Vijendra B. Singh Vs Uma Vijendra Singh

Court: Bombay High Court

Date of Decision: April 2, 2014

Acts Referred: Hindu Marriage Act, 1955 â€" Section 13(1A), 23, 23(1), 23(1)(a)

Hon'ble Judges: S.C. Gupte, J; Abhay Shreeniwas Oka, J

Bench: Division Bench

Advocate: Ketan Parekh, Kunjal Sanghavi and Pratima Saundalkar instructed by K.R. Parekh and Co, Advocates for the Appellant; Sasi Nair, Advocates for the Respondent

Judgement

S.C. Gupte, J.

1. The appeal impugns a Judgment and decree passed by the Family Court at Bandra, Mumbai dismissing the Appellant-husband''s petition for

divorce under Section 13(1A) of the Hindu Marriage Act, 1955 (""Act"").

2. The Appellant and Respondent were married on 22 April 1996. A baby girl was born to them in the following year. Since 8 April 1997 the

couple started living separately. In 1998, the Respondent filed a petition for restitution of conjugal rights before the Family Court. On 3 October

2002, the petition was decreed. The parties did not cohabit even thereafter. On or about 22 September 2003, an execution application was filed

by the Respondent. On 23 November 2003, during the pendency of that execution application, the Appellant filed the present petition for divorce

under Section 13(1A) of the Act. The petition was dismissed by the Family Court on 23 August 2006. This appeal challenges that dismissal order.

3. Admittedly during the period of one year of the decree of restitution of conjugal rights, there was no cohabitation between the parties. The only

question before the Family Court was whether such non-restitution was on account of any fault of the Appellant. The learned Judge of the Family

Court, after a full-fledged trial and upon consideration of evidence led by the parties therein, held that the Appellant prevented the Petitioner from

fulfilling the decree for restitution of conjugal rights and as a spouse at fault, could not claim a decree for divorce on the ground of non-restitution

for the statutory period after the decree of restitution.

4. The learned Counsel for the Appellant contends that the learned trial judge has arrived at a finding of fault of the Appellant and consequent

disentitlement of the Appellant from obtaining a decree of divorce, under Section 23 of the Act, without framing such an issue; that the pleadings

and evidence on record does not make out any wrong on the part of the Appellant within the meaning of Section 23; that mere refusal to

cohabitate, on the part of the Appellant, assuming there was any, does not amount to a wrong within the meaning of Section 23; and that the

spouses have as a matter of fact not cohabited since 1997 and there is an irretrievable breakdown of marriage. The learned Counsel submits that

the impugned order deserves to be set aside and decree granted or at any rate the matter may be remanded to the trial court for a fresh hearing on

the issue of wrong under Section 23. The learned Counsel relies on the judgments of the Supreme court in the cases of Dharmendra Kumar Vs.

Usha Kumar, , and Satish Sitole Vs. Smt. Ganga, , of our court in the cases of Vatsala Niranjan Gulwade vs. Niranjan Ramchandra Gulwade

1981 Mh.L.J. 917 and Naveen Kohli Vs. Neelu Kohli, , and of Punjab and Haryana High Court in Amarjit Kaur @ Karamjit Kaur Vs. Jagsir

Singh, and Gurmeet Kaur Vs. Harbans Singh, , respectively.

5. The learned Counsel for the Respondent submits that both parties led evidence on the circumstances that led to non-restitution during the

statutory period; that the evidence on record clearly shows that restitution could not be achieved due to the Appellant driving her away and

refusing to allow her to cohabit; that the trial court found so; and that this conduct on the part of the Appellant amounts to a wrong within the

meaning of Section 23(1)(a) of the Act. The learned Counsel relies on several judgments and in particular, Smt. Saroj Rani Vs. Sudarshan Kumar

Chadha, , T. Srinivasan Vs. T. Varalakshmi (Mrs), , and Smt. Gopi Bai Vs. Govind Ram, , in support of his contentions.

6.The Respondent''s case before the trial court was that she made several honest attempts to join the matrimonial home after the decree of

restitution, but the Appellant foiled all these attempts and did not allow any cohabitation, and that the Appellant cannot take advantage of his own

wrong and get a decree for divorce on the ground of non-restitution during the statutory period. The Respondent pleaded, and gave evidence in

respect of, five separate instances following the decree of restitution of conjugal rights, where she attempted to resume cohabitation and was

prevented by the Appellant. These are briefly narrated below:

(i) After the decree of 3 October 2002, the Respondent called the Appellant on 5 October 2002 for a personal meeting. The parties met

accordingly. During this meeting, the Respondent requested the Appellant to forget the past and admit her to the matrimonial home for the sake of

their daughter. The Appellant flatly refused the request and left the meeting;

(ii) On 30 December 2002, the Respondent along with her father and two friends, went to the matrimonial home with her bag and baggage.

(Before going there, the Respondent had addressed a letter on 21 December 2012 to the Appellant expressing her desire to stay with the

Appellant; the letter came back ''unclaimed''; the Respondent''s friend, one Pushpa, also met the Appellant trying to convince the latter to take

back the Respondent.) The Appellant''s mother opened the door, but immediately closed it on seeing the Respondent. The Respondent kept

waiting there and after 15 minutes rang the doorbell again. This time the Appellant himself opened the door and started abusing her in filthy

language, calling her ''Randi''. The Appellant pushed the Respondent out of the door. This incident was reported by the Respondent to the police

by lodging an N.C;

(iii) On 19 February 2003, once again the Respondent made an attempt and went to the matrimonial home. This time the Appellant and

Respondent had a discussion, during which the Respondent insisted that she was ready to stay with the Appellant, but the Appellant refused to

take her back. After this incident, the Respondent addressed two letters to the Appellant, requesting him to take her back, made phone calls and

requested for personal meetings, but the Appellant paid no heed;

(iv) On 30 August, 2003, one more attempt was made by the Respondent. The Respondent went to the matrimonial home with her father. The

house was locked. She thereafter went to a relative''s house, and met the Appellant''s mother there. The Appellant''s mother not only refused to

allow the Respondent to come to stay in the matrimonial home, but abused the Respondent in filthy language and threw her out of the house. Even

this incident was reported by the Respondent to the police on the following day. One more communication was addressed by the Respondent to

the Appellant after this incident on 3 September 2003;

(v) After she failed in all these attempts, on 22 September 2003, the Respondent filed an execution application before the Family Court at Bandra,

Mumbai for enforcement of the decree of restitution of conjugal rights. Immediately after the notice of this application was served on the Appellant,

the Appellant moved the present petition for divorce.

7. These incidents have all been deposed to by the Respondent herself. The testimony is consistent with her pleadings. The only cross-examination

of the Respondent on this testimony was as follows:

It is not correct to say that when I had been to the house of the petitioner on 30/12/2002 I was not carrying any luggage and the daughter. It did

happened that before going to the house of the petitioner initially I had been to the police station on the very day. It is not correct to say that the

contents of my affidavit in para No. 4 and 5 are false in toto and that is so averred just to create the evidence. It is not correct to say that I have

falsely alleged that I had been to the house of the petitioner at the time Diwali in 2005 and I have falsely alleged so to create the evidence.

Apart from the Respondent herself, the Respondent''s father and two friends, who had accompanied her to the matrimonial home on 30 December

2012, were also examined. These witnesses corroborated the testimony of the Respondent. There is hardly any cross-examination of these

witnesses apart from a mere suggestion of a false deposition at the instance of the Respondent. This oral evidence is also further corroborated by

documentary evidence in the form of contemporaneously made police complaints and communications to the Appellant.

8. The learned trial judge accepted this evidence and came to a conclusion that the Respondent was eager to comply with the decree for restitution

of conjugal rights but the Appellant prevented her. The learned Judge held that the fault and / or the wrong lies with the Appellant, and he cannot

be allowed to take advantage of his own wrong and claim a decree under Section 13(1A).

9. Firstly, the contours of the controversy were clear to both the parties with a focus on the plea and proof of a wrong on the part of the Appellant

which prevented restitution between the parties despite the decree of restitution of conjugal rights. Both parties accordingly went to trial and led

their evidence. In these premises, the dismissal of the divorce petition cannot be faulted for non-framing of an issue under Section 23 of the Act.

Secondly, there is adequate proof of a wrong on the part of the Appellant which caused non-restitution of conjugal rights despite the decree. The

appreciation of evidence by the learned trial judge cannot be faulted on any ground.

10. The Supreme Court, in the case of Dharmendra Kumar (supra) held that the expression ""petitioner is not in any way taking advantage of his or

her wrong"" occurring in Clause (a) of Section 23(1) does not apply to taking advantage of the statutory right to obtain dissolution of marriage

under Section 13(1A) and that the relief of dissolution cannot be denied to the spouse against whom a decree of restitution has been passed. The

Court held that the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion; that it must be misconduct

serious enough to justify denial of the relief to which the spouse is otherwise entitled. To the same effect is the decision of the Supreme Court in the

case of Saroj Rani (supra). The decisions of this Court in the case Vatsala Niranjan Gulwade (supra) and of the Punjab & Haryana High Court in

the cases of Amarjit Kaur and Gurmeet Kaur (supra) are also on the same point. In the present case, there is ample evidence of the Appellant

husband not just showing disinclination to resume cohabitation, but blocking every attempt of the Respondent wife at cohabitation and ill-treating

her and driving her away from the matrimonial home. These acts can be safely called positive wrongs amounting to a misconduct within the mischief

of Section 23(1)(a) of the Act. The conduct amounts to a wrong contemplated under Section 23(1)(a) of the Act.

11. In that view of the matter, there is no merit in this appeal. The appeal is dismissed. There shall be no order as to costs.