Gujarat High Court
Harish Mansukhlal vs Hansagauri Ramshanker And Anr. on 17 February, 1981
Equivalent citations: 1982 CriLJ 2033, (1981) GLR 1223
Author: V Bedarkar
Bench: V Bedarkar
ORDER V.V. Bedarkar, J.

1. This is a petition filed by petitioner Harish Mansukhlal, (hereinafter referred to as 'the husband") against the order of the learned Judicial Magistrate, First Class, Bhavnagar, in Misc. Criminal Case No. 9 of 1978, and confirmed by the learned Sessions Judge, Bhavnagar in Criminal Revision Application No. 25 of 1979, granting maintenance to respondent No. 1 Hansagauri Ramshanker (hereinafter referred to as 'the wife') of Rs. 75/- per month from the husband,

2. Unfortunately, the love marriage between the boy and the girl of different castes ended into a failure. The wife belongs to Brahmain caste of Vartej near Bhavnagar and the boy belongs to Bania caste of Ahmedabad. At any rate, both of them married on 24-1-1977 and both stayed together at Ahmedabad. It also seems that thereafter the families of both the parties reconciled. Thereafter, somehow or the other on 4-8-1977 the wife left with her father who had come to Ahmedabad, and thereafter, as per the allegation of the husband, because the father of the wife wanted to have a new taxi for his business purposes as he is a driver, he went on demanding money and as his desire could not be satisfied, he prompted his daughter (i. e. the wife) not to go to her husband. Thereafter, the wife gave a notice on 28-11-1977 which was replied to by the husband on 15-12-1977. Thereafter the wife filed the aforesaid application for maintenance in the court of the learned Magistrate, Bhavnagar. The learned Magistrate passed an order in favour of the wife on 25-4-1979 awarding her maintenance of Rs. 75/-per month. The revision application preferred by the husband against the order of the learned Magistrate was dismissed by the learned Sessions Judge, Bhavnagar on 6-6-1979. Therefore, this petition.

3. Both the Courts below on evidence led came to the conclusion that the husband neglected to maintain the wife and there were reasonable grounds for the wife to live separate from the husband Considering the letters produced and other aspects, the learned Magistrate came to the conclusion that the wife's life in staying with the husband was not at all free from risk of her life and, therefore, came to the conclusion that there was cruelty in the husband's approach towards the wife and that her refusal to stay with the husband at Ahmedabad was quite justified. The learned Sessions Judge also on appreciation of the evidence came to the conclusion that there was cruelty to the wife and concluded that as a matter of fact there are sufficient reasons for the wife to refuse to live with the husband because of the cruelty, and that her life was certainly in danger as certified both by the father and mother of the husband. He, therefore, concluded that in that situation the wife could not be expected to live with the husband and, therefore, the readiness and willingness on the part of the husband does not absolve him from liability to pay maintenance when once it has been established that the wife is a woman unable to maintain herself and the husband is the person who has sufficient means but who has neglected or refused to maintain his wife. On this finding, the revision petition was dismissed.

4. It is of course true that on considering the financial position of the husband and considering that the amount of maintenance of Rs. 75/- per month awarded to the wife was very negligible, the learned Sessions Judge suo motu issued notice to the husband asking him to show cause as to why the amount of maintenance should not be enhanced.

5. Mr. K.B. Padia, learned Advocate for the petitioner husband, did not very much attempt to assail the finding of facts, but he wanted to impress upon me one patent fact that along with this petition he has produced a simple copy of the judgment of the City Civil Court, Court No. 15, Ahmedabad, in H. M. Petition No. 63 of 1978 filed by the husband for restitution of conjugal rights and on 23-4-1979 decree is passed in favour of the husband for restitution of conjugal rights. It apparently seems that in the record no copy of the decree was produced. So, there was nothing on the record to know as to when the decree for restitution of conjugal rights was passed. As the point was not very much pressed before the learned Sessions Judge, he does not seem to have touched it, and even if it would have been pressed, he was deciding a revision application against the order of the learned Magistrate wherein there was no scope for the learned Magistrate to consider this decree as it was not put before him. Therefore, whatever scope has remained with the present petitioner-husband would be the scope to proceed under Section 127 of the Criminal P.C., 1973 (hereinafter referred to as 'the new code'), to which I will immediately refer when I shall consider that position from the precedents which are cited before me.

6. * * * *

7. The first and the oldest ruling is of the Bombay High Court in Bai Parbati v. Chanchi Mansukh Jetha (1920) ILR 44 Bom 972 : AIR 1920 Bom 203. In that case, there was a decree for restitution of conjugal rights in favour of the husband. The wife did not comply with the said decree. But in that decree an order was passed by the appellate Court that defendant No. 1 (wife) do go and live with the plaintiff (husband) as his wife, and after considering the provisions of Order 21, Rule 33, Civil P.C. 1908, he further directed that in the event of wilful disobedience of Court's order defendant No. 1 should be asked to go to jail as she had already suffered rigorous imprisonment for three years (in a Criminal Proceeding) and was quite accustomed to that life. That was the matter of appeal before the Bombay High Court, and Macleod, C.J. who decided the matter, observed as follows:

...In my opinion a decree for the restitution of conjugal rights is a relic from the barbarous and middle ages. It is recognised, and has been recognised for many years in England, that a decree for restitution of conjugal rights is merely a preliminary step to enable a wife to get a divorce when she would not otherwise be able to do so, since the refusal of the husband to obey a decree for restitution of conjugal rights is considered as desertion, and desertion equivalent to cruelty, and therefore, such desertion, coupled with adultery, will be sufficient to enable a wife to get a decree for divorce. That is the only use to which proceedings for restitution of conjugal rights are now put in England. In this country they may be used by the husband as a means for preventing the wife from claiming maintenance, since, if the Court passes an order against a wife to go and live with her husband, and she refuses to do so, then she is debarred herself from making any claim to maintenance. For a wife is only entitled to separate maintenance if she has some good reasons for living apart from her husband.

It is, therefore, submitted by Mr. Padia that after having got a decree for restitution of conjugal rights in his favour, the husband is entitled to tell the wife to come and stay with him, and if she comes and stays with him, there is no question of paying the maintenance, but if she refuses to come and stay with him, then as observed by the Bombay High Court, she is not entitled to maintenance. Mr. Padia is perfectly justified provided this argument was available initially when the matter was pending before the learned Magistrate. The decree for restitution of conjugal rights was not before the learned Magistrate who passed the order and, therefore - it being a changed circumstance - application under Section 127 of the new Code can be filed,

8. Before considering the provisions of Section 127, I would also consider the decision of the Punjab High Court in Baldev Raj v. Pushpa Rani , on which Mr. Padia has placed reliance. Therein it has been observed that if there is a decree against wife for judicial separation, then she cannot claim maintenance having no reasonable ground to live apart. That decision was given relying on the decision of this Court in Dahyalal Amathalal Bhagat v. Bai Madhukanta wherein it was observed:

Where an order for judicial separation is passed under Section 10 of the Hindu Marriage Act, subsequent to the order for maintenance passed under Section 488 of the Cr. P.C. the order for maintenance must be cancelled.

The fact that a decree for judicial separation has been passed means that the wife has no reasonable ground not to live with her husband. In such a case it is clear that Sub-section (4) of Section 488, Cr. P.C. applies and the wife is not entitled to maintenance.

Section 489(2) of the Cr. P.C. empowers a Magistrate to cancel or vary an order for maintenance in consequences of any decision of competent civil Court.

The Scheme of the new Code, so far as Section 125 is concerned, is almost identical to Section 488(4) of the Cr. P.C. 1898 (hereinafter referred to as 'the old Code'). Sub-section (4) of Section 488 of the old Code was to the following effect.

No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband. or if they are living separately by mutual consent.

So, because under Section 10 of the Hindu Marriage Act, 1955 as it stood prior to its amendment, judicial separation was available on deserfon, and 'desertion' with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, it was considered that if there is a decree for judicial separation in favour of the husband, it would mean that the wife had deserted the husband and, therefore, she was not entitled to maintenance in view of the provisions of Sub-section (4) of Section 488 of the old Code. Under this consideration, this Court in the aforesaid decision in Dahyalal's case 1965 (2) Cri LJ 497 (2) (supra) observed that the wife cannot get maintenance, and if at all there is an order of maintenance in favour of the wife, then the husband

can go to the Court and get the order of maintenance cancelled under Section 489(2) of the old Code. The corresponding section in the new Code is Section 127(2), which is as follows (at p. 498):

127. (2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

9. Mr. M.M. Dave, learned advocate for the wife submitted before me that the decision of this Court in Dahyalal's case 1965 (2) Cri LJ 497(2) (supra) is no longer good law in view of the amended provision of Section 125 of the new Code, wherein a divorced wife is also entitled to maintenance. His submission seems to be justified, because under Section 488 of the old Code, a divorced wife was not entitled to maintenance, while under the new amended provisions, a divorced woman is also entitled to maintenance and, therefore, while considering the amended provisions, this Court considered the various rulings in Bai Ramilaben v. Kantilal Shankerlal 1978) 19 Guj LR 29. After considering the explanation (b) to Sub-section (1) of Section 125 of the new Code, which is to the following effect:

'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

It was considered by this Court:

A plain reading of Section 125 of the Cr. P.C. of 1973 read with the Explanation thereto, clearly shows the legislative intention and its anxiety to assist the divorced woman by statutory means providing that if any person having sufficient means neglects to maintain even a woman who has been divorced or has obtained a divorce from her husband and has not remarried is also entitled to get an order for maintenance in her favour.

It was further observed therein:

From the provisions contained in Sections 10 and 13 of the Hindu Marriage Act, 1955, it is clear that when a party against whom a decree for judicial separation is passed, it is unquestionably and merely a step-in-aid of getting a decree for divorce. In case of judicial separation, a decree for divorce in favour of the husband is not yet passed and Section 125 of the Code read with Ex-1 planation clearly provides for an order of maintenance in favour of even a divorced wife. Such a woman though staying separately in view of the decree of judicial separation is entitled to maintenance under Section 125 of the new Cr. P.C.

Of course, in that judgment mere reference was made to Dahyalal's case 1965 (2) Cri LJ 497 (2) (Gai) (supra) and also to Baldev Raj's case 1970 Cri LJ 1569 (Punj & Har) (supra) but no discussion in respect of those rulings was made precisely because now there is change in the law which shows that even a divorced wife is entitled to maintenance and, therefore, a wife who is judicially separated cannot be denied the right to maintenance,

10. In the instant case, as per the argument of Mr. Padis, the husband has obtained a decree for restitution of conjugal rights in his favour. He has nightly submitted that there is a gulf of difference, between a decree obtained by the husband for restitution of conjugal rights and a decree obtained for judicial separation. It is true that in both the cases, the parties are entitled to file a suit for a decree for divorce after a lapse of one year. But in the case of a decree for restitution of conjugal rights reconciliation is open. Any party or a party against whom a decree is passed can say that he or she wants to abide by the decree and start cohabitation, and the moment there is interruption or the moment there is cohabitation within the period prescribed, no divorce can be claimed. It should be noted that in Bai Ramilaben's case 1978-19 Guj LR 29 (supra) there is reference only to Sections 10 and 13 of the Hindu Marriage Act and there is no reference to Section 9 which pertains to a decree for restitution of conjugal rights. Decree for restitution of conjugal rights passed by a Civil Court clearly confers in favour of the decreeholder, a dictate that one spouse has without reasonable excuse withdrawn from the society of the other. In the instant case after having been satisfied of the truth of the statement made by the husband in the petition, decree for restitution of conjugal rights is passed in favour of the husband. So, this decree if it is there, clearly shows that the wife has without reasonable excuse withdrawn from the society of the husband.

11. Under Sub-section (4) of Section 125 of the new Code, no wife is entitled to receive an allowance from her husband if without any sufficient reason, she refuses to live with her husband, and under Sub-section (2) of Section 127 any order made under Section 125 can be cancelled by the Magistrate in consequence of any decision of a competent Civil Court. If there is a decision of a competent Civil Court granting decree for restitution of conjugal rights in favour of the husband showing his intention to receive: the wife and that decree of restitution of conjugal rights clearly shows that the wife without reasonable excuse has withdrawn from the society of the husband, then that decree of the Civil Court clearly makes out a ground under Sub-section (2) of section 127 of the new Code. However, insistence of Mr. Dave that the decree for restitution of conjugal rights and the decree for judicial separation should be considered on par, so far as the spirit of the decision of this Court in Bai Ramilaben's case 19.7.8-19 Guj LR 29 (supra) is to be applied, does not stand to reason. When a husband files a petition for restitution of conjugal rights, he goes to the Court with full desire that the wife should go and cohabit and stay with him, and when the wife opposes the petition, it clearly shows that she does not want to go and stay with him for some reasons and if in spite of that a decree is passed, then the Civil Court definitely comes to the conclusion that' the wife has without reasonable excuse withdrawn from the society of the husband, while in the case of judicial separation a decree is passed under the old provision if desertion is proved. So, even though there is possibility of getting a decree for divorce, when there is a decree for restitution of conjugal rights and also a decree for judicial separation, so far as the decree for restitution of conjugal rights is there, the marriage ties subsist and either party is entitled to start cohabitation, while in a decree for judicial separation, the materimonial right is temporarily suspended and there is no obligation on either of the parties to have cohabitation. Therefore, in the first case if one party wants to abide by the decree, there is an end to it.

12. Under Section 13(1A)(i) and (ii) of the Hindu Marriage Act, either party to a marriage, whether solemnised before or after the commencement of the Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground 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 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. So, in both the cases, period for one year is there for non-resumption of cohabitation or absence of restitution of conjugal rights. But as considered earlier, so far as the decree for restitution of conjugal rights is concened, it can be available to the wife if it is a decree against her to obey it, and as held by the Bombay High Court in Bai Parbati's case AIR 1920 Bom 203 (supra), if the wife does not obey the decree for restitution of conjugal rights, the only coercive measure that can be pleaded against her is denial of maintenance to her. In view of this, if the husband feels that by the subsequent decree of restitution of conjugal rights he has got a right to get the order of maintenance cancelled, he can move the court under Sub-section (2) of Section 127 of the new Code by producing a certified copy and persuading the court to cancel the order by proper arguments.

13. In the result, I do not find any substance in this petition, subject to the observations made above, and therefore, the petition is dismissed with no order as to costs. Rule is discharged. Stay granted is vacated.