

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: October 20, 2016

% *Judgment Delivered on: October 25, 2016*

+ **MAT.APP.(F.C.) 123/2014**

PUSHKAR GUPTA Appellant

Represented by: Mr.Shailender Dahiya, Adv.
with appellant in person

versus

NARENDER KUMAR GUPTA Respondent

Represented by: Mr.Naveen Kumar Raheja,
Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. The joy of success of counter claim filed by the appellant/wife in HMA Petition No. 07/10 was short lived. Her grievance is that on the basis of decree of restitution of conjugal rights passed in her favour, it is the respondent/husband who despite being at fault, ultimately secured a decree of divorce under Section 13(1A)(ii) of Hindu Marriage Act, 1955 in HMA Petition No.1228/2011.

2. We shall hereinafter refer the parties as the 'wife' and the 'husband'.

3. Undisputed facts of this case are that the parties got married on July 01, 1994 as per Hindu rites and customs. The marriage was consummated. The parties were blessed with twin daughters on March 11, 1995. The parties are living separately since May 11, 1995. The divorce petition being HMA No.07/10 filed by the husband on the ground of cruelty and desertion was dismissed vide judgment and decree dated November 30, 2010.

However, the counter claim by the wife for restitution of conjugal rights was allowed. It is not disputed that despite there being a decree of restitution of conjugal rights in favour of the wife, the parties have not resumed cohabitation. It is also not disputed by the husband that the reason for his disinclination to comply with the decree of restitution of conjugal rights is mainly for the reason that his entire family had suffered on being made accused by the wife in the criminal case being FIR No.56/98 PS Saraswati Vihar under Section 406/498-A/34 IPC. Not only he, even his paralytic mother who was on wheel chair, his sister and his brother had to remain in jail in the said FIR. His mother and sister expired during trial. The trial has concluded only in the year 2012 and ended in acquittal of the husband and his brother.

4. On expiry of statutory period of one year from the date the decree of restitution of conjugal rights was passed as well failure of the parties to resume cohabitation, the husband filed HMA No.1228/11 seeking dissolution of his marriage on the ground specified under Section 13(1A)(ii) of the Hindu Marriage Act, 1955.

5. The learned Judge Family Court while recording that the husband never wanted to resume cohabitation, considered his justification that the husband and his family suffered in the criminal trial in case FIR No.56/98 PS Saraswati Vihar and remained in jail and he was acquitted after facing trial for about fourteen years. Though the husband had been paying maintenance regularly, the wife had been creating problems for him by visiting his office. Learned Judge Family Court referred to the conduct of the wife after passing of the decree in her favour under Section 9 of the Hindu Marriage Act, 1955 and held that she herself was also not keen on resumption of conjugal rights. The husband was held entitled to dissolution of marriage under his statutory right.

6. The wife is questioning the legality of the judgment on the following grounds:-

(i) She did her best to get the decree of restitution of conjugal rights executed by even sending a legal notice to him as well his counsel for resumption of ties and also visited the residential address of the husband in Faridabad as given by him in HMA Petition No.1228/2011 but he was found not residing there.

(ii) The husband failed to inform his transfer to Uri, J&K and this fact she came to know only when she received the cheque towards maintenance drawn on the bank in Uri, J&K.

(iii) She had visited the office of her husband to file RTI to enquire about his salary and did not met him or created any scene.

(iv) The husband himself being a wrong doer, under the provisions of Section 23(1)(a) of Hindu Marriage Act, 1955 cannot be allowed to take advantage of his own wrong.

(v) Filing of a criminal case, registration of FIR or arrest of the husband and his mother, brother and sister are part of the legal remedy and legal process for which she cannot be blamed.

(vi) Death of mother and sister of the husband had no connection with the criminal trial.

(vii) She has undergone change of mind and she is willing to establish the matrimonial home with her husband, the two daughters who are now fully grown up also need the care and protection of father.

7. The question raised by the wife to challenge the legality of the impugned judgment is whether the husband could get a decree of divorce under Section 13(1A) of Hindu Marriage Act, 1955 by taking advantage of his own wrong i.e. disinclination or refusal to resume cohabitation.

8. It is admitted case of the parties that after the counter claim filed by the wife was allowed by the learned Judge, Family Court on November 30, 2010 by passing a decree of restitution of conjugal rights in her favour, they have never lived together.

9. The reasons for the husband to refuse cohabitation are:

(i) Filing of criminal case bearing FIR No.56/1998 under Section 498-A/406 IPC, PS Saraswati Vihar against him, his mother, younger brother and sister.

(ii) Not only he but also his mother, who was paralytic and was on wheelchair, his sister and his brother had to remain in jail.

(iii) During the trial, his mother and sister expired. The contributing and aggravating factor also being their harassment and torture by the wife.

(iv) After a long trial for about 14 years, ultimately their stand was vindicated as disbelieving the complainant he and his brother stood acquitted on April 28, 2012.

(v) After the entire family faced so much humiliation, it was not possible for him to resume the matrimonial ties.

10. The thrust of the contention raised on behalf of the wife is that under Section 23(1)(a) of Hindu Marriage Act, 1955, the marriage could not have been dissolved by allowing the husband to take advantage of his own wrong i.e. refusal to resume cohabitation.

11. Before examining the contentions raised on behalf of the wife, we may have a re-look at the sequence of events of this failed marriage lasting less than a year, which are:

(i) Date of marriage of the parties is July 01, 1994.

(ii) Date of birth of twin daughters on March 11, 1995.

(iii) Date of leaving the matrimonial home by the wife is May 11, 1995.

(iv) Criminal complaint was filed by the wife against the husband and in-laws on December 19, 1997 which resulted into registration of FIR No.56/1998 under Section 498-A/406 IPC, PS Saraswati Vihar.

(v) Divorce petition was filed by the husband on February 21, 2004 on the ground of cruelty and desertion wherein counter claim was filed by the wife for restitution of conjugal rights as well as application under Section 24 of Hindu Marriage Act, 1955 to seek maintenance.

(vi) Filing of petition under Section 25 and 26 of Guardian and Wards Act, petition under Section 125 of Code of Criminal Procedure.

(vii) Criminal trial concluded on April 28, 2012 in Session Case No.294/1/02 in FIR No.56/1998 under Section 498-A/406 IPC, PS Saraswati Vihar acquitting the husband and his brother. (Mother and sister being dead, proceedings abated against them).

12. While disposing of HMA Petition No.07/10 wherein counter claim under Section 9 of Hindu Marriage Act, 1955 was filed by the wife (certified copy of the judgment is Ex.PW1/B) the learned Judge, Family Court in para 24 of the judgment while noting that the family of the parties belong to 'Baniya' community where birth of even one daughter is not considered good whereas in this case twin daughters were born to the couple, had recorded the post marriage treatment to the wife and change in behaviour after the birth of two daughters as under:

'In view of such customary practice, any Baniya family feels financially burdened and this could be the only reason or explanation for the change in behaviour/conduct/treatment of the petitioner/husband and his family towards the respondent. In fact, it was like a U-turn from an exceptionally good and caring to total negligence towards her.'

13. The above finding of learned Judge, Family Court remained unchallenged establishing thereby that till the birth of the two daughters on

March 11, 1995 the wife was properly taken care of without any kind of harassment from any family member. Even at the time of her delivery, brother of her husband donated blood for her. If it was so then for the criminal trial, the cruelty, if any committed, could be only between the period March 11, 1995 when twin daughters were born till May 11, 1995 when the wife finally left the matrimonial home. However, the certified copy of the judgment in criminal trial reveals that the allegations made by her in her complaint dated December 19, 1997 were about she being harassed by all the accused persons on account of not bringing sufficient dowry as well further demand of ₹5 lacs. These accusations have been found to be false.

14. The husband had thus offered reasonable justification for not complying with the decree for restitution of conjugal rights.

15. In the case reported as ILR (1971) Del.6 Ram Kali vs. Ram Gopal the Full Bench of this Court held that mere non-compliance of decree for restitution of conjugal rights does not constitute 'wrong' for purpose of Section 23(1)(a) of Hindu Marriage Act, 1955 so as to deny divorce to the defaulting spouse. After considering the provisions of law it was held that :

'to non-suit such a petitioner by invoking clause (a) of sub-section (1) of section 23 would have the effect of defeating the manifest purpose of the amending Act and reducing it to futility, and a construction which would lead to such a result must be avoided and the provisions should be so construed that they operated in harmony and the duty of the courts was to place such construction on a statute as shall suppress the mischief and advance the remedy.'

16. Following the decision of the Full Bench of this Court in Ram Kali vs. Ram Gopal (Supra) in a subsequent decision reported as AIR 1977 Delhi 178 Ganja Devi vs. Purshotam Giri the legal position was reiterated as under:

'Section 23 existed in the statute book prior to the insertion of Section 13(1A)...Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of Section 23 of the Act, not entitled to obtain divorce, then it would have inserted an exception to Section 13(1A) and with such exception, the provision of Section 13(1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore, cannot be construed so as to make the effect of amendment of the law by insertion of Section 13(1A) nugatory.

...the expression "Petitioner is not in any way taking advantage of his or her own wrong" occurring in Clause (a) of Section 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by Section 13(1A).. In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree....'

17. In the decision reported as AIR 1977 SC 2218 Dharmendra Kumar vs. Usha Kumar the Apex Court while approving the decision of this Court in Ram Kali vs. Ram Gopal (Supra) and Ganja Devi vs. Purshotam Giri (Supra) held that mere compliance of decree for restitution of conjugal rights would not by itself amount to any 'wrong' to disentitle the spouse against whom the decree for restitution of conjugal rights was obtained. It was held that:

'In our opinion the law has been stated correctly in Ram Kali v. Gopal Das (supra) and Gajna Devi v. Purshotam Giri (supra). Therefore, it would not be very 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 one who does not insist on 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 an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.'

18. Thus, the legal position as declared by the Supreme Court is that if the withdrawing spouse is disobedient to the decree of restitution of conjugal rights and both the spouses continued to live separately as before, each of them is entitled to dissolution of marriage by availing the statutory remedy.

19. It is not out of place to mention here that though the parties separated in May, 1995 the petition seeking dissolution of marriage was filed by the husband after about nine years i.e. on February 21, 2004 only.

20. The efforts pleaded by the wife for execution of the decree of conjugal rights passed in her favour by the learned Judge, Family Court have been termed as 'a story concocted by her to make out a case in her favour'. Further returning a finding that she had visited the residential address of the husband only after he filed a petition seeking dissolution of marriage under Section 13(1A) of Hindu Marriage Act, 1955.

21. The husband has placed on record his official identity card issued by NHPC, Faridabad containing the same address as mentioned in HMA Petition No.1228/2011 stating that during the pendency of the petition he was transferred to Uri Power Station, NHPC, Jammu & Kashmir.

22. The husband and wife lived together for less than a year i.e. from July 01, 1994 till May 11, 1995. It was the wife who after about two years of leaving the matrimonial home initiated criminal proceedings and ensured that her husband and his entire family is sent behind bars. She leveled false accusations of dowry demand against her husband and his entire family who had suffered for about 14 years facing humiliation in social and official circle. She had precipitated the situation leading the husband to a point of no return. Unlike decree for specific performance of contract, for restitution

of conjugal rights only sanction is provided in case of disobedience to such decree under Order 21, Rule 32 of Sub-Rule 1 Code of Civil Procedure. Mere non-compliance of a decree passed under Section 9 of the Hindu Marriage Act, 1955 being not a 'wrong' the meaning of Section 23(1)(a) of the Hindu Marriage Act, 1955 would not disentitle the husband to obtain divorce under Section 13(1A)(ii) of the Hindu Marriage Act, 1955.

23. The husband has been regularly paying the maintenance and no such conduct which may disentitle him to seek divorce under Section 13(1A) of Hindu Marriage Act, 1955 has been has been pleaded or proved on record.

24. When the facts of this case are examined in the light of legal position enumerated above, we have no hesitation to hold that the husband was rightly entitled to a decree of divorce under Section 13(1A)(ii) of the Hindu Marriage Act, 1955.

25. We accordingly dismiss the appeal affirming the decree for dissolution of marriage.

26. No costs.

27. TCR be sent back alongwith copy of this order.

PRATIBHA RANI
(JUDGE)

PRADEEP NANDRAJOG
(JUDGE)

OCTOBER 25, 2016
'pg'