RAJASTHAN HIGH COURT

Smt. Gopi Bai

Vs.

Govind Ram

D.B. Civil Misc. Appeal No. 1558 of 2001
(Shiv Kumar Sharma and R.S. Chauhan, JJ.)

05.02.2007

JUDGMENT

R.S. Chauhan, J.

1. Like a leaf in autumn, the wife has been drifting in troubled waters. Abandoned by a husband, forced to look after her child, the wife is challenging the judgment dated 6.9.2001 passed by the Family Court No. 1, Jaipur whereby the learned Judge has granted divorce in favor of the husband.

2. The factual matrix of the case is the wife and the husband (henceforth to be referred to as 'the wife' and 'the husband' respectively, for short) were married in 1984 according to the Hindu rites and customs. During the wedlock, a girl, Usha was born on 2.1.1990. After the birth of the daughter, the wife was allegedly thrown out of her matrimonial home. She, therefore, decided to go back to her parental home. Unable to look after herself and the child, she filed an application for maintenance under Section 125 of the Criminal Procedure Code (henceforth to be referred to as 'the Code' for short). She also filed an application under Section 9 of the Hindu Marriage Act, 1955 (henceforth to be referred to as 'the Act', for short). Vide order dated 16.09.1993, her application under Section 9 of the Act was allowed and the husband was directed to resume cohabitation with the wife. However, according to the husband, he refused to co-habit with the wife. Instead, he filed an application against the wife under Section 13 of the Act on the ground of non-resumption of cohabitation by the wife.

3. In the divorce petition, the husband claimed that after the delivery of the child the wife did not return to the matrimonial home. The reason for her non-return was that the husband's younger brother was engaged to the wife's younger sister. But, subsequently, the wife's family broke off the said engagement. The husband's family

tried their level best to prevent the marriage of the wife's sister to another person. But, her family succeeded in getting her married off to one Mr. Chetandas. Further according to the husband in 1991, the wife filed an application under Section 125 of the Code and another application under Section 9 of the Act. He and the members of the community tried to convince the wife to return to her matrimonial home. But she refused to do so. He further claimed that vide order dated 16.9.1993, the learned Judge had allowed the application under Section 9 of the Act for restitution of conjugal rights in favor of the wife. However, despite the said decree in favor of the wife, she has not resumed cohabitation with the husband. Hence, he is entitled for divorce on the non-compliance of the decree for restitution of conjugal rights.

4. The wife filed her written statement against the said application. In her written statement, she narrated her tale of woes. According to her, the main root-cause for her troubles is the fact that her family refused to marry her younger sister to her younger brother-in-law (Dewar). Ever since the breaking off the said engagement, the husband's family members are against her. According to her, the in-laws family, including her husband, had kicked her out of the matrimonial home. Ever since then, she has been living with her parents. She had filed an application under Section 125 of the Code and another application under Section 9 of the Act. According to her, the husband had resumed co-habitation for few days, but because of his family pressure he had abandoned her. Hence, the non-resumption of cohabitation is not by her, but by the husband.

5. On the basis of the pleading, the learned Family Court had framed two issues. After considering the oral and documentary evidence, the learned Judge had granted the divorce in favor of the husband. Hence, this appeal before this court.

6. Mr. Ashvin Garg, the learned counsel for the wife, has argued that the husband had filed the divorce petition solely on the ground that the wife did not resume cohabitation with him despite the existence of the decree for restitution of conjugal rights in favor of the wife. Secondly, the learned Judge has failed to appreciate the fact that the decree for restitution of conjugal right was in favor of the wife and against the husband. Thus, it was the husband's duty to fulfill the said decree and not of the wife. According to the husband, he has never resumed cohabitation with the wife. Therefore, it is the husband who has committed "a wrong". Although, it is the husband who was at fault, as he did not follow the direction of the court, yet he has been permitted to take advantage of his own wrong. Thirdly, the learned Judge has failed to appreciate the scope and ambit of Section 23 of the Act. According to the said section

a spouse cannot be permitted to take advantage of his own wrong. It is the husband who has thrown the wife and the daughter out of the matrimonial home. It is the husband who has not cared to look after their needs. It is the husband who has not resumed co-habitation despite the direction of the court. Yet, his favour. Thus, the court has not applied section 23 of the Act properly. In order to support has contention, the learned counsel has relied upon the case of *T. Srinivasan v. T. Varalakshmi (Mrs.)* [1]

7. Mr. A.K. Pareek, the learned counsel for the husband has argued that non-resumption of cohabitation by the husband, in case where a decree for restitution of conjugal rights has been passed in favour of the wife, does not constitute as a wrong. Therefore, merely because the husband has refused to resume his cohabitation with the wife, it cannot be said that he has committed a wrong. Thus, there is no question of the husband taking benefit of his own wrong. In order to substantiate this contention, he has relied upon the case of *Dharmendra Kumar v. Usha Kumar,* [2] Therefore; he has supported the impugned judgment.

8. We have heard both the learned counsels for the parties and have perused the impugned judgment.

9. The issue before this Court is, in case a decree for restitution of conjugal rights has been granted in favor of the wife and in case the husband still refuses to resume his cohabitation with the wife, whether such a conduct amounts to a 'wrong' under Section 23 of the Act or not ? This issue is no longer *res integra* as the issue has recently been settled in the case of T. Srinivasan (supra). In the case of Dharmendra Kumar (supra), a judgment decided by the Division Bench of the Hon'ble Supreme Court, the wife was granted a decree of restitution of conjugal rights. Since there was no resumption of cohabitation, she filed an application under Section 13(1)(a) of the Act for divorce on the ground of non-implementation of the restitution decree. The wife (husband?) contended that he had tried to bring the wife back to the matrimonial home, but she refused to resume cohabitation. Therefore, she cannot take the benefit of her own wrong and claim a divorce on the ground of non-implementation of the restitution of decree. Since the trial court still granted a decree of divorce in favor of the wife, which was further confirmed by the High Court, the husband filed a S.L.P. before the Hon'ble Supreme Court. While dismissing his S.L.P., the Hon'ble Supreme Court has held as under:

> "Section 13(1A)(ii) of the Hindu Marriage Act, 1955 allows either party to a marriage to present a petition for the dissolution of the marriage by a decree of

divorce on the ground that there has been no restitution of conjugal rights as between the parties for the period specified in the provision after the passing of a decree for restitution of conjugal rights. The grounds for granting the relief under Section 13 are subject to the provisions of Section 23 which provide that in any proceeding under this Act, if the Court is satisfied that any of the grounds for granting relief exists and the petitioner is not, in any way, taking advantage of his or her own wrong or disability for the purpose of such relief, the Court may pass a decree for the relief claimed.

The expression "the petitioner is not, in any way, taking advantage of his or her own wrong" occurring in Section 23(1)(a) does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred by Section 13(1A). It would not be reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed should be denied to the other party who does not insist on the compliance with the decree passed in his or her favour. In order to be a 'wrong' within the meaning of Section 23(1)(a), the conduct alleged has to be something more than a mere disinclination to agree to the offer of reunion and must be misconduct serious enough to justify the denial of the relief to which the spouse is otherwise entitled."

10. This judgment was subsequently followed in the case of *Smt. Saroj Rani v. Sudarshan Kumar Chadha* [3] a case also decided by the Division Bench of the Hon'ble Supreme Court. However, in T. Srinivasan (supra) - A Full Bench decision - the Hon'ble Supreme Court has held that in case the husband obtained the decree for restitution of conjugal rights and deprived the right to the wife to perform her conjugal duties, such an action amounted to misconduct un condonable for the purpose of Section 23(1)(a) of the Hindu Marriage Act, 1955. Therefore, he was rightly denied relief under Section 13(1A) of the said Act. Since a Full Bench decision has been pronounced after two Division Bench judgments, this Court is bound to follow the decision of the Full Bench.

11. Thus, in case the husband does not follow the directions of the court and refuses to implement a decree for restitution of conjugal rights, such an action would tantamount to wrong committed by him under Section 23 of the Act. He cannot be permitted to take advantage of his own wrong. Hence, he cannot seek a divorce under Section 13(1A) of the Act.

12. Marriage is a sacred bond entered into by the husband and the wife. Both are duty

bound to ensure the solidity of the institution. They should make an endeavor to live in peace and harmony. In case either one of them breaks the bond, the erring party cannot be allowed to take advantage of his/her own wrong. To allow the erring party to take advantage of his/her own wrong is to motivate people to dilute and destroy the institution of marriage. Since the family is the basic unit of any society, it is imperative that the family be protected and promoted by the two spouses. The courts of law are also bound to protect and promote the family as a social unit. Therefore, the court are duty bound to consider as to who is in fault while considering a petition for divorce. Section 23 of the Act merely imports "the fault theory" in divorce cases.

13. In the present case, the learned Judge has ignored the importance of the fault theory. A bare perusal of the evidence of the wife and of her father, DW2 Devdas, clearly reveals that the husband's family was agitated by the fact that the wife's family had broken of the engagement between the wife's younger sister and the wife's younger brother-in-law (Devar). In his statement, DW2 clearly explained that the brother-in-law was mentally challenged. Therefore, they had decided to call off the engagement. The calling off the engagement created an ego hassle between the two families. The husband's family seems to have taken it as a personal affront. Therefore, the husband's family kicked the wife and the child out of the matrimonial home. Hence, the desertion is not from the side of the wife, but from the side of the husband.

14. Moreover, once the decree for restitution of conjugal rights was granted in favor of the wife, it was the husband's legal duty to resume his cohabitation with the wife. In the age of gender justice and women emancipation and empowerment, it cannot be argued that it is the duty of the wife to go back to the matrimonial home. Today, it is equally the duty of the husband to resume cohabitation and to take his wife back to the matrimonial home. Since the husband had filed the divorce petition on the ground that the wife did not resume cohabitation despite the decree of restitution of conjugal rights, in order to protect her interest, the wife has claimed that the cohabitation was resumed by the husband himself. However, the learned Judge has thoroughly analyzed the evidence and has rightly concluded that the cohabitation was not resumed between the parties. It is, indeed, surprising that having concluded so, the learned Judge failed to see that the fault lay with the husband and not with the wife. Therefore, the learned Judge has mis- appreciated the evidence and has drawn a wrong conclusion. The learned Judge has also failed to apply Section 23 of the Act.

15. In the result, this appeal is allowed and the judgment dated 6.9.2001 is quashed and set aside. There shall be no order as to cost.

Appeal allowed.

Cases Referred.

1. (1998) 3 SCC 112
2. (1997) 4 SCC 12
3. ((1984) 4 SCC 90)