

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

FAMILY COURT APPEAL NO.94 OF 2014

Azrullah Inamdar S/o Shamiulla
Inamdar, aged about 43 Yrs.
Occ. Teacher, R/o Azad Colony,
Tazabad, Near Malik School,
Nagpur

... Appellant

-vs-

Mst. Asefa Anjum w/o Azrulla,
Aged about 32 years, Occ. Teacher,
R/o Plot No.67, Geeta Society,
Anant Nagar, Nagpur 13
P. S. Gittikhadan.

... Respondent

Shri D. C. Chahande, Advocate for appellant.
Shri S. Raisuddin, Advocate for respondent.
Shri O. A. Ghare, Advocate for Assisting the Court.

CORAM : A. S. CHANDURKAR AND G. A. SANAP, JJ.

DATE : December 09, 2021

Oral Judgment : (Per A. S. Chandurkar, J.)

In this appeal filed under Section 19 of the Family Courts Act, 1984, the judgment of the Family Court No.4 in Petition No.A-130/03 dated 25/01/2007 allowing the petition for restitution of conjugal rights as filed by the respondent has been challenged. The appellant-husband being aggrieved by that decree has approached this Court.

2. The facts in brief are that the appellant and the respondent were

married on 25/05/1997 as per Shariat customs. From the said wedlock a daughter was born. It is the case of the wife that after marriage the couple was residing with the elder brother of the husband and his wife. The elder brother and his wife were ill-treating the present respondent and hence the respondent decided to stay at her parents' house. Subsequently the appellant and the respondent started residing separately in a residential house in the same locality. It is at that point of time that it is alleged that the appellant left the respondent and again started residing with his elder brother. A daughter was born on 08/01/1999 after which the respondent again started residing with her parents. The appellant then agreed to reside with the respondent. However the ill-treatment by the elder brother and his wife continued. The respondent thus filed a report under Section 498-A read with Section 323 of the Code of Criminal Procedure against the appellant and his family members. She also initiated proceedings for grant of maintenance. As the appellant avoided residing with the respondent she filed proceedings for restitution of conjugal rights with a prayer that the appellant be directed to reside with the respondent.

3. Written statement was filed by the appellant below Exhibit-14. The allegations as made were denied. It was stated that the respondent was not entitled for the relief as sought and on the contrary the proceedings were filed merely to harass the appellant.

The parties led evidence before the Family Court. The wife examined herself below Exhibit-20. The husband examined himself below Exhibit-31. After considering the entire evidence on record the learned Judge of the Family Court found that the appellant had neglected to maintain the respondent and the minor child. He noted that the evidence on record was sufficient to hold that it was the appellant who had withdrawn from the society of the respondent without any sufficient reason. The petition for restitution of conjugal rights as filed by the respondent was accordingly allowed. Being aggrieved the husband has come up in appeal.

4. Shri D. C. Chahande, learned counsel for the appellant submitted that there was no evidence whatsoever before the Family Court to grant relief to the respondent. Except for bare statement made by the respondent there was no material on record to indicate that it was the appellant who had neglected to maintain the respondent. The learned counsel referred to the deposition of the appellant as well as the respondent and their cross-examination to substantiate his contention. It was urged that since the parties were governed by Mahomedan Law there was no custom recognised by which the wife could initiate proceedings for restitution of conjugal rights. In that regard the learned counsel referred to Clause 281 of the Principles of Mahomedan Law by Sir Dinshaw Fardunji Mulla. In absence of any such right to file proceedings for restitution, the Family Court did not

have jurisdiction to entertain and grant relief to the respondent. He therefore submitted that the judgment of the Family Court was liable to be set aside and the proceedings initiated by the respondent were liable to be dismissed.

5. Shri S. Raisuddin, learned counsel for the respondent supported the judgment of the Family Court. He submitted that there was no bar in Mahomedan Law by which a wife could be precluded from initiating proceedings for restitution of conjugal rights. He referred to Chapter XI of Mulla on Mohammedan Law in which it was observed that marriage under Mahomedan Law being a contract, restitution of conjugal rights would be a relief that could be prayed for in a suit that could be filed by any aggrieved party. He then referred to the deposition of the parties and the admission of the appellant that he was not interested in cohabiting with the respondent. This indicated the conduct of the appellant and therefore he submitted that the Family Court was justified in granting relief to the respondent.

6. Before proceeding further we may state that when the appeal was taken up for hearing on 01/12/2021 there was no appearance on behalf of the respondent. Since the learned counsel for the appellant raised a jurisdictional aspect touching the maintainability of the proceedings we requested to Shri O. A. Ghare, Advocate to assist the Court in deciding the

said aspect. He invited our attention to the decision of the Privy Council in *Moonshee Buzlout Ruheem and Jodanath Bose vs. Shumsoonnissa Begum MANU/PR/0018/1867* and submitted that there was no bar in Mahomedan Law on the basis of which the wife could be precluded from seeking restitution of conjugal rights. He also referred to The Principles of Muhammadan Jurisprudence by Sir Abdur Rahim and the Chapter in relation to marriage wherein it has been observed that a wife has a corresponding right to demand from husband the fulfilment of his marital duties towards his wife. He therefore submitted that such proceedings at the instance of the wife would be maintainable.

7. In the light of aforesaid submissions the following points arise for adjudication :

- (i) *Whether the proceedings for restitution of conjugal rights are maintainable at the instance of the wife under Mahomedan Law ?*
- (ii) *Whether the respondent has proved that she is entitled for a decree of restitution of conjugal rights ?*

8. We have heard the learned counsel for the parties at length and we have perused records of the case. In so far as the objection raised by the learned counsel for the appellant to the maintainability of the proceedings on the ground that restitution of conjugal rights could not have been sought by the wife under Mahomedan Law, we find that there is no specific bar in

that regard pointed out. Clause 281 of Principles of Mahomedan Law by Sir Dinshaw Mulla merely refers to a suit for restitution of conjugal rights and states that where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights. According to Shri O. A. Ghare, learned counsel marriage under Mahomedan Law is in the nature of contract and marriage confers a right both on the husband and wife against each other. Marriage being in the nature of contract constituted by proposal and acceptance of both, the parties had a right to demand fulfilment of marital duties towards each other. He further submitted that the law with regard to restitution was discussed in detail in the decision in *Moonshee Buzlout Ruheem* (supra) and same did not indicate any such prohibition on the wife to institute such proceedings.

According to Shri S. Raisuddin, learned counsel for the respondent in Mulla on Mahomedan Law it had been clearly stated that the right of restitution of conjugal rights was available to both the parties to the marriage. Any party who withdraws himself or herself from the society of the other would not be a bar for the aggrieved party to bring a suit for restitution of conjugal rights.

9. In the light of aforesaid we do not find any specific bar to a suit for restitution of conjugal rights being filed by the wife and hence point (i) is answered by holding that the proceedings for restitution of conjugal rights

initiated by the wife herein were maintainable under the Mahomedan Law. Moreover, such objection was not raised by the appellant in his written statement or before the Family Court but since the question of jurisdiction was raised we have considered the same.

10. In so far as passing of the decree for restitution of conjugal rights is concerned, we find from a perusal of the entire evidence on record that the respondent was always willing to reside with the appellant but it was the appellant who was not desirous of continuing with her company. In his cross-examination the appellant admitted that though the respondent was ready to reside with the appellant he was not willing to do so. The respondent had waited for him for the period of about 3-4 months at his rented house and had also paid rent during that period. No notice was issued by him between 20/08/1999 to 20/08/2000 so as to call her back nor did he make any attempt whatsoever to bring back the respondent.

According to the respondent on account of harassment and ill-treatment by the appellant, his brother and his brother's wife she was required to initiate proceedings under Section 498-A of the Penal Code. She has stated that she was always willing to reside with the husband in the interest of their daughter but the appellant was not willing to do so. The respondent denied various suggestions given to her in cross-examination.

The learned Judge of the Family Court has considered the

aforesaid evidence and found that the allegations made by the appellant against his wife were not substantiated nor were any details given. Vague statements were made and in the light of his admission in the cross-examination that he was not willing to cohabit with the respondent, it was concluded that the appellant had withdrawn from the society of the respondent without sufficient reason and that he had refused and neglected to maintain the respondent and their daughter. We do not find any material on record to take a different view of the matter. On re-appreciation of the entire evidence, we are satisfied that the view taken by the learned Judge of the Family Court is the only possible view and the Court was justified in passing a decree for restitution of conjugal rights in favour of the respondent. Point (ii) is answered accordingly.

As a result of the aforesaid discussion, there is no reason to interfere with the judgment of the Family court. Consequently Family Court Appeal No.94/2014 stands dismissed with no order as to costs.

(G. A. Sanap, J.)

(A. S. Chandurkar, J.)

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