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Sm. Mita Gupta Vs. Prabir Kumar Gupta

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Court : Kolkata

Decided On : Jun-20-1988

Reported in : AIR1989Cal248,93CWN50

Judge : A.M. Bhattacharjee and ;Ajit Kumar Nayak, JJ.

Acts : Hindu Marriage Act, 1954 - Sections 13, 13(1A) and 23(1); ;Hindu Marriage (Amendment) Act, 1965

Appeal No. : A.F.O.D. No. 129 of 1982

Appellant : Sm. Mita Gupta

Respondent : Prabir Kumar Gupta

Advocate for Def. : J.P. Srivastava and ;B. Kumar, Advs.

Advocate for Pet/Ap. : N.B. Roy and ;Shyamal Sur, Advs.

Disposition : Appeal dismissed

Judgement :

A. M. Bhattacharjee, J.

1. A petition for divorce under the Hindu Marriage Act was filed by the respondent-husband on the ground of cruelty and desertion by the wife-appellant and also on the ground of non- restitution of conjugal rights for more than one year after the

passing of a decree to that effect between the parties. The trial court has negatived the first two grounds but has decreed divorce on the third ground.

2. Even though the grounds of cruelty and desertion alleged by the respondent-husband have been decided against him, the petition for divorce filed by him having been decreed in his favour, the husband, even as a respondent, could, as provided in Order 41, Rule 22 of the Code of Civil Procedure, have urged, and that without filing any cross-objection, that the petition for divorce ought to have been decreed on those two grounds also. But the learned counsel appearing for the respondent-husband not having done that, the only question that would require our consideration in this case is whether the trial Judge was right in decreeing divorce on the ground of non-restitution of conjugal rights between the parties for more than one year after a decree for such restitution was passed in favour of the wife-appellant against the husband-respondent.

3. The legislative laws on the point are not in doubt; but, as is not unusual, the case-laws clustering round them are not that clear. The relevant legislative provisions of the Hindu Marriage Act may be reproduced hereinbelow : --

'13. .....

(1A) Either party to a marriage, whether solemnized before or after the commencement of this act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground -

(1) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage 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.

23. .....

(1) In any proceeding under this act, whether defended or not, if the court is satisfied that -

(a) any of the grounds for granting relief exists and the petitioner ..... is is not in any waytaking advantage of his or her wrong or disability for the purpose of such relief, and .....

(e) there is no other legal ground why relief should not be granted, then, and in such case, but not otherwise, the court shall decree such relief accordingly,'

4. Therefore, all that is necessary to justify a decree for divorce under these provisions are - (a) a decree for restitution of conjugal lights or for judicial separation between the petitioner and the respondent, whosoever might be the decree-holder; (b) non-resumption of conjugal relation between the perties for a period of one year or upwards; (e) the petitioner not in any way taking advantage of his or her wrong or disability; and (d) non-existence of any other legalground warranting refusal of the relief prayed.

4A. The first question that has arisen in ; this case in that if one spouse has obtained a decree for restitution of conjugal rights against the other spouse, can the latter, against whom a decree is passed, without taking any steps to comply with the decree and to restore conjugal rights to the former, still invoke the provisions of Section 13(1A)(ii) on the ground of such non-restitution for one year or more and be entitled to a decree for divorce under those provisions or would he or she be denied such relief on the ground that he or she has committed ''wrong' within the meaning of Section 23(1)(a) by not taking any steps towards the restitution of conjugal rights and, therefore, cannot be allowed to take advantage of such wrong?

5. Section 13(1A) has been inserted by the Amendment Act of 1964 in replacement of Clause (viii) and (ix) of Section 13(1), as it then was, whereunder a marriage on the ground of non-restitution of conjugal rights after a decree to that effect could be dissolved only when the respondent, that is, 'the other party' against whom the decree was made, 'has failed to comply' with such a decree. The spouse against whom such a decree was passed could in no event invoke

that provision against the spouse obtaining such a decree, because it is only the former, who has been directed by the decree to restore conjugal rights, could comply or fail to comply with that decree ; and not the one who obtained such a decree. As a result, even if the spouse who obtained such a decree, far from facilitating its , compliance, took every step to thwart the compliance thereof, the other spouse was without any remedy under that Clause (ix) because the party obtaining the decree could not be regarded to have not complied with the decree. The present Section 13(1A) was accordingly inserted replacing Clause (ix) to provide that any of the spouses, whether or not the earlier decree for restitution was in favour or against such spouse, can invoke the provisions and petition for divorce under the law as amended in 1964 on the ground thatthere has been no restitution of conjugal rights between the parties for one year or more after the passing of such a decree. Thus Section 13(1A), as inserted in 1964, is virtually a partial recognition of the break-down theory in the divorce jurisdiction under the Hindu Marriage Act, which till then recognised mainly matrimonial faults like adultery, cruelty, desertion and the like, as grounds for dissolution of marriage. It has been assumed, and rightly too, that if there has been no restitution of conjugal rights between the parties for one year or more after a decree for judicial separation or for restitution of conjugal rights, then the marriage has broken down irreparably and irretrievably and, in accordance with the modern trend in this jurisdiction not to insist on the maintenance of such union which has so broken down, a dissolution thereof by a decree of divorce has been provided. A much later (and better late than never) recognition of this breakdown theory in the divorce jurisdiction under the Hindu Marriage Act has been made in 1976 by inserting Section 13B therein providing for dissolution of marriage by mutual consent.

6. But as already noted, and as has also been pointed out by the Supreme Court in Dharmendra v. Usha, : [1978]1SCR315 , the whole of Section 13 of the Hindu Marriage Act providing for grounds for dissolution of marriage, including Section 13(1A), is subject to the provisions of Section 23, Clause (a) of Sub-section (1) whereof provides that even if any of the grounds for granting relief exists, the petitioner must not be taking advantage of his or her own wrong. Against this backdrop, we will have to decide te question as to whether a husband, against

whom a decree for restitution of conjugal rights has been passed at the instance of his wife, can invoke the provisions of Section 13(1A)(ii) and petition for dissolution of marriage on the ground of expiry of one year or more without any such restitution, even if he has taken no steps to comply with the decree and has thwarted all attempts on the part of the wife towards the resumption of conjugal rights.

7. I have had the occasion to consider, not the same, but somewhat allied questionin Sumitra v. Gobinda, : AIR1988 Cal192 , which was referred to me on a difference of opinion between two of my learned brothers on the question. That was a case where a decree for judicial separation was passed in favour of the wife and against the husband and the husband thereafter petitioned for divorce under Section 13(1A)(i) without taking any step towards resumption of cohabitation during the prescribed period and on a consideration of the relevant statutory provisions and the decision of the Supreme Court in Dharmendra v. Usha, : [1978]1SCR315 (supra), approving the decisions of the Delhi High Court in Ram Kali v. Gopal Dass, 1LR (1971) 1 Dehli 6 (FB) and in Ganja Devi v. Purshotom Giri, : AIR1977 Delhi178 , 1 have held that a husband, against whom a wife has obtained a decree for judicial separation, is no longer under any obligation to cohabit with the wife and, therefore, his failure to do so would, by itself, constitute no 'wrong' within the meaning of Section 23(1)(a) to disentitle him from a decree for divorce under Section 13(1A).

8. But in the case at hand, we are concerned, not with a decree for judicial separation, but with a decree for restitution of conjugal rights. Until marriage is dissolved by a decree of nullity or divorce or until a decree for judicial separation is passed, the husband was obviously under the obligation lo cohabit with the wife and the decree for restitution of conjugal rights in effect reinforced such obligation directing him to take the wife back and thereby holding that the husband had no reasonable excuse to withdraw from the society of the wife. There is reliable evidence on record not only from the wife (DW-1) and her maternal uncle (DW 2), but also an independent witness like DW 3, who is retired Government servant residing just opposite to the house of the husband, that on 1-2-1977, the wife, along with her maternal uncle (DW 2) went to the house of the husband to resume

conjugal life, but the husband refused her entry into the house and shut the doors against her face. That is also the finding of the trial court in the impugned judgment. But the trial Judge held, relying mainly on the single Judge decision of the Gujarat High Court in Anil v. Sudhaben, : AIR1978 Guj74 , that the mere fact of non-compliance by the husband withthe decree would not per se amount to taking advantage his own wrong so as to disable him from claiming the relief. The trial Judge has also referred to the Supreme Court decision in Dharmendra v. Usha, : [1978]1SCR315 (supra) as authority for such view.

9. As already noted, in the divorce jurisdiction, even if a ground for granting divorce exists, a petitioner would be denied the relief if he or she would thereby be taking advantage of his or her own wrong. Adultery is a ground of divorce, but even if it is evident that a wife is living in adultery, a husband would still be refused divorce if it is shown that he led her to lead such a life for his gain or otherwise and that has been expressly provided in Section 23(1)(b). Conversion to another religion is a ground for divorce, but a spouse may be denied divorce even if the other spouse has embraced some other religion if the former goaded the latter to such conversion. Suffering from venereal disease is a ground for divorce, but a spouse may be denied relief even if the other spouse is so suffering if the fomer was responsible for the contagion. By parity of reasoning, it could, therefore, be urged that even though non-restitution of conjugal rights for one year or more after a decree to that effect is a ground for divorce, still a spouse should be denied that relief, if in spite of such a decree against him or her mandating resumption of conjugal life, he or she has deliberately failed to comply with the decree. It could have been urged that since spouses are obligated to render society to each other until a decree for judicial separation or dissolution and such obligation becomes reinforced when one obtains a decree for restitution against the other, failure to comply with such decree would be 'wrong' within the meaning of Section 23(1)(a) and should disentitle the spouse against whom such a decree is passed to proceed for divorce under Section 13(1A)(ii) against the spouse who obtained such a decree, on the ground of non-resumption of conjugal relation for one year or more.

10. But the decision of the Supreme Court in Dharmendra v. Usha, : [1978]1SCR315 (supra) appears to have ruled otherwise andto have held that 'mere non-compliance with the decree for restitution does not constitute a 'wrong' within the meaning of Section 23(1)(a)' and that 'in order to be 'wrong' within the meaning of Section 23(1)(a), 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.' It is true that in Dharmendra v. Usha (supra), the wife obtained a decree for restitution against the husband and then proceeded for divorce under Section 13(1A)(ii) on the ground of non-restitution and, therefore, it was not a case where the petitioner-wife was under any decretal obligation to render her society. But the wife still had the marital obligation under the law to offer her society to the husband and if according to the Supreme Court decision in Dharmendra (supra), the wife, by failing to discharge such obligation and declining all offers on the part of the husband to re-union was committing no 'wrong' and was not taking advantage of any 'wrong' in asking for divorce by making out a case under Section 13(1A)(ii) of non-restitution after a decree for restitution, then it may not be possible to hold that a husband, by similar failure and demonstration of disinclination to resume cohabitation, even if a decree for restitution is passed against him, would be committing any 'wrong' and would be taking advantage of any such wrong in proceeding against his , wife under Section 13(1A)(ii), simply because the obligation on his part to cohabit was also sanctioned under a decree. In fact, the Full Bench decision of the Delhi High Court in Ram Kali, ILR (1971) 1 Delhi 6 (supra), which has been expressly approved by the Supreme Court in Dharmendra (supra) to have laid down the law correctly, was a case where a decree for restitution was passed against the husband who, without taking any steps to comply with the decree, proceeded against the wife for dissolution of marriage under Section 13(1A)(ii) on the ground of non-restitution of conjugal right for the requisite period after the decree. And the Full Bench ruled that whichever spouse may have obtained the decree for restitution, if in fact there hasbeen no restitution of conjugal rights for the requisite period after such decree, the court should assume that the marriage between the parties has utterly broken down beyond any prospect of repair and should dissolve the marriage under Section

13(1A)(ii) and that mere non-compliance with the decree for restitution of conjugal rights is not a 'wrong' within the meaning of Section 23(1)(a). To the same effect is the single Judge decision of the Gujarat High Court in Anil v. Sudhaben, : AIR1978 Guj74 (supra) on which the trial Judge has heavily relied.

11. That mere non-compliance with the decree for restitution of conjugal rights, would not, by itself, amount to any 'wrong' to disentitle the spouse against whom the decree is passed to obtain divorce under Section 13(1A)(ii) has now got to be accepted to be the law in view of the Supreme Court decision in Dharmendra, : [1978]1SCR315 (supra), approving the Delhi decisions in Ram Kali (ILR (1971) 1 Delhi 6) (FB) (supra) and in Ganja Devi, : AIR1977 Delhi178 (supra). The later decision of the Supreme Court in Saroj Rani v. Sudarshan, : [1985]1SCR303 also appears to have ruled, after relying on the earlier decision in Dharmendra (supra), that mere non-compliance with a decree for restitution of conjugal rights is not a 'wrong' within the meaning of Section 23(1)(a).

12. But as we have noted, in the case at hand, the allegation against the petitioner-husband is not that he merely failed to comply with the decree for restitution passed against him, but he deliberately thwarted all attempts on the part of the wife-respondent to resume conjugal life by refuisng her any entry in the matrimonial home and driving her away form the door-step by closing the doors against her face. This is a not mere non-compliance or mere non-restitution, but deliberate acts and attempts on the part of the husband to prevent, obstruct and frustrate restitution and thereby to hatch out a case of non-restitution to his advantage to make out a case under Section 13(1A)(ii) for dissolution. As already noted, in view of the decisions of the Supreme Court in Dharmendra, : [1978]1SCR315 (supra) and in Saroj Rani, : [1985]1SCR303) (supra),a mere non-compliance with a decree for restitution may not be a 'wrong' within the meaning of Section 23(1)(a) to disentitle even a spouse against whom such a decree is passed from invoking Section 13(1A)(ii) in a later proceeding, but the question as to whether deliberate and positive acts of actual or physical obstruction by such spouse to furstrute all bona fide attempts on the part of the other spouse to effect re-union would be such a 'wrong', has not been decided by the Supreme Court in Dharmendra (supra) and has rather been left open in Saroj Rani (supra), where

the Supreme Court did not allow the wife to raise such a question as there being no foundation therefor in the pleadings and also refused permission to make necessary amendment in the pleading raising such a ground at that stage. That the Supeme Court has left the question open in Saroj Rani (supra) would also appear from the manner in which it has distinguished (at p. 1569) the decision of the Andhra Pradesh High Court in Geeta Laxmi v. Sarveswara Rao, : AIR 1983 AP111 . In that Andhra Pradesh case also, the husband against whom the decree for restitution was passed and who thereafter applied for divorce under Section 13(1A)(ii) 'not only not complied with the decree, but did positive acts by ill-treating her (the wife) and finally drove her away from the house' and the Division Bench ruled that as 'it is not a case of mere non-compliance of the decree, but fresh positive acts of wrong', the husband was not entitled to any relief under Section 13(1A)(ii). The Supreme Court in Saroj Rani (supra, at p. 1569) has taken care to distinguish this Andhra Pradesh decision in Geeta Laxmi (supra) by pointing out that, unlike the case in the Geeta Laxmi (supra), in the case before it in Saroj Rani (supra) 'there is no such allegation or proof of any ill treatment by the husband or any evidence that the husband had driven the wife out of the house.' The Supreme Court thus, far from negativing or overruling the decision in Geeta Laxmi (supra), has distinguished the same on facts and, as we have already stated, , left the question open. The question thus being not covered by the Supreme Court decision in Dharmendra (supra) or Saroj Rani(supra) or by the Delhi decisions in Ram Kali (ILR (1971) 1 Delhi 6) (FB) (supra) or Ganja Devi, : AIR1977 Delhi178 (supra), which have been expressly approved by the Supreme Court in Dharmendra (supra), would have required to be decided by us.

13. But in the case at hand, however, even if the aets alleged to have been committed by the husband in obstructing the entry of the wife in the matrimonial home and driving her away from the door-steps are held to be 'wrong' within the meaning of Section 23(1)(a), those acts were admittedly done on 1-2-1977 while the decree for restitution was passed on 30-1-1976. There is nothing on record to show that any such wrong was committed by the husband before 1-2-1977 i.e., before the expiry of one year after the decree for restitution and up to that date what was done by the husband was mere non-complianee with the restitution decree, which, as now settled by the Supreme Court, is not 'wrong' within the

meaning of Section 23(1)(a). On 1-2-1977, therefore, the husband became legally entitled to divorce under Section 13(1A)(ii) as a result of the passing of the restitution decree and non-restitution for one year thereafter. A ground of divorce having thus already accrued in favour of the husband before 1-2-1977, he cannot be said to be taking any advantage of his 'wrong' by his alleged acts and deeds on 1-2-1977, even if those acts and deeds would have otherwise amounted to any such 'wrong'. A spouse already having acquired a valid cause of action or ground for divorce under Section 13, including its Sub-section (1A), cannot be regarded to have done any 'wrong' within the meaning of Section 23(1)(a), if he or she refuses to agree to undo that ground or cause of action by accepting subsequent offers of reunion. That being so, we would have to hold that the husband-respondent in this case was entitled to a decree for divorce under Section 13(1A)(ii), as granted by the trial Judge, though we do so for reasons different from those adopted by him.

14. We accordingly dismiss the appeal and affirm the decree for dissolution of marriage passed by the trial Judge. We would, however, make no order as to costs. Needlessto say, the appellant-wife shall be entitled tomake application under Section 25 of the HinduMarriage Act for such permanent alimony and maintenance which she may be found entitled to.

Ajit Kumar Nayak, J

15. I agree.

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