

Naba Kumar Katari Vs. Kalyani Katari

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Court : Kolkata

Decided On : Nov-18-2009

Judge : Bhaskar Bhattacharya, A.C.J. and ;Prasenjit Mandal, J.

Acts : Hindu Marriage Act - Sections 9, 9(1), 9(2), 22 and 23(1); ;Marriage Laws (Amendment) Act, 1976; ;Matrimonial Causes Act, 1950 - Sections 15; ;
[Constitution of India](#)

Appeal No. : F.A. No. 296 of 2007

Appellant : Naba Kumar Katari

Respondent : Kalyani Katari

Advocate for Def. : Tapan Kumar Gupta, ;Amit Banerjee and ;Amit Kumar Misra, Advs.

Advocate for Pet/Ap. : Aniruddha Chatterjee, Adv.

Disposition : Appeal allowed

Judgement :

Bhaskar Bhattacharya, A.C.J.

1. This first appeal is at the instance of a husband in a proceeding under Section 9 of the Hindu Marriage Act and is directed against the judgment and decree dated 19th October, 2006 passed by the learned Additional District Judge, Arambagh,

District-Hooghly, in Matrimonial Suit No. 72 of 2005, thereby dismissing the proceeding for restitution of conjugal rights.

2. Being dissatisfied, the husband has come up with the present appeal.

3. There is no dispute that the parties were married on 5th July, 1987 according to Hindu rites and ceremonies and in the said wedlock, two children were born. The husband, at present, is employed in Border Security Force and is posted at Amritsar in the State of Punjab.

4. After the marriage, the parties lived together as husband and wife in the joint family of the husband, but in view of disputes between the wife and her in-laws, in absence of the husband, the wife left the said joint family of her husband and went back to her father's house on 5th August, 1988.

5. At that point of time, according to the husband, he was posted in West Bengal and due to pressure given by the wife, he paid a sum of Rs. 1,60,000/- in cash to his father-in-law, who, in his turn, helped him to construct a new house for the respondent.

6. Subsequently, the husband was transferred to Amritsar. The wife, in spite of repeated requests by the husband, had refused to come to the place of posting of the husband and hence, the said proceeding for restitution of conjugal rights was initiated.

7. The suit was contested by the wife by filing written statement thereby denying the allegations made in the application for restitution of conjugal rights and the defence of the wife was that the members of the family of the husband demanded dowry from the wife, but such money not having been paid, they started torture upon the wife and the wife was compelled to come back to her father's house. The father of the wife gifted 8 sataks of bastu land in favour of the wife and with his own money, made construction of a house for the residence of the wife. It was absolutely false that the husband contributed a sum of Rs. 1,60,000/- for the construction of the said house. Although the husband inflicted physical cruelty upon the wife, she was always ready and willing to stay as a wife with the husband

and she never declined to stay together and as such, the application should be dismissed.

8. At the time of hearing, the husband himself and one Anisura Begum deposed in support of the application while the wife herself, her sister and one Swapan Kr. Roy deposed in favour of the wife.

9. As indicated earlier, the learned Trial Judge, by the judgement and decree impugned herein, has dismissed the application for restitution of conjugal rights on the ground that the husband did not mention in the application for restitution of the conjugal rights, the place where the wife should go to perform her marital obligations. According to the learned Trial Judge, the house constructed by the father of the wife at the village Supara within the Arambagh Municipality is the permanent residence of the parties and thus, no direction could be given to the wife to stay at Amritsar without creating any congenial atmosphere. It was further found by the learned Trial Judge that the wife never withdrew herself from the society of the husband and as such, the husband was not entitled to get a decree for restitution of conjugal rights.

10. Mr. Chatterjee, the learned advocate appearing on behalf of the appellant, strenuously contended before us that the wife herself having specifically asserted before the Court that she was always ready and willing to come and stay with the husband, there was no just reason for the learned Trial Judge to dismiss the proceeding for restitution of conjugal rights. Mr. Chatterjee submits that the learned Trial Judge dismissed the proceeding by not following the well-accepted principles which are required to be followed by a matrimonial court in disposing of a proceeding for restitution of conjugal rights.

11. Mr. Gupta, the learned advocate appearing on behalf of the wife/respondent, has, however supported the decree of dismissal of the proceedings and has contended that as the parties had been staying apart for quite a long time, the wife has lost her confidence in the husband and thus, the learned Trial Judge rightly dismissed the proceeding. According to him, this Court also should not pass any direction upon the wife to leave the house at Supara and accompany the husband to his place of posting in the state of Punjab. He, therefore, prays for dismissal of

the appeal.

12. Therefore, the question that falls for determination in this appeal is whether the learned Trial Judge in the facts of the present case was justified in dismissing the proceeding for restitution of conjugal rights in the facts of the present case.

13. In order to appreciate the said question, it will be profitable to refer to the provisions contained in Section 9 of the Hindu Marriage Act which is quoted below:

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.

14. The aforesaid Section 9 was amended by the Marriage Laws (Amendment) Act, 68 of 1976 by which the Explanation was added and the original Sub-section 2 was omitted. The original Sub-section 2 stood as follows:

Nothing shall be pleaded in answer to a petition of restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

15. The said Sub-section created an impression that the 'reasonable excuse' as mentioned in Sub-section 1 must be such conduct on the part of the petitioning spouse as would amount to a matrimonial offence. To obviate such impression, the said Sub-section has been omitted and at the same time, an 'Explanation' has been added to clarify the conflicting views as regards the burden of proof of reasonable excuse in such a proceeding.

16. Thus, after the said amendment, the conduct of a spouse which even falls short of cruelty or any other matrimonial offence under the Act would afford reasonable excuse for withdrawing from the society of the petitioning spouse and the same can be put forward as a defence in a proceeding for restriction of the conjugal rights.

17. At this stage, we must bear in mind that the quintessence of marriage lies in sharing of all the delights that one can expect in one's life and at the same time, also of the melancholy and misfortune that has to be faced in life by the two spouses, and in bestowing the love and affection on their off-springs and in guiding them to become successful members of the society.

18. The aforesaid object of the marriage cannot be accomplished if any of the spouses decides to live apart against the wish of the other. For the above reason, even in the absence of legislation on the subject, the Courts in India, in the past, have been passing the decree of conjugal rights in respect of the parties belonging to all the communities.

19. After the coming into operation of the Hindu Marriage Act, in considering whether in the facts of a case governed by the Act, a decree for restitution of conjugal rights should be granted or not, the matrimonial courts are guided not only by the provisions contained in Section 9 but also by Section 23(1)(a), (c) and (d) of the Act which prohibits grant of such relief in cases where the applicant was trying to take advantage of his own wrong or the petition was made in collusion with each other or where there was unnecessary delay in presenting the petition.

20. The phrase 'conjugal rights' has not been defined in the Act. However, In the Dictionary of English Law, 1959 Edition, at page 453, Earl Jowitt defines 'conjugal rights' thus:

The right which husband and wife have to each other's society and marital intercourse. The suit for restitution of conjugal rights is a matrimonial suit, cognisable in the Divorce Court, which is brought whenever either the husband or the wife lives separate from the other without any sufficient reason, in which case the court will decree restitution of conjugal rights (Matrimonial Causes Act, 1950,

Section 15), but will not enforce it by attachment, substituting however for attachment, if the wife be the petitioner, an order for periodical payments by the husband to the wife (Section 22).

Conjugal rights cannot be enforced by the act of either party, and a husband cannot seize and detain his wife by force R. v. Jackson (1891) 1 QB 671.

21. The aforesaid definition has been quoted with approval by the Apex Court in the case of Smt. Saroj Rani v. Sudarshan Kumar Chadha reported in : AIR 1984 SC 1562 while considering the question of legality of Section 9 of the Act in the context of the provisions of the [Constitution of India](#).

22. Bearing in mind the principles mentioned above, we now propose to consider the materials on record.

23. The learned Trial Judge has recorded the statement of the wife that she was ready and willing to live with her husband and has also arrived at a finding that the husband has official quarter in his place of posting in Amritsar where he can take his family. In spite of such findings, the learned Trial Judge has rejected the prayer for restitution of conjugal rights on threefold ground.

24. First, the husband has not disclosed in his petition the place where the wife is required to perform her marital obligations. Secondly, the residence at the village Supara in the District of Hooghly where the wife is at present staying should be treated to the permanent residence and thus, the wife cannot be directed to go to Amritsar to perform her obligations and thirdly, as the wife has expressed her inclination to stay with the husband, it should be held that the wife has not withdrawn herself from the society of the husband. Lastly, the learned trial judge has opined that as the parties are living separately for a considerable period, congenial atmosphere should be created before the wife should be directed to go the place of posting.

25. After hearing the learned Counsel for the parties and after going through the materials on records we are unable to approve the judgement and the decree passed by the learned Trial Judge for the reasons set forth below:

In this case, although the wife complained of cruelty on the part of the husband by alleging physical assault on one occasion, the learned trial judge did not arrive at any finding on that point. We find that DW-2, an alleged witness to such assault and who allegedly accompanied the respondent to a nursing home stated in cross-examination that he did not see such incident but only heard such fact. He admitted that he did not notice any mark of injury of the respondent. He did not get summons but being requested by the respondent and her father, came to depose. DW- 3 is the married sister of the respondent who claimed that in her presence the appellant assaulted the respondent when she came to the house of the respondent on the day of Durga Puja and she took the respondent to the nursing home for treatment of the injury along with DW-2. She is a chance witness and at the same time, an interested witness. We have already pointed out that the said DW-2 admitted that he did not notice any mark of injury of the respondent. It appears that in cross-examination of the appellant, the alleged offender, no question was put to him regarding assault on the day of Durga Puja. In such circumstances, we find no reason to believe the allegation of assault on the respondent and the further allegation that she was admitted in a nursing home. Even no document relating to the treatment of the respondent in the nursing home has been produced.

26. The wife herself stated in her evidence that she was willing to stay with her husband and that she did not want divorce. In such circumstances, there was no reason for refusing the prayer for restitution of the conjugal rights on the face of admission of the respondent. Law does not require that in order to have a decree for restitution of conjugal rights, the husband must have a permanent place of residence and that the wife must be asked to go to that permanent place of residence. In this case, it has been found from materials on record that the husband is entitled to a family quarter at the place of his posting in Amritsar. Thus, the learned Trial Judge erred in law in refusing to pass a decree directing the wife to stay with the husband at his place of posting on the ground that as the parties had been living separately for a long time, congenial atmosphere must be created before passing such direction even after the willingness expressed by the wife to stay together.

27. We, thus, find that in the absence of any 'reasonable excuse' put forward by the wife for not living with the husband, the learned Trial Judge erred in law refusing the prayer of the husband for restitution of conjugal rights.

28. We, therefore, set aside the judgement and the decree, passed by the learned Trial Judge and allow the application of the husband by granting a decree for restitution of conjugal right against the wife. The wife is directed to stay with the appellant at his place of official posting provided the husband makes arrangement of residential accommodation for the wife and his children.

29. The appeal is, thus, allowed. In the facts and circumstances, there will be, however, no order as to costs.

Bhaskar Bhattacharya, A.C.J.

30. I agree.

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