
(1875) 01 CAL CK 0003

Calcutta High Court

Case No: Special Appeal No. 2221 of 1873

Gatha Ram Mistree

APPELLANT

Vs

Moohita Kochin Atteah
Domoonee and Another

RESPONDENT

Date of Decision: Jan. 9, 1875

Final Decision: Allowed

Judgement

Markby, J.

In this case the plaintiff sues for the restitution of his conjugal rights. The defendants (the alleged wife and her mother) denied the marriage. The first Court found that the marriage had been solemnized according to the custom of the caste to which the parties belonged, the principal feature in the ceremony being the giving of a feast to their own community. The Deputy Commissioner has reversed this decision on grounds which appear to us altogether arbitrary. He does not dispute that the ceremony took place, but thinks it does not constitute a formal marriage ceremony so as to be binding. No reasons are given for this opinion, which is directly contrary to the evidence, and the consequences of such a decision might be very serious. We, therefore, Set aside the judgment of the Deputy Commissioner, and order him to retry the appeal.

2. This is the judgment of the Court. But I think it right to add, on my own behalf, some observations upon the form of the decree and the nature of the proceedings which may be taken) upon it. This seems to me the more necessary inasmuch as the first Court in this case made a decree in a form which this Court has expressly and authoritatively declared to be erroneous.

3. The cases in which it has been decided that a decree in favor of the husband whose marital rights are withheld ought to be made, are to be found in Jhotun Beebee v. Ameer Chand 1 I.J., N.S., 317 : S.C., 6 W.R., 105, Koobur Khansama v. Jan Khansama 8 W.R., 467, and Moonshee Buzloor Ruheem and Jodonath Bose .

4. The decrees in the two former cases declared the husband "entitled to his conjugal rights," and ordered the wife "to return to his protection." The Privy Council did not make any decree.

5. Up to the point of saying that the suit will lie, and of making a decree to the above effect, there is neither doubt nor difficulty. Whenever the law recognizes that the relation of husband and wife exists, it also recognizes that the husband is bound to live with the wife, and the wife with the husband: and if that obligation be denied by either of the parties to the marriage, Courts ought certainly to declare the right to exist. If also any person should interfere and prevent the wife from returning to her husband, or the husband to the wife, there is no difficulty, as far as I can see in punishing this invasion of the rights of others, and even in compensating the injured party to some extent. The real difficulty arises when we come to deal with a refusal to perform the conjugal duties by one of the parties to the marriage, after the existence of the matrimonial relation has been ascertained.

6. It appears to have been at one time thought that, in this country, the duty of cohabitation should be enforced by seizing and making over the recreant party bodily to the claimant and cases are mentioned in which this has been directed in the case of a wife refusing to return to her husband. I am not aware of any case in which it has been suggested that similar violent measures should be taken against a husband refusing to receive his wife: and the cases in which a wife has so been treated are obviously based upon the notion that the husband purchases the wife at marriage, and that she thereby becomes an article of his property. Widely as this notion has prevailed in the world, I need scarcely say that it is wholly abhorrent to the Hindu law.

7. In what way then is the decree to be enforced? As far as I have been able to discover there is but one recent case direct upon this point, and as I am unfortunately unable to agree with the opinion there expressed, greatly as I respect it, I feel myself bound to consider the question at some length.

8. Macpherson, J., in the case of *Jhotun Beebes v. Ameer Chand* 1 I.J., N.S., 317 : S.C., 6 W.R., 105, after expressing his opinion that the person of the wife cannot be taken in execution, says that "a suit will lie for a declaration that the husband is entitled to his marital rights and for an order that the wife do return to him and live with him. Such an order is an order "for the performance of a particular act" within the meaning of s. 200 of Act VIII of 1859; and if the wife refuse to obey it, the decree may be enforced, as that section provides, by the imprisonment of the wife, or by attachment of her property, or by both imprisonment and attachment." Seton-Karr, J., in the same case adhered to the view that the wife could be delivered over bodily to the husband in execution. Jackson, J., concurs with Macpherson, J. in thinking that there can be no delivery of the body of the wife to her husband. This judgment, however, is not quite so explicit as to the mode in which the decree is to be enforced, and no doubt that question was not strictly speaking under judicial consideration.

9. Assuming, as laid down in that case and in the case of *Koobur Khansama v. Jan Khansama* 8 W.R., 467, that the decree ought to contain an order to the wife to return to her husband's protection, still I doubt whether such an order is an order "for the performance of a particular act" within the meaning of s. 200 of the Code of Civil Procedure. I think some meaning is to be given to the word "particular," and an order to a wife to return to her husband's protection cannot, in my opinion, be called an "order for the performance of a particular act." It clearly could not be said that such a decree would be obeyed simply by a return to the husband's house only. I think the decree is intended as an order to the wife to live with her husband, to remain in his house, and there to perform the duties of a wife. Now, if we accept the view that marriage is a contract, and that such an order is an order for specific performance of the contract we are at once met by this difficulty that it would be contrary to well-established principles that such a decree, to be so enforced, should be made at all. It is not, I believe, considered to be within the province of the Court of Chancery in England, and I have no reason to believe that it is within the province of the Courts here, to decree specific performance of continuous duties which the Court has no means to enforce except by repeated infliction of fine and imprisonment. This I understand to be the opinion expressed by the Lord Chancellor Cranworth in *Blackett v. Bates* L.R., 1 Ch., 117 overruling the decision of Wood, V.C., who had attempted to do something of the kind, but which attempt the Lord Chancellor characterized as "perfectly novel." This seems to be in accordance with previous decisions. There is, no doubt, a good deal of discretion in such cases, but I do not think a contract of marriage could possibly be enforced without taking a very different view of the powers of the Courts of this country from that taken of their own powers by English Courts of Chancery. The case most like this is that of contracts of partnership which are not specifically enforced, the reason frequently given being that it would be like attempting to enforce a contract of marriage--Lindley on Partnership, p. 991. Moreover, though I feel bound emphatically to dissent from the opinion of Seton-Karr, J. that a wife's person can be seized in execution of decree, I think there is force in his observations on the proposed proceedings under s. 200, where he says, "nor do I think that the provision for imprisonment of the party (in s. 200) against whom the decree is made and for attaching his property ought, or was intended, to apply to such a case. Surely it would be a harder course to imprison a reluctant wife than to deliver her to her husband who wishes to cohabit." Seton-Karr, J., seems to have thought that, if you are to compel the woman to cohabit at all, then the direct way of doing so, by delivering her person to her husband, is not more inhuman, and infinitely more effectual, than throwing her into prison; and so far I am disposed to agree with him.

10. It appears to me, however, that such a decree cannot be considered as one for the specific performance of a contract at all. I am not unwilling to look upon marriage as a contract but I do not think it is a contract which Courts of law would be wise to undertake specifically to enforce. I think the case is one of an entirely exceptional kind. The Privy Council in *Moonshee Buzloor Ruheem and Jodonath Bose* have held that a suit for the restitution of conjugal rights will lie. I do not think any stress should be laid on the term

"restitution of conjugal rights" as there used, or that it expresses in any way definitely what sort of a decree should be given, or what proceedings can be taken subsequent to decree. This decision, so understood, I cheerfully accept; because it appears to me that it is absolutely necessary that a husband and wife should have some means of obtaining an authoritative decision as to whether or no they really stand in that relation. If a decision cannot be obtained binding on all the world, it is at least desirable that one should be obtained binding upon themselves, and upon which other persons may act with a reasonable degree of safety. But I consider the Privy Council to lay down no more than that a suit to ascertain the existence of this relation can be maintained, and carefully to abstain from laying down any final propositions of law upon the exact form of decree, or exact mode of enforcing the decree. All the rest of the judgment is intended, as I understand it, to call attention to the importance and gravity of the matter, and to overrule emphatically the contention then put forward at the bar, that no suit of the kind would lie in India at all.

11. I do not, indeed, think it likely that any one will contend that the bare declaration of the existence of the relation, even if not "relief in the technical sense of that term, is not of the greatest value and assistance to the parties: what seems to be considered is that the Courts must in order to be logically consistent follow up this declaration with all the powers which they possess.

12. That the Courts, however, are not hemmed in by any such absolute necessity is, I think, indisputable. The simplest and most direct and indeed the only really effectual mode of enforcing the obligation, and, therefore the one to be adopted, if the Courts have no discretion in the exercise of their powers, is to bring the parties together by force. But this has been universally repudiated, not only in India, as is above shown, but in every other country, as shocking to our feelings of humanity. The alternative of forcing the recalcitrant party into compliance by imprisonment is a course which to my mind has little to recommend it by comparison, and though not quite as universally condemned has also been very generally repudiated. During the anxious inquiry which I have thought it my duty to make upon this subject, I have ascertained that upon the continent of Europe the right both of the husband and of the wife to cohabitation (in the etymological sense), the husband selecting the place of residence, is everywhere considered as altogether beyond dispute. So also is the right to proceed against and to punish any third person who detains a wife from her husband; so also is the right of the husband to maintain a suit against the wife if she refused to acknowledge the marital rights. But all attempts at enforcing this duty by compulsion have been abandoned or very nearly so. The only trace of compulsion which I have found is in some smaller States of Germany, where a very small fine or a few days' simple confinement of the woman appears to be allowed. If this produces no effect, no further punishment can be inflicted. The Prussian Courts have expressly decided that no direct compulsion whatever can be applied. The matter has been the subject of considerable discussion in Austria and in France. In the latter country, I am informed on the highest authority, that the question has been settled against the use

of compulsion. In Austria I am not sure that the question has been finally set at rest, but I have reason to believe that the leaning is strongly against the use of any such means.

13. If we consider the law of England, I think the difficulties about the Civil Court attempting to enforce by compulsion the observance of conjugal duties are in no way lessened. Perhaps some persons would be inclined at first sight to treat the law of England as affording an example of the almost unbounded exercise of judicial power in this direction: and if we look to forms and words only it is so. The old Ecclesiastical Courts, that is, the Church, claimed to have the power to enforce specifically the performance of conjugal duties in their minutest particulars, and gave decrees accordingly. But inasmuch as these Courts soon found that they had no effectual independent power of enforcing their decrees when pronounced (3. Bl. Com., 101), this claim was not so substantial as at first sight appears. I am unable to find any exact information in any books available to me as to the exact proceedings which could be taken upon the decree of an Ecclesiastical Court for the restitution of conjugal rights: undoubtedly the Ecclesiastical Court had a right to call in the ordinary civil power in aid of its own weak authority (Black ubi supra), but whether from the difficulty of the procedure, or the contempt entertained for those who invoked the assistance of the Court for such purposes (3 Black., 94), such extremities were, I believe, very rarely proceeded to. No doubt the Court which now exercises jurisdiction in matters matrimonial in place of the old Ecclesiastical Courts has the same powers of enforcing its decrees as the Court of Chancery, but I can only find three cases in the reports since the new Court was established in which writs have been actually issued. It is significant that in two of these cases the recusant party had already escaped out of the country.

14. But surely when we look to the law of England for a guide, it is where that law is in harmony with the general principles of equity and jurisprudence that we should adopt it, not where it is exceptional. That the English law on the subject of enforcing conjugal right is exceptional, I have no manner of doubt. It is based on the Canon Law, or the law of the Church; and, as far as I can gather, the following are the propositions which that law maintained:--(i) that all sexual intercourse except between husband and wife, is a mortal sin; (ii) that marriage is a divine institution entirely under the control of the Church; (iii) that all marriages not sanctioned by the Church are unlawful; (iv) that divorce is impossible; (v) that the Church can release the parties from their conjugal duties; (vi) that they can enforce these duties in the minutest particulars. The law of England has in modern days to a very great extent rejected these pretensions and modified these views, but they have not as yet been radically removed; rather, however, in my opinion because they produce but small practical evils than from any approval of the principles on which they rest.

15. The state of the law in America seems to me to show very clearly how repugnant it is to the principles which govern the ordinary Civil Courts to attempt to enforce the performance of conjugal duties by compulsion. The common law in America on the subject of marriage is the law as it stood in England when these colonies were founded:

including, therefore, the law of marriage as administered in the Ecclesiastical Courts and based originally upon the Canon Law. But the colonies though they take the law of the mother country, do not take her Courts, and there never have been in America Courts of ecclesiastical jurisdiction: solely, therefore, because no Court has been specially vested with the particular power of enforcing the performance of conjugal duties, no Court in America ever has enforced these duties; and that part of the law has in fact become obsolete; see Bishop on Marriage and Divorce, Ch. iv, passim. Nothing could show more strongly how completely this portion of the English law stands apart from the ordinary law of the country.

16. It appears to me, therefore, that if we were to hold that a Court could enforce the continuous performance of conjugal duties by unlimited fine and imprisonment, we should place the law of this country in opposition to the law of the whole civilized world, except the ecclesiastical law of England. That the ecclesiastical law of England is not binding upon or suitable to the non-Christian inhabitants of this country, even where there is jurisdiction to apply it, is fully shown by the decision of the Privy Council in 6 M.I.A. 348 (Privy Council). The remedy for matrimonial grievances must (as there shown) be applied by the ordinary Civil Courts, acting upon ordinary legal principles and applying the law of the community to which the parties belong. There is nothing which leads me to suppose that the Hindu law is less humane in this matter than that of other civilized countries, or that severer remedies are required here in case of matrimonial differences than have been found effectual elsewhere. For these reasons, although I think that the existence of the relation of husband and wife ought to be enquired into in this case, and if it exist, declared and though I think there is no reason why the decree should not order the wife to return to her husband's protection, as has been done in the other cases, and as her duty clearly is, yet I cannot give my assent to the proposition that this decree is enforceable by the mode pointed out in s. 200 of the Code of Civil Procedure. That question has not yet formally arisen for determination, but as in the other cases, whilst making a decree, an opinion has been expressed as to how it is to be enforced, I have thought it right to express my opinion also.