

Bombay High Court

Mr. Jinu P. Philip vs Annie Varghese W/O Mr. Jinu P. ... on 2 May, 2008

Equivalent citations: 2008 (110) Bom L R 1660

Author: R Desai

Bench: R Desai, R Sondurbaldota

JUDGMENT Ranjana Desai, J.

Page 1663

1. Rule. Respondents waive service. By consent of the parties, taken up for hearing forthwith.

2. The appellant is the original respondent-husband and the respondent is the original petitioner-wife in Petition No. A-361 of 2007, which was filed in the Family Court No. 3, Pune at Pune. For the sake of convenience, we shall refer to them as the appellant- husband and the respondent-wife.

3. A petition was filed by the respondent-wife for restitution of conjugal rights under Section 22 of the Special Marriage Act, 1954 (for short, "the said Act"). The case of the respondent-wife was that she and the appellant-husband were married on 11/12/2003 at Pune under the provisions of the said Act. Both the parties are Christians by religion. It was a love marriage. The appellant- husband had not informed about this marriage to his parents. It is the case of the respondent-wife that notice of the marriage was given in September, 2003. After the marriage, which took place on 11/12/2003, the appellant-husband left the respondent-wife at Lonavla. He went to Dubai on 14/12/2003. He told the respondent-wife that after he would get a job, he would arrange for her Visa. After he got a job in Dubai, he told her that after he gets a better job, he would call her to Dubai. They were in contact with each other on telephone and through e-mails.

4. According to the respondent-wife, she lost her father on 28/4/2005. She therefore, requested the appellant-husband to be with her in India. He made some excuses for not coming to India. However, he used to regularly phone her till 21/5/2005. According to the respondent-wife, on 21/5/2005, the appellant-husband informed her that he was going to Saudi Arabia for a couple of days. On 28/5/2005, she got an SMS from the appellant-husband informing her that he was at Trivandrum Airport Page 1664 and proceeding to Chennai as his mother was very serious. He also told her that he would be in the hospital and would not be able to speak to her. In the third week of June, 2005, the appellant-husband telephoned her and informed her that his mother is discharged from the hospital and that he had to leave for Dubai via Colombo, Sri Lanka. Thereafter, the respondent-wife repeatedly asked the appellant- husband whether she can join him. The appellant-husband promised her that he will come to India on 3/1/2007.

5. According to the respondent-wife, on 3/1/2007, the appellant- husband informed her that he had written a detailed letter to her. She insisted that she wants to know about the contents of the said letter. The appellant-husband then informed that under pressure from his parents, he had married a girl called Beena Varghese on 30/5/2005. The respondent-wife thereafter asked the appellant-husband to come to India. On 14/6/2007, the appellant-husband met the respondent-wife at

Lonavla. On the same day, he informed his parents about his marriage with the respondent-wife. His parents called the respondent-wife and accused her of cheating their son. They started harassing her. They wanted her to accept some amount as settlement and agree for a separation. According to the respondent-wife, they pressurized and threatened her. The appellant-husband left India on 17/1/2007 without informing her.

6. The further case of the respondent-wife is that after reaching Abu Dhabi, the appellant-husband called her and asked for a divorce. She refused to give divorce and asked him to return to India. On 20/1/2007, the parents of the appellant-husband along with other members of their family and a local counselor visited her parents' house. They tried to threaten the respondent-wife. They again visited her on 22/1/2007. According to the respondent-wife, she through her lawyer sent a notice to the parents of the appellant-husband and to the Priest of the Church in Pondanand, Kerala where the second marriage of the appellant-husband was performed. The Priest of the said Church sent a copy of the marriage certificate and an incomplete and false affidavit filed by the appellant-husband in the Church.

7. The case of the respondent-wife is that the appellant- husband treated her with cruelty; he had left her without any reasonable excuse; due to the refusal of the appellant-husband to live with her, there was no co-habitation and she has been deprived of her marital rights. In the circumstances, she prayed for restitution of her conjugal rights.

8. The appellant-husband filed his written statement. He denied all the allegations. According to him, he was working for Sahara India Commercial Corporation Limited, Lonavla. He was introduced to the respondent-wife and other family members through her father in Marthoma Church in a Christmas Programme in 2001. The respondent-wife was to get married to one Mr. Koshy. The sister of the respondent-wife told him that they had selected him as the best man for the marriage. However, Mr. Koshy rejected the marriage proposal as he learnt about the past love affair of the respondent-wife. According to the appellant-husband, since he has no sisters, he was sympathetic towards her. Respondent-wife is six years older Page 1665 to him and he had a sisterly affection for her. According to him, he was told by the parents of the respondent- wife to find a suitable bridegroom for her as she was above 32 years. His further case is that the respondent-wife told him about her affair and the reasons why the parents had rejected the boy. According to the appellant-husband, because of the affair of the respondent-wife, the marriage proposals brought to her, were rejected.

9. Further case of the appellant-husband is that in August, 2003, the respondent-wife telephoned him and told him that she was in love with him. He tried to convince her that he was only sympathetic towards her. Considering the age difference, he was like a younger brother to her. According to him, the respondent- wife threatened and blackmailed him that she would commit suicide if he did not marry her. He then cut off his relationship with her and her family. He was compelled by the mother of the respondent- wife to meet her. The respondent-wife then forced him to go along with her to Pune to give notice for registration of marriage. She compelled him to sign the notice on 15/9/2003. On 11/12/2003, he received a telephone call from the respondent-wife. She requested him to join her at Pune as her cousin had met with an accident and was hospitalised. She

requested him to escort her as the train had left. He decided to drive her in his friend's car considering the situation. According to the appellant-husband, the respondent-wife then took him to the Marriage Registrar's Office at Pune instead of taking him to the hospital. The respondent-wife's friend, elder sister and her husband and her daughter were waiting there. He tried to resist but he was pressurized. Under the circumstances, he signed the Register of Marriage. According to him, four days' prior to the notice period, he was forced to marry the respondent-wife. After the registration of marriage, the family members of the respondent-wife did not allow them to live together. He was told that after the marriage is performed in the Church, they can start their family life. He was also told not to disclose about this marriage either to her father or to his parents or to anybody else. It is his case that his marriage is not consummated and that the respondent-wife and her family members were not ready to allow the appellant-husband and respondent-wife to cohabit. According to the appellant-husband, he is not ready and willing to accept the respondent-wife because of the attitude of the respondent-wife and members of her family. On 14/12/2003, he left for Chennai and on 17/12/2003, for Dubai. He was in touch with the respondent-wife because he was threatened by the respondent wife that she would inform his parents and commit suicide.

10. According to the appellant-husband, his parents not knowing about his marriage with the respondent-wife, advertised in the local newspapers for a bride. Since, he wanted a wife and was not ready and willing to live with the respondent-wife, he gave his consent for an arranged marriage without informing his parents about his marriage with the respondent-wife. He then got married on 30/5/2005 with one Beena Varghese. A daughter was born to them on 28/12/2006.

11. According to the appellant-husband, during this period, the respondent-wife asked him to come and perform the marriage in the Church. Page 1666 He had informed her and her brother that he cannot consider her as his wife. On 3/1/2007 he disclosed to the respondent-wife that he is married to Beena and has a daughter. The respondent-wife then forced him to separate from Beena and take her to Dubai. She agreed to a legal separation provided he gives her Rs. 5 lacs. He came to India and met the respondent-wife on 14/1/2007. Since the respondent-wife kept forcing him and since she went back on her promise, he informed his parents on 14/1/2007 about it. The parents of the appellant-husband made efforts to bring about a settlement but the respondent-wife was not ready. According to the appellant-husband, the respondent-wife is six years older to him. He was forced to marry her. The marriage is not consummated. The respondent-wife had withdrawn from his society from the very first day. There is only a formal relationship between the two. He, therefore, prayed for dismissal of the petition.

12. All efforts made by the marriage counselor to bring about a settlement failed. In the Family Court, the respondent-wife gave her evidence on affidavit. She examined her sister Elezabeth. The appellant-husband examined himself. Written arguments were filed on behalf of the respondent-wife. After perusing the evidence, the Family Court came to the conclusion that the appellant-husband had withdrawn from the society of the respondent-wife without reasonable cause and, therefore, she is entitled to a decree of restitution of conjugal rights. By the impugned order, therefore, the petition was allowed and the appellant-husband was directed to reconstitute the conjugal rights of the respondent-wife. The appellant- husband was also directed to pay maintenance of Rs.

3,000/-per month to the respondent-wife till he restitutes her conjugal rights. The appellant-husband was also directed to pay costs of Rs. 3,000/-to the respondent-wife. Being aggrieved by this judgment and order, the appellant-husband has filed the present appeal.

13. We have heard Mr. John, learned Counsel appearing for the appellant-husband and Mr. Deshmukh, learned Counsel appearing for the respondent-wife.

14. Mr. John, learned Counsel for the appellant-husband contended that the Family Court erred in passing a decree of conjugal rights. He submitted that admittedly the appellant- husband and the respondent-wife never cohabited. The marriage was not consummated. Therefore, there can be no question of passing a decree of restitution of conjugal rights. He drew our attention to the meaning of the word "restitution" given in Strouds Judicial Dictionary Vol. 4, Fourth Edition. He submitted that restitution means restoring any thing unlawfully taken from another. He submitted that a person must possess something, so that it can be dispossessed. He submitted that conjugal rights means right of the husband or the wife to the society of the other spouse. Thus, for restitution of this right, the husband and wife must have first lived together. If one of them without reasonable cause withdraws from the society of the other, then the court can order restitution of conjugal rights. But, if they do not cohabit after the marriage, there is no question of one spouse withdrawing from the society of the other and, therefore, in such a situation, decree of conjugal rights cannot be passed. Page 1667 Mr. John then submitted that in this case, there is a complete breakdown of marriage. He submitted that considering the irretrievable breakdown of marriage, this Court should dissolve it. In this connection, learned Counsel relied on *Kanchan Devi (Smt.) v. Promod Kumar Mittal and Anr.* , *Madhuri Mehta v. Meet Verma* , *Naveen Kohli v. Neelu Kohli* , *Sanghmitra Ghosh v. Kajal Kumar Ghosh* 2007(1) BCR 55 and *Ashok Hurra v. Rupa Bipin Zaveri* .

15. Learned Counsel for the appellant-husband further submitted that the Family Court erred in passing an order for maintenance in favour of the respondent-wife when she had not even prayed for maintenance. Learned Counsel submitted that this shows that the Family Court has passed the decree without application of mind. Learned Counsel submitted that in the circumstances, the impugned judgment and decree be set aside.

16. On the other hand, learned Counsel for the respondent-wife submitted that the conduct of the appellant-husband is reprehensible. He suppressed his first marriage from his family and filed a false affidavit in the Court. He cheated the respondent-wife. Learned Counsel submitted that the appellant- husband also cheated his parents and the second wife. Such a person deserves no sympathy. Learned Counsel submitted that the appeal be dismissed.

17. The legal question involved in this appeal is whether a decree for restitution of conjugal rights can be passed if the husband and wife have never cohabited after marriage and the marriage is not consummated.

18. Conjugal rights are defined in the Concise Oxford Dictionary, Ninth Edition as those rights (esp. to sexual relations) regarded as exercisable in law by each partner in a marriage.

19. In *Smt. Saraj Rani v. Sudarshan Kumar Chadha*, the Supreme Court was, inter alia, dealing with the constitutional validity of Section 9 of the Hindu Marriage Act, 1955 which provides for restitution of conjugal rights. This provision is in pari materia with Section 22 of the said Act, with which we are concerned here. While upholding the constitutional validity of Section 9, the Supreme Court held that it must be borne in mind that in India conjugal right i.e. right of the husband or the wife to the society of the other spouse is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself.

Page 1668

20. Thus, upon marriage, the husband and wife are in law entitled to each other's society. This right comes into existence the moment the two tie the knot. The courts by their decree give effect to this right if one spouse withdraws from the society of the other without sufficient cause. If for any reason the husband and the wife do not stay together from the day of the marriage, this right does not cease to exist. It is inherent and always exercisable if grounds for such exercise are made out in law. There is no reason to hold that withdrawal from the society comes about only when the husband and wife have lived together for sometime and one refuses to live with the other after some time.

21. Since conjugal rights are inherent in a marriage, and obligation of the husband and wife to live together begins from the day of the marriage, if one spouse refuses to live with the other from day one, he or she must be held to have withdrawn from the obligation to give to the other the benefit or pleasure of his or her society. Therefore, even if they do not live together or the marriage is not consummated, a decree for restitution of conjugal rights can be passed in a given case.

22. In *Dadaji Bhakaji v. Rukma Bai* (1886) 10 Bom. 301, the husband and wife had never lived together. The marriage was not consummated. The husband filed a suit for a decree for restitution of conjugal rights. It was urged that a decree for restitution of conjugal rights implies that the marriage has been consummated and that what was really being asked for was a decree for restitution of conjugal rights and that there was no authority for such a decree. It was held that gist of the action for restitution of conjugal rights is that married persons are bound to live together and that one or the other has withdrawn himself or herself without lawful cause as it was not contended that consummation was necessary by Hindu law to complete the marriage and, therefore, it necessarily follows that whether the withdrawal be before or after consummation, there has been a violation of conjugal duty which entitles the injured party to the relief prayed.

23. In *V.G. Venugopal Naidu v. Lakshmi Ammal and Anr.*, admittedly the husband and wife had never lived together at all, anywhere. The husband sued the wife for restitution of conjugal rights. Similar contention was raised before the Madras High Court. The Madras High Court referred to the judgment in *Dadaji Bhikaji's* case (supra) and observed that there can be no distinction between the case of a wife who has never allowed her husband conjugal rights and refuses to do so thereafter. The judgment in *Dadaji Bhikaji* (supra) was relied upon as laying down the proposition that a suit for restitution of conjugal rights will lie and the wife can be ordered to take up her residence with her husband even where the marriage has not been consummated and the parties have not previously lived together. In view of the above clear enunciation of law, the submission of Mr. John

that the petition for restitution of conjugal rights is not tenable because the appellant-husband and the respondent-wife have not lived together and that the marriage is not consummated, must fail.

Page 1669

24. So far as the merits of the case are concerned, we are of the opinion that the respondent-wife has indeed made out a case for restitution of conjugal rights. She has established that the appellant-husband has withdrawn from her society without lawful excuse. We concur with the Family Court on this aspect. The appellant-husbands' case that he regarded the respondent-wife as his sister and he was forced to marry her can never be accepted. We are of the opinion that it is a false story. The appellant- husband has made an unsuccessful attempt to wriggle out of marriage. We reject the story.

25. Mr. John submitted that the appellant-husband has got married again. He has a child from the second marriage. The marriage has irretrievably broken down and, therefore, this Court may dissolve it.

26. It is not possible to accept this submission. Irretrievable breakdown of marriage is not a ground for divorce under the said Act. In our opinion, reliance placed on the judgment of Naveen Kohil's case (supra) is misplaced. In that case, the husband had filed a petition for divorce. The trial court after evaluating the evidence, passed a decree of divorce. On appeal, the High Court set aside the decree. The Supreme Court observed that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact. The Supreme Court restored the decree of divorce and recommended that amendment should be brought about in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. Facts of this case cannot be compared with the facts of the present case. In this case, there is no petition for divorce. When irretrievable breakdown of marriage is not a ground for divorce, we cannot convert a petition for restitution of conjugal rights into a petition for divorce. We may also note that the respondent-wife is present in the court. We asked her whether she would consent to a divorce. She categorically refused to submit to a decree of divorce by mutual consent. In the circumstances, no such decree can be passed.

27. Similarly, in Madhuri Mehta's case (supra), both the husband and wife had consented to a decree of divorce by mutual consent. Hence, in a transfer petition in exercise of its power under Article 142 of the Constitution of India, the Supreme Court dissolved the marriage by a decree of divorce by mutual consent. In Kanchan Devi (Smt.)'s case (supra), the Supreme Court found that the marriage had irretrievably broken down. In view of the agreement between the husband and wife, the Supreme Court dissolved the marriage by decree of divorce by mutual consent in exercise of its power under Article 142 of the Constitution of India. In Sanghmitra Ghosh's case (supra), also the marriage had irretrievably broken down. Consent terms Page 1670 were filed by the parties whereby they, inter alia, agreed to dissolve the marriage by a decree of divorce by mutual consent. The Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution put an end to the litigation by directing the parties to adhere to the consent terms. In Ashok Hurra's case (supra), the husband and wife had filed a joint petition for divorce under Section 13-B of the Hindu Marriage

Act. Later on, the husband alone moved an application praying for a decree of divorce. The wife filed an application withdrawing her consent for divorce. She prayed that the petition for divorce by mutual consent may be dismissed. One of the questions raised before the Supreme Court was, whether mutual consent continued till the divorce decree was passed even if the consent was withdrawn by one of the parties within the period of 18 months. The Supreme Court was of the opinion that the marriage had broken down irretrievably. Hence, in exercise of its powers under Article 142 of the Constitution, the Supreme Court dissolved the marriage by conditional decree of divorce by mutual consent. In all the cases, relied upon by Mr. John, the parties were agreeable to a divorce by mutual consent and orders were passed by the Supreme Court in exercise of its powers under Article 142 of the Constitution of India. In view of the categorical statement made by the respondent-wife that she is not agreeable to a divorce by mutual consent, we cannot pass such a decree, in this proceeding arising out of a petition for a decree for restitution of conjugal rights, on the ground that the marriage has irretrievably broken down.

28. Mr. John raised objection to the order of maintenance. He submitted that the respondent-wife had not prayed for maintenance and, hence, the appellant-husband could not have been directed to pay maintenance.

29. We are unable to agree with Mr. John. Once a decree for restitution of conjugal rights is passed, the spouse who is deprived of the society of the other spouse is legally entitled to it. In the present case, the respondent-wife is entitled to the society of the appellant-husband. He is expected to abide by the decree. By the impugned order, the family court has directed the appellant husband to pay to the respondent-wife Rs. 3,000/-per month till her conjugal rights are restituted. This order is passed to secure compliance of the impugned order. In our opinion, therefore, no interference is called for with it.

30. In the circumstances, we find no merit in this appeal. Appeal is, therefore, dismissed.