

Rakhi Nautiyal v. Mohit Nautiyal - FAO-M-108-M-2004 [2006] INPBHC 6051 (28 August 2006)

FAO NO. 108-M OF 2004

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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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Date of decision: 06.09.2006

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Rakhi Nautiyal

.... Appellant

Versus

Mohit Nautiyal

.... Respondent

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CORAM: HON'BLE MRS.JUSTICE NIRMAL YADAV

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Present:- Mr. Dhirinder Chopra, Advocate, for the appellant.

Mr. P.K.Mutneja, Advocate, for the respondent.

JUDGMENT

This is wife's appeal against the judgment and decree dated 2.4.2004 passed by the Additional District Judge, Panchkula, vide which the husband's petition for divorce under Section 13 of Hindu Marriage Act, 1955, hereinafter referred to as 'the Act', has been accepted.

On a petition filed by the wife under Section 9 of the Act, a decree for restitution of conjugal rights was passed by the Additional Civil Judge (Senior Division),

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Chandigarh on 20.12.2000. In the said petition, the husband put in appearance and filed written statement. However, he absented himself from the proceedings and was proceeded against exparte.

The wife made numerous efforts to join the matrimonial home and requested the husband to rehabilitate her, however, all her efforts failed. An execution petition was also filed by the wife, which is still pending adjudication and is fixed for 11.10.2006. On 21.8.1996, the husband also filed a petition under Section 13 of the Act for dissolution of the marriage, at Dehradun, which was transferred to Chandigarh by the order of Supreme Court. During the pendency of the said petition, the trial Court awarded maintenance pendente lite at the rate of Rs.1000/- per month to the wife.

However, the entire amount of maintenance was not paid by the husband.

Case was adjourned for making the payment on 8.1.2001 to 6.2.2001. On 6.2.2001, case was called several times but none appeared on behalf of the husband and, therefore, the petition was dismissed in default. **The maintenance pendente lite awarded by the Court was also not paid by the husband.** Thereafter the husband has filed the present petition under Section 13(i)(A)(ii) of the Act for dissolution of marriage on the ground that after the passing of the decree under Section 9 of the Act, the parties could not co-habit and live together, therefore, praying for granting of a decree of divorce on the aforesaid ground.

Petition was contested by the wife wherein she admitted having filed a petition under Section 9 of the Act. The husband absented during the proceedings and an exparte decree was passed in favour of the wife. It is pleaded that from the conduct of the husband it can be well inferred that he was not interested in keeping the marriage alive. On the other hand, the wife had always been willing and ready to reside and settle with the husband. During the execution proceedings also, the husband did not respond to the wife's efforts for rehabilitation. It is pleaded that the husband had filed a petition under Section 13 of the Act for dissolution of the marriage, which was dismissed in default. During the pendency of that petition, the learned trial Court had awarded maintenance, but not even a penny was paid out of the maintenance pendente lite awarded by the Court to the wife. The husband has deprived the wife of her right to survival, therefore, he cannot be allowed to take advantage of his own wrongs. It was further pleaded that the wife was insulted and harassed by her in-laws and other relatives on account of demand of dowry though sufficient dowry was given at the time of marriage. **After bearing the on-slaught for a long time, the wife filed complaint under Sections 406 and 498-A of Indian Penal Code against the husband, his parents and other relatives. In the said complaint, the husband was convicted vide order dated 7.5.2005.** Appeal against the said judgment and order dated 7.5.2005 was also dismissed on 7.6.2006 and a criminal revision is pending in this Court.

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The trial Court after taking into consideration the evidence and facts on record, allowed the petition filed by the husband granting decree of divorce for dissolution of marriage under Section 13(1A)(ii) of the Act.

Aggrieved by the said judgment and decree of the trial Court dated 2.4.2004, the wife has come up in the present appeal.

Learned counsel for the appellant-wife argued that after the decree of restitution of conjugal rights was passed in favour of the wife, she filed execution petition for satisfaction of the said decree. However, the respondent-husband deprived her the right to perform conjugal rights. She made sincere efforts to join the matrimonial home, but the husband did not allow her to enter the house. Rather the attempts made by her and other relatives to rehabilitate the appellant were repelled by the husband. It is further argued that during the pendency of the petition under Section 13 of the Act filed by the husband seeking divorce, the learned Court had awarded maintenance pendente-lite. The husband did not make the payment inspite of the directions issued by the learned Court. In order to avoid the making of payment, the husband absented from the Court and the petition was dismissed in default. It is further argued that the respondent-husband had treated the appellant with cruelty and, therefore, she made a complaint under Sections 406, 498-A IPC in which the husband has been convicted.

Accordingly it is argued that disobeying the decree for restitution of conjugal rights coupled with the non-payment of maintenance amount and treating the appellant-wife with cruelty, amounts to misconduct uncondonable for the purposes of Section 23(1)(a) of the Act. In support of his arguments, the learned counsel relied on the cases of T.Srinivasan Versus Mrs. T.Varalakshmi, AIR 1999 Supreme Court 595 and Hirachand Srinivas Managaonkar Versus Sunanda, AIR 2001 Supreme Court 1285.

On the other hand, learned counsel for the respondent-husband argued that in order to be a 'wrong' within the meaning of Section 23(1)(a) of the Act, the alleged conduct has to be more than a mere disinclination to agree to an offer of reunion. The misconduct must be serious enough to justify denial of the relief to which the respondent-husband is otherwise entitled. In support of this contention, he referred to the case of Dharmendra Kumar Versus Usha Kumar, AIR 1977 Supreme Court 2218.

Originally nine grounds were available to a husband or a wife for obtaining a decree of divorce under sub-section (1) of Section 13 of the Act. Under clause (ix) of the sub-section, a marriage could be dissolved by a decree of divorce on a petition presented by the husband or the wife on the ground that the other party had failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after passing of a decree of conjugal rights. As per the Amendment Act No. 44 of 1964, the said right is now available to either party to the marriage irrespective of whether the party presenting petition for divorce is a decree holder or a judgment debtor, as the case may be. The said provision was further amended in the year 1976, reducing the period from two years to one year.

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The relevant provisions of Sections 13(1A)(ii) and 23(1)(i) of the Act are reproduced as under:-

"13(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) xx xx xx

(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."

"23(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that--

(a) any of the grounds for granting relief exists and the petitioner (except in cases where the relief is sought by him on the ground specified in sub- clause (a), sub- clause (b) or sub-clause (c) of clause (ii) of section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief :"

The right conferred by sub-Section (1A) of Section 13 is not absolute and unqualified, but is subject to the provisions of Section 23. The object of sub-section (1A) was to enlarge the right to apply for divorce by either of the party and is compulsive that a petition for divorce presented under this sub-section must be allowed on a mere proof that there was no cohabitation or restitution for the requisite period. The conduct must qualify to justify denial of the relief to which the husband or the wife is otherwise entitled. The language of Section 23 shows that it governs every proceeding under the Act and a duty is cast on the Court to decree a relief only if the conditions mentioned in sub-section are satisfied and not otherwise. After the decree for the restitution of conjugal rights was passed on a petition filed by the wife, a duty was cast upon both the spouses to bring cohabitation in order to satisfy the decree. In such circumstances the husband was also duty bound to resume cohabitation and maintain the wife.

In the present case it is not disputed that maintenance pendente lite was awarded by the Court of Additional District Judge in a petition filed by the husband under Section 13 of the Act for dissolution of the marriage.

Case was adjourned for making the payment of maintenance pendente lite awarded by the Court, however, on the next date, the husband absented and failed to make the payment of the amount awarded by the Court. Non- payment of maintenance pendente-lite shows clear intention of the husband not to resume cohabitation by living together as husband and wife and not performing the duty of financially supporting his wife.

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It is clear from the language of Sections 13(1A)(ii) and 23(1)(i) of the Act that it is not necessary that a right automatically accrues to any of the parties to get a divorce once a cause of action arises under Section 13 (1A) and the Court is also not duty bound to grant the relief of divorce sought by the applicant. The provisions only enables either party to a marriage to file an application for dissolution of marriage. It does not provide that on filing of an application under this Section, the Court has no alternative but to grant a decree of divorce. If such an interpretation is taken into consideration the provisions of Section 23(1)(a) of the Act would be totally nugatory. In Section 23(1) it is clearly laid down that 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, only then the decree of divorce shall be granted. The provisions of Sections 13(1A)(ii) and 23(1)(a) of the Act if read together make it crystal clear that the petitioner does not have a vested right for getting the relief of a divorce merely on showing that the grounds in support of the relief as stated in the petition exist. The Court has to satisfy its conscience before passing a decree of divorce that the wrong doer is not taking benefit of his own wrong by getting the decree of divorce.

There is no dispute with regard to the proposition of law laid down that, the conduct alleged, has to be something more than a mere disinclination to an offer of reunion. The misconduct must be serious enough to justify denial.

The above decision cannot be read to be laying down a general principle that the Court has no discretion to decline relief to the petitioner.

In the present case, it is clear from the documentary evidence that the respondent-husband had failed to make the maintenance pendente lite during the pendency of the petition under Section 13 of the Act, filed by him. The trial Court had adjourned the case for making the payment and filing of written statement for the next date. On the said date the respondent-husband absented himself and did not make the payment. No evidence has been placed on record to prove that the said maintenance amount has been paid by the husband. It has merely been stated that the maintenance as awarded by the Court in the proceedings under Section 125 Cr.P.C had been paid. The amount of Rs. 65,000/- as mentioned by the trial Court has been connected by any evidence that it relates to the period mentioned by the wife.

Besides the non-payment of the maintenance allowance, it has been proved on record that the respondent-husband has been convicted for committing the offences under Sections 406, 498-A IPC. The appellant- wife had made a complaint against the respondent-husband and others for subjecting her to harassment and cruelty in order to meet unlawful demand of dowry. The respondent-husband was convicted vide order dated 7.5.2005 and the appeal against the said conviction has also been dismissed. The act on the part of the husband certainly amounts to matrimonial offence. In such circumstances the

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respondent-husband does not have a vested right to get the relief of dissolution of marriage by way of decree of divorce against the appellant-wife, merely on the ground that he is entitled to divorce as there is no cohabitation between the parties even after one year of the passing of a decree of restitution of conjugal rights. Moreover, before granting the relief of divorce which snaps the relationship between a husband and a wife, every attempt should be made to maintain the sanctity of the relationship which is considered to be sacrosanct in our society.

The finding of the trial Court that the allegations against the husband are not of serious dimensions, appears to be against the facts on record. The husband has been convicted under Sections 406 & 498-A IPC, so there was no necessity to bring specific instances on record at this stage.

He had intentionally absented himself from the proceedings in order to avoid payment of maintenance pendente-lite and further subjected the appellant-wife to cruelty and as such he is not entitled to take advantage of his own wrongs. Therefore, the relief under Section 13(1A)(ii) of the Act is not available to him.

Resultantly, the appeal filed by the appellant-wife is accepted and the judgment of the learned trial Court dated 2.4.2004, granting a decree of divorce to the respondent-husband by dissolution of their marriage, is hereby set aside.

(Nirmal Yadav)

JUDGE

September 6th, 2006.

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