(1974) 08 CAL CK 0026

Calcutta High Court

Case No: F.A. No. 97 of 1971

Nandita De		APPELLANT
	Vs	
Monoranjan De		RESPONDENT

Date of Decision: Aug. 19, 1974

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 2
- Hindu Marriage Act, 1955 - Section 13, 13(1A)(I), 23(1A)(II)

Citation: 79 CWN 48

Hon'ble Judges: N.C. Mukherjee, J; C.N. Laik, J

Bench: Division Bench

Advocate: Bhupendra Nath Mitra, for the Appellant;Gopal Chandra Chakraborty and Narayan Chandra Bhattacharjee, for the Respondent

Final Decision: Allowed

Judgement

N.C. Mukherji, J.

The husband brought a suit for restitution of conjugal rights in 1964 and got a decree on 11.1.65. On 10th of April, 1967 the husband filed an application for divorce u/s 13 of the Hindu Marriage Act on the ground that two years had already passed since the passing of the decree for restitution of conjugal rights but the wife failed to comply with the said decree for the said period. The wife previously contested the suit for restitution of conjugal rights. She also contested the suit for divorce. In the present suit the wife''s case is that in obedience to the decree for restitution of conjugal rights, she with her daughter went to the house of the husband at 406, Dum Park on 21.5.65 to live there, but the husband and his parents refused to allow the wife to stay and to live with the husband at his said residence. That by a verified petition dated the 8th of June, 1965, a copy of which was served upon the Advocate of the husband, the wife intimated all the above facts to the learned 7th Court of the Additional District Judge at Alipore which "passed a decree for restitution of conjugal rights. It is her positive case that she has been prevented

by the husband from going back to him and live with him and that being so the husband cannot take the benefit of his own wrong and claim divorce. That the wife was always and is still willing to live with the husband. It is also the wife''s case that immediately after the decree for restitution of conjugal rights, she wrote to her husband two letters, one on 25.1.65 and the other on 2.8.65, but none of the letters was replied to by the husband. The learned Additional District Judge found that as two years elapsed from the date of the passing of the decree for restitution of conjugal rights and as it was in evidence that there was no resumption of conjugal relationship between the husband and the wife since the passing of the decree and that the wife could not prove that it was the husband who made it impossible for her to live with him, the learned Judge decreed the suit in favour of the husband. Being aggrieved the wife has come up in appeal before us.

2. Mr. Bhupendra Nath Mitra appearing on behalf of the appellant contends in the first place chat the learned Additional District Judge did not properly consider the effect of the petition which was filed by the wife on 8th of June, 1965, before the Court which passed the decree for restitution of conjugal rights. The facts and circumstances were stated clearly by which she was precluded by the husband from going back to him and live with him as wife, a copy of the said petition was served on the lawyer for the husband. The learned Judge without giving any consideration to the said petition simply disposed of the said petition by one word, namely, "rejected". Mr. Mitra contends that the petition should be treated as a petition u/s 47 of the CPC and the petition was filed in order to show that there was sufficient compliance by the wife with the decree for restitution of conjugal rights. The learned court below was wrong in dismissing the application summarily and ought to have enquired into the merits of the said petition. He further contends that the learned Additional District Judge who passed the decree for divorce was also wrong to think that such a petition was surreptitiously filed on behalf of the wife. Though in another place of the judgment, the learned Judge observes "if such a petition would have been filed before the court which passed the decree for restitution of conjugal rights, the position would have been different". At the time of making such observation it is obvious that the learned Judge was unmindful of the fact that such a petition was actually filed before the court which passed the decree for restitution of conjugal rights before the initiation of the proceeding for divorce. In support of the contention that such a petition is to be regarded as a petition u/s 47 of the Code of Civil Procedure, Mr. Mitra relies on a Supreme Court decision reported in M.P. Shreevastava v. Mrs. Veena, AIR 1967 Supreme Court 1193. In this case the husband obtained a decree for restitution of conjugal rights against his wife. The wife made various attempts to persuade the appellant to take her back into the marital home, but was unsuccessful. She then applied to the Court which passed the decree for an order that the decree be recorded as satisfied. There was, at that time, no pending application by the appellant for execution of the decree or for a decree for divorce. On the question, whether the application of the respondent was maintainable either

under Order 21, Rule 2 or u/s 47 of the Civil Procedure Code, it was held" "that the application was maintainable u/s 47 but not under Order 21, Rule 2". It was further held that "a question relating to execution, discharge or satisfaction of a decree may be raised by the decree-holder and the pendency of an application for execution by the decree-holder is not a condition for the exercise of the Court''s power". Without saying anything as to the correctness or otherwise of the statements made by the wife, the case as made out by the wife is exactly the same as the case which was made by the wife in the case just now referred to. Such being the position it must be held that the application which was filed by the wife on 8th of June, 1965, was an application u/s 47 of the CPC and the learned court below was wrong to reject the said application summarily. The learned Judge who disposed of the application u/s 13 was also wrong in overlooking the effect of the said petition.

3. Mr. Gopal Chandra Chakraborty, learned Advocate appearing on behalf of the husband submits that when the said application was rejected there was an end of the whole affair as the wife did not come up higher against the said, order of rejection and that being so the learned Judge who disposed of the application section 13 was perfectly right in ignoring the said petition. We are unable to agree with Mr. Chakraborty and hold that due consideration ought to have been given by the learned Judge to be said petition and the same ought not to have been dismissed summarily.

4. Mr. Mitra next contends that the learned Judge was all the time placing onus on the wife and he held that the wife failed to prove that she made any attempt to comply with the decree for restitution of conjugal rights. As has been stated earlier, besides the filing of the said petition about which discussion has been made above, the wife filed copies of two letters to show that she actually made ''attempts to live with the husband. Besides, she examined herself and her father to prove her case. Mr. Mitra further contends that the learned Judge proceeded on the footing that after the passing of the decree for restitution of conjugal rights the husband is required to show nothing more than that a period of two years had elapsed from the time of the passing of the decree for restitution of conjugal rights and during this period there has been no resumption of conjugal relationship between the parties. Mr. Mitra contends that the learned Judge was absolutely wrong in proceeding in such a manner. In order to get a decree for divorce, it is incumbent on the husband to show that he made sincere efforts to bring back his wife but the wife did not comply with the decree for restitution of conjugal rights. In support of the contention Mr. Mitra refers to a decision reported in (1) Captain B.R. Syal v. Smt. Bam Syal AIR 1968 Punjab 489. It was held "The significant feature of petition for restitution of conjugal rights is that it is a remedy aimed at preserving the marriage and not at dissolving it, as in the case of divorce or judicial separation.....That being the purpose of the petition for restitution of conjugal rights, the petitioner must show that he is sincere in the sense that he has a bonafide desire to resume matrimonial cohabitation and to render the rights and duties of such cohabitation. A

petitioner has, there fore, to satisfy the Court of his sincerity in wanting to resume cohabitation with the respondent; if the decree is disobeyed, then petitioner may move the court for obtaining a decree for dissolution of marriage in accordance with law and procedure". Mr. Mitra next refers to a Division Bench decision of this Court reported in (6) Smt. Kanak Lata Ghose v. Amal Kumar Ghose AIR 1970 Calcutta 328. It was there observed. "It may also be pointed out that the suit for restitution of conjugal rights was decreed by the High Court solely for the purpose of giving a fair trial to the offer made by the'' husband to take back the wife. Hence, it was incumbent upon the husband after disposal of the said suit by the High Court to keep open that offer by reiterating it after the passing of the decree. It was not the intention of the High Court that the husband would merely stand by and watch the situation after obtaining the decree for restitution of conjugal rights. The High Court intended that the initiative taken by the husband in filing a suit for restitution of conjugal rights on an offer to take her back should be maintained even after the passing of the decree. Hence unless we find that the husband offered to take her back even after the passing of the decree for restitution of conjugal rights, made appropriate arrangements and took necessary steps to facilitate the wife''s return to him either in family dwelling house at Naihati or in a separate matrimonial home we cannot say that the wife failed to comply with the decree for restitution of conjugal rights". Mr. Chakra-borty submits that Their Lordships in this case did not lay down any general proposition but held as above with reference to the facts of that particular case. It is true that each case is to be decided on the facts and circumstances of that case but on going through the entire judgment carefully we find that the learned judges laid down the principle which has been urged by Mr. Mitra.

5. Mr. Chakraborty on the other hand submits that it is not at all necessary for the husband to take any initiative. He relies upon the provisions of law as embodied in Section 13 (1A) (I) of the Hindu Marriage Act which simply state that any party can file an application for divorce after a lapse of two years from the passing of the decree of the restitution of conjugal rights. It is even open, for the party to file such an application against whom a decree has been passed. That being so, it does not stand to reason that the husband in whose favour a decree has been passed will have to make efforts to bring his wife back. In support of the contention Mr. Chakraborty first refers to a decision reported in (5) Mst. Kamlesh Kumaru v. Kartar Chand Diwan Singh, AIR 1962 My. 156. In this case the husband obtained a decree for restitution of conjugal rights. He failed to execute the decree. It was held "that his failure does not amount to non-compliance and the wife cannot seek dissolution on the ground of such failure". This decision cannot be held as good law at the present moment in view of the amended provision'' of section 23 (1A) (II) which lays down that any party to the proceeding can file an application for divorce. Mr. Chakraborty next refers to a decision reported in (2) Ishwar Chander Ahluwala v. Smt, Promila Ahluwala AIR 1962 Punjab 432. In this case it was held that "the

petitioner need not prove any efforts to bring about compliance with decree for restitution of conjugal rights. Mere admission of the opposite party that she had made no efforts to comply with the decree is quite sufficient." The facts of this case are completely different from those of the present case. In this case the wife admitted that she did not make any effort to comply with the decree, while in the present case it is the wife''s definite case that she made every effort to comply with the decree. Moreover AIR 1968 Punjab 489 is the latest decision of the same court which lays down a different principle. The last case referred to by Mr. Chakraborty is reported in (4) Madhukar Ahasbar Sheoraj v. Smt. Saral Madhukar Sheoraj AIR 1973 Bombay 55. The facts of this case are also different and the application for divorce arose on the basis of a decree passed for judicial separation. Considering-all the decisions referred to above and relying very much cm the Bench decision of this Court reported in AIR 1970 Calcutta 328 we are of the opinion that if after getting a decree for restitution of conjugal rights the husband stands by and does not make any effort to bring his wife back, he cannot, as a matter of course, get a decree for divorce simply on the ground that a period of two years has elapsed and that during the said period the wife did not live with him. As we have stated earlier the application filed by the wife on 8th of June, 1965, has not been duly considered by the learned Judge. He has failed to consider the case from the correct stand point as indicated above. For all the reasons we are inclined to send the case back for hearing afresh the application u/s 13 of the Hindu Marriage Act in the light of the observations made above. The parties will be allowed to adduce further evidence. If the parties adduce further evidence the court will consider that new evidence, if any, along with the evidence on record and dispose of the application in accordance with law.

In the result the appeal is allowed, on contest. The judgment and decree passed by the learned Additional District Judge are set aside. The suit is sent back to the learned Judge for disposal in the manner as indicated above. There will be no order for costs in this appeal.

Laik, J.

I agree.