

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

Judgment Reserved on: October 04, 2016
% *Judgment Delivered on: October 07, 2016*

+ **MAT.APP.(F.C.) 64/2015**

SUDHA GUPTA Appellant
Represented by: Mr.Om Saran Gupta, Advocate

versus

HAR PRASAD GUPTA Respondent
Represented by: Respondent in person

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. The parties to this appeal got married on February 17, 1993 at Kanpur (Uttar Pradesh) according to Hindu Rites and Ceremonies. At the time of solemnization of the marriage both the parties were in the age group of 35 years. On coming to know that the respondent/husband has filed execution of the decree passed by the Family Court for the restitution of conjugal rights, she has preferred this appeal as she does not want to be forced to have physical relationship with the respondent/husband in execution of the said decree.

2. Sh.Om Saran Gupta, Advocate who is not only her counsel but also real brother submits that the appellant/wife is not worried about the decree so long as it remains on paper but the appellant/wife is aggrieved to the extent that in execution she may not be forced to resume cohabitation.

3. Relationship between the parties to be of husband and wife is admitted. The parties are having numerous litigations, one of the litigation being a petition under Section 9 of the Hindu Marriage Act, 1955, initiated by the respondent/husband on September 29, 2009. The petition was vehemently contested by the appellant/wife. Vide impugned judgment and decree dated February 28, 2015 the learned Judge Family Court held that the wife has withdrawn herself from the society of the respondent/husband without any just excuse at the behest of her brother Sh.Om Saran Gupta, Advocate. The Family Court has also noted that she has been taking care of the children of her brother and discharging her duties more as a sister than as a wife. The Family Court has also noted her family circumstances i.e. death of parents, that being deprived of parental love and affection she was dependent on her brother for all purposes. She could not settle in her life till the age of 35 years i.e. when she got married. The learned Judge Family Court directed the wife to join the company of her husband.

4. Sh.Om Saran Gupta, Advocate has submitted that notwithstanding the decree of restitution of conjugal rights, the relationship between the parties is so strained that the appellant is not willing to join the company of her husband and resume cohabitation.

5. Thus, the grievance of the appellant/wife as on date is not against the decree of restitution of conjugal rights in favour of the husband but on its execution.

6. The object of decree for restitution of conjugal rights is to bring about cohabitation between the parties so that they can live at the matrimonial home in amity. If the decree for restitution of conjugal rights is not complied with for a period of one year it becomes a ground to seek dissolution of marriage under Section 13(1A)(ii) of the Hindu Marriage Act, 1955 which reads as under:

‘(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.’

7. As per the scheme of the Hindu Marriage Act the decree for restitution of conjugal rights is a stepping stone and passage towards divorce. Section 13(1A)(ii) provides that if the withdrawing spouse is disobedient to the decree of restitution of conjugal rights and the husband and wife continue to live separately as before, each of them is entitled to seek dissolution of marriage. Thus, the legal position is that on passing of a decree for restitution of conjugal rights at the most it can be said that the law enforces cohabitation but it does not and cannot enforce sexual intercourse. The apprehension in the mind of the appellant that if the decree is executed she will be forced to have cohabitation with her husband, is a mistaken notion.

8. While Section 9 of the Hindu Marriage Act tries to bring the parties together, Section 13(1A) and 13(1A)(ii) dissolve the marriage if there has been no resumption of cohabitation for a period of one year or upward after the passing of decree of restitution of conjugal rights.

9. The amendment in the Hindu Marriage Act in the year 1964 by insertion of Section 13(1A) is a legislative recognition of the principal that in the interest of society if there has been a breakdown of the marriage keeping the parties tied together would not serve any purpose.

10. The legal position which emerges is that while the defaulting spouse tries to denounce the restitution of conjugal rights but welcome as a ground for seeking dissolution of marriage under Section 13(1A) (ii) of the Hindu Marriage Act, 1955.

11. The question with respect to the execution of a decree for restitution of conjugal rights has been examined by the Supreme Court in the decision reported as AIR 1984 SC 1562 Smt.Saroj Rani Vs. Sudarshan Kumar Chadha. The relevant discussion appears in paragraph Nos. 16 and 17 of the report as under:-

“16. Section 9 only is a codification of pre-existing law. Rule 32 of Order 21 of the CPC deals with decree for specific performance for restitution of conjugal rights or for an injunction. Sub-rule (1) of Rule 32 is in these terms:

Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

17. It is significant to note that unlike a decree of specific performance of contract, for restitution of conjugal rights the sanction is provided by court where the disobedience to such a decree is willfull i.e. is deliberate, in spite of the opportunities and there are no other impediments, might be enforced by attachment of property. So the only sanction is by attachment of property against disobedience of a decree for restitution of conjugal rights where the disobedience follow as a result of a willfull conduct i.e. where conditions are there for a wife or a husband to obey the decree for restitution of conjugal right but disobeys the same in spite of such conditions, than only financial sanction, provided he or she has properties to be attached, is provided for. This is so as an inducement by the court in appropriate case when the has decree restitution for conjugal rights and that the court can only decree if there is no just reason for not passing decree for restitution of conjugal

rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves a social purpose as an aid to the prevention of break-up of marriage. It cannot be viewed in the manner the learned single judge of Andhra Pradesh High Court has viewed it and we are therefore unable to accept the position that Section 9 of the said Act is violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in view.”

12. The parties to this appeal are aged about 60 years i.e. on the verge of becoming senior citizens. Whether the parties are in a position to resume cohabitation, instead of a detailed discussion we just extract what the wife has stated during her cross-examination before the learned Judge Family Court

*“.....It is correct that I have stated that the petitioner is impotent. I never got myself aborted. It is wrong to suggest that I got my child aborted in Vohra Nursing Home, Raja Garden, Delhi. **It is correct that although I knew that the petitioner was impotent yet I spent 10 years with him in Delhi.** I told that my husband was impotent to my neighbours namely Babbu, Sonia, Rani, however, I do not remember their addresses and I did not tell it to my relatives under the hope that situation may improved.....”*

13. In her affidavit also she has stated that marriage was not consummated because respondent/husband was physically weak and this fact was well within the knowledge of her mother-in-law. To hide the physical inefficiency of her son, her mother-in-law sent two children aged about 8 years (boy) and 12 years (girl) from Kanpur to Delhi in their one room house. The marriage being not consummated as she never conceived, there was no question of any abortion.

14. If the case of the appellant/wife is that the marriage between the parties was not consummated though they lived together as husband and wife for 10 years, we do not find any reason for her to apprehend forced cohabitation after more than 23 years of their marriage.

15. It is a matter of record that various civil and criminal litigations are pending between the parties. The purpose behind filing of a petition under Section 9 of the Hindu Marriage Act for seeking a decree for restitution of conjugal rights or filing the execution appears to be not to force the wife to resume cohabitation but with an objective to be achieved under Section 13(1A)(ii) of Hindu Marriage Act, 1955 which enables a party to seek divorce if a decree for restitution of conjugal rights is disobeyed.

16. We do not find any merits in this appeal. The appeal is dismissed but without any order as to costs.

17. Trial Court Record be sent back alongwith copy of this order.

PRATIBHA RANI
(JUDGE)

PRADEEP NANDRAJOG
(JUDGE)

OCTOBER 07, 2016

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