

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FAMILY COURT APPEAL NO. 15 OF 2020

Rupali Santoshsinh Chandele .. Appellant

Versus

Santoshsinh Bharatsinh Chandele .. Respondent

Shri Mahesh V. Ghatge, Advocate for the Appellant.
Shri Pushkar S. Shendurnikar, Advocate for the Respondent.

**CORAM : NITIN W. SAMBRE AND
S. G. CHAPALGAONKAR, JJ.
DATE : 28TH MARCH, 2023.**

FINAL ORDER :

. The appeal is preferred against judgment and order dated December 04, 2019 delivered by the Family Court, Nanded in a proceeding taken out by the appellant-wife under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred as to the “Act of 1955” for the sake of convenience) seeking restitution of conjugal rights.

2. The facts necessary for deciding present appeal are as under :

The appellant and the respondent got married at Nanded on March 18, 2012.

3. It is claimed by the appellant-wife that the respondent-

husband started harassing her for not fulfilling demand of dowry and at times physically assaulted for failure of the appellant to get the monetary demands satisfied from her parents.

4. It is claimed that in view of cruelty meted out to the appellant, she was driven out from the matrimonial house, which led to filing proceedings under the provisions of the Protection of Woman from Domestic Violence Act, 2005 (for short "D. V. Act") on September 30, 2015, which was allowed to be withdrawn.

5. In the aforesaid background, it is the case of the appellant that on June 08, 2017, the respondent-husband initiated proceedings seeking divorce on the ground of cruelty and the appellant has initiated proceedings on February 09, 2018 for restitution of conjugal rights.

6. After appreciating rival claims of the parties, the Family Court, Nanded by the impugned judgment dismissed the claim of the appellant for restitution of conjugal rights. As such this appeal.

7. Heard Mr. Ghatage, learned counsel for the appellant-wife and Mr. P. S. Shendurnikar, learned counsel appearing for the respondent-husband.

8. According to Mr. Ghatage so as to have normal matrimonial ties, the appellant has not lodged any police

complaint. The aforesaid act on the part of the appellant ought not to have been considered adverse to the interest of the appellant in the matter of refusal of restitution of conjugal rights, particularly for the purpose of inferring the voluntarily parting company of the respondent. According to the learned counsel for the appellant, certain admissions contrary to the interest of the appellant have come on record (in D. V. Act proceedings), by the appellant, however, appellant has withdrawn said proceedings, which itself demonstrate that the appellant intend to maintain matrimonial ties and healthy relations with the respondent. The learned counsel for the appellant submits that in matrimonial proceedings it is always open for either of the spouses to change their heart/mind qua matrimonial relations. In such eventuality, the Court ought to have granted the restitution of conjugal rights as prayed so as to maintain the healthy matrimonial life with an intention to preserve institution of marriage. So as to substantiate aforesaid contention, Mr. Ghatage, learned counsel has relied on the judgment of the Apex Court in the matter of **Sureshta Devi Vs. Om Prakash** reported in **1992 AIR (SC) 1904**.

Mr. Ghatage would urge that the appellant is not paid maintenance and as such she is facing financial difficulties.

09. While opposing aforesaid contentions, Mr. Shendurnikar, learned counsel appearing for the respondent-husband would urge that after marriage was solemnized on March 18, 2012, the

appellant has never co-operated in consummating the marriage. According to him, the evidence recorded during the D. V. Act proceedings not only establishes the non cooperative attitude of the appellant in permitting the respondent to maintain marital relations, but the appellant has given admission on record that she was not willing to marry the respondent as she had no liking to him. He would invite attention of this Court to the testimony of the appellant so as to demonstrate that the appellant was made to marry the respondent against her wish under the pressure of her parents. In this background, Mr. Shendurnikar would urge that the appellant has intentionally and deliberately withdrawn herself from the company of the respondent. He urged that such withdrawal from the company of the respondent was with an intention of not honouring matrimonial commitments and obligations. That being so, the Family Court was justified in rejecting the proceeding. He would further urge that withdrawal of D. V. Act proceedings was with an intention to avoid adverse order therein particularly in the backdrop of admissions given by the appellant about the marriage against her wish and dislike for the respondent-husband. He would further urge that the law laid down by the Apex Court in the matter of **Sureshta Devi Vs. Om Prakash** cited supra will be of hardly any assistance as the said law laid down by the Apex Court is while dealing with the proceedings for divorce by mutual consent under Section 13-B(1) of the Act of 1955. The learned counsel for the respondent as such would urge that since the appellant has failed to discharge burden as provided under

Section 9 of the Act of 1955, the Court below was justified in rejecting the prayer for restitution.

10. We have appreciated the rival submissions.

11. It is not a disputed fact that the marriage between the parties was solemnized at Nanded on March 18, 2012 and the appellant started residing with the respondent. It is the case of the appellant that she was illtreated immediately after the marriage and at times was subjected to physical cruelty by use of abusive and filthy language against her. According to her for non fulfillment of demand of dowry, the appellant was driven out of the house and as such she was forced to leave the house of the respondent-husband.

12. To the aforesaid claim of the appellant, in the written statement preferred by the respondent at Exhibit 16, he has tried to demonstrate that since beginning the behaviour of the appellant was not cooperative with the respondent particularly keeping in mind the matrimonial ties. According to him the marriage was never allowed to be consummated and it is under pressure of the father of the appellant she was made to marry the respondent. He has tried to demonstrate the conduct of the appellant and non cooperation in the matter of consummating the marriage. The respondent as such claimed that having regard to the conduct of the appellant he was constrained to file divorce proceedings at Kalyan on 14.06.2017.

13. In the backdrop of aforesaid rival submissions the points which this Court is required to look into are (i) whether the appellant has intentionally withdrawn herself from the company of the respondent ? and (ii) as to whether the judgment and order of the Family Court warrants interference ?

14. Before the Family Court, so also before this Court attempts appear to have been made by the parties to go for mediation. However, report of the mediator suggests that parties hereto are not willing to settle their differences.

15. The report of the marriage counsellor Exhibit 13 substantiates the aforesaid finding of failure of amicable settlement or reconciliation between the parties.

16. So as to substantiate claim in appeal for restitution of conjugal rights, so also before the Family Court, appellant had entered into the witness box and deposed in support of the claim for restitution of conjugal rights. The appellant has tendered her examination in chief at Exhibit 26/C. In her oral testimony she has tried to demonstrate that she was treated cruelly for non fulfillment of demand of dowry by physically assaulting and use of abusive language against her. She has also deposed that she was driven out of matrimonial house for the aforesaid reason. She has also deposed that her father requested for restoration of cohabitation, but the respondent has not agreed to.

17. In the cross examination the appellant has admitted that her father is a retired police inspector. She has also admitted that she has stated to the respondent that her marriage was solemnized with the respondent against her wish. She has admitted that the respondent is short in height. She has also admitted that qua her harassment physical assault, demand of dowry and use of filthy language against her inspite of being a daughter of police inspector and knowing about her legal rights, she has not lodged police complaint against the respondent. She has admitted that since 2014 she is staying with her parents and further admitted that she has not sent any legal notice to the respondent expressing her intention of cohabitation. She has also admitted that she has not visited any hospital or doctor when she suffered assault. She has gone on record to say that the respondent has extra marital affairs with a girl.

18. As against above the respondent has submitted his reply to be treated as affidavit of examination in chief. However, it appears that the respondent has submitted Exhibit 34, which is affidavit of examination in chief. In the said affidavit he has stated that appellant has informed her on the occasion of her birthday that the appellant dislikes him. He has denied all adverse allegations. He has further stated that the appellant has refused to permit the respondent to establish physical relationship. He has stated that even during the marriage ceremony of the brother of the appellant, she had asked the

respondent not to attend the said ceremony with the appellant. The appellant has stated that he has sent a letter dated 27.06.2013 to the father of the appellant requesting him to sent his daughter i. e. wife of the respondent for cohabitation. He has also stated about the cruel behaviour of the appellant for a period when she resided with the respondent. The threatening communications issued by the appellant were exhibited at Exhibit 5 and 6.

19. The Family Court upon appreciation of the evidence in the matter has proceeded to evaluate the evidence and had noted that the present respondent has filed divorce case bearing H.M.P. No. 670 of 2017. The appellant-wife has initiated domestic violence case bearing No. 19 of 2015.

20. During the course of recording of evidence in domestic violence proceeding a admission given by the appellant that the marriage with the respondent was performed against her wish was duly taken note of. It appears that, the said D. V. Act proceedings were withdrawn by the appellant. The present proceedings were initiated by the appellant on 09th February, 2018, after having noticed that the respondent-husband has initiated divorce proceedings in H.M.P. No. 670 of 2017. It appears that at the behest of the appellant the proceedings for divorce were stayed in an application U/Sec. 24 of the Code of Civil Procedure pursuant to the order passed by the High Court.

21. After the marriage was solemnized on March 18, 2012, the appellant has refused to permit the respondent to establish conjugal relations. It is thereafter brought on record that time and again appellant went to her parental home and even while staying with the respondent instead of discharging her duties towards the respondent, she used to get herself locked in a room. The fact remains that the appellant was unable to conceive inspite of completion of two years from the date of marriage.

22. Though the appellant has tried to place blame on the respondent, however, she is neither able to establish by specific pleadings as to the manner and the mode in which the respondent was successful in not permitting the appellant to conceive, nor she has stated anything about her gynecological health and her visits to a doctor, if any.

23. Rather it is brought on record that the appellant during cross examination has stated that the respondent is a short highted person. In addition, she has specifically stated that her marriage was performed against her wish in D. V. Act proceedings, which were subsequently withdrawn by her so as to avoid recording of adverse findings against her.

24. In this background, if we appreciate the satisfaction of ingredients required under Section 9 of the Act of 1955 so as to consider the case of the appellant for grant of restitution of conjugal rights, what can be inferred is marriage of appellant

with the respondent was against her wish and she has no liking for the respondent. In view of above, she had hardly any interest in her matrimonial life with the respondent. That being so the evidence speaks of she having been withdrawn from the company of the respondent-husband. As such the evidence sufficiently speaks of the appellant without reasonable excuse has withdrawn herself from company of the respondent and it is not other way round. Even if the pleadings in the application are appreciated, the appellant is claiming that the respondent has forcefully driven her out of the house, whereas the respondent is claiming that it is appellant who has withdrawn herself from the company of the respondent. The claim of the respondent appears to have been established in view of the findings recorded hereinabove. As such in view of explanation to Section 9 of the Act of 1955, the burden shifts on the appellant to prove that the respondent has forcefully driven out of the matrimonial house.

25. In this background, the findings recorded by the Family Court of refusing the decree for restitution of conjugal rights is quite justified. The appellant was neither able to demonstrate as to the date on which she was driven out of matrimonial house.

26. As far as the contention of the learned counsel for the appellant Mr. Ghatge that the appellant before initiation of this proceedings has changed her mind and inspite of admissions given in the D. V. Act proceedings adverse to her interest. Such change of mind is permissible in law which is sought to be

justified, based on the judgment of the Apex Court in the matter of **Sureshta Devi Vs. Om Prakash** cited supra cannot be accepted. The reliance placed on the aforesaid judgment in the matter of **Sureshta Devi Vs. Om Prakash** (supra) is wholly misplaced as the Apex Court in the said matter was dealing with the prayer of wife U/Sec. 13-B(i) of the Act of 1956 for divorce by mutual consent. The Apex Court has observed that either of the parties can withdraw consent before the decree is actually passed. Such withdrawal of consent is based on the facts and circumstances of each case. However, in the case in hand, we are dealing with claim U/Sec. 9 of the Act of 1955 and wherein there is no issue of consent being extended.

27. In the present proceedings, the appellant before the Family Court has sought maintenance, which upon an order made by the Family Court is been paid by the respondent-husband. The appellant alleging illtreatment and cruelty initiated D. V. Act proceedings in which she has given admissions about her disliking and her marriage being performed against wish with the respondent. As such, she was duty bound to prove allegations in the case of illtreatment and cruelty, etc, which she has failed to and has chosen to withdraw the said proceedings for obvious reasons, she having given admissions adverse to her interest. As such it is to be inferred that the appellant has failed or is unable to establish that she was compelled to leave her matrimonial home. Rather the respondent-husband has every right to require his wife not only to live with him, but also to

discharge her corresponding matrimonial duties. From the evidence on record it can be inferred that it is the appellant who has failed to discharge her such duties and has failed to prove alleged illtreatment.

28. In this background, it is to be noted that the appellant herself has failed to prove her case by discharging burden for granting decree for restitution of conjugal rights, that being so appeal fails and stands dismissed.

[S. G. CHAPALGAONKAR, J.]

[NITIN W. SAMBRE , J.]

bsb/March 23