position to satisfy the Court regarding the truth in the pleadings, hence, he has to lead evidence, then the burden will be shifted to the respondent to establish reasonable excuse. Even when the respondent made counter claim under Section 23A of the Hindu Marriage Act, it does not make any change in the position of law.

11. The citations have been made by the counsel for the petitioner from the text books that respondent has to begin the evidence is not quite relevant to the case on hand.

12. In view of the reasons mentioned above, this Court is of the view that the conclusion arrived at by the trial court that the petitioner herein, who brought in the proceedings has to lead evidence first to prove the averment in his O.P. is perfectly valid and interference of this Court is not warranted. The Civil Revision Petition is dismissed with costs of Rs. 5,000/-.