

(1972) 09 GUJ CK 0018

In the Gujarat High Court

Case No : Second Appeal No. 605 of 1971 and Civil Application No. 1454 of 1972

Bai Kanchanguari Chhagnalal

APPELLANT

Vs

Chandulal Virjibhai Tank

RESPONDENT

Date of Decision : 26-09-1972

Acts Referred:

Hindu Marriage Act, 1955 — Section 9

Citation : AIR 1973 Guj 275 : (1973) GLR 532

Hon'ble Judges : Mohanlal Ujamshi Shah, J

Bench : Single Bench

Advocate : H.K. Gandhi, for the Appellant; D.D. Vyas, for the Respondent

Judgement

1. This is a Hindu wife's appeal directed against the decision of the learned District Judge. Rajkot. give on July 31, 1971 in Civil Appeal No. 59 of 1970, thereby reversing the decree of dismissal of the present respondent's Hindu Marriage Petitioner No. 50 of 1968 which was filed on September 27, 1968 u/s 9 of the Hindu Marriage Act. 1955 (Act No. 25 of 1955) for restitution of conjugal rights. The learned trial Judge had dismissed the petitioner on the ground that the petitioner husband who is the respondent herein had failed to prove the averment in the petitioner. namely. that the wife had withdrawn from the society of her husband without reasonable excuse. He also found that the respondent-wife had proved that she had been treated by the petitioner husband with cruelty. Having regard to these findings. the learned trial Judge dismissed the petition. In reaching his conclusion,. the learned Judge had considered the oral as well as the documentary evidence on record. In husband's appeal against this decision of the trial Judge, the learned District Judge has found that there was no proof of legal cruelty or any cruelty against the wife which gave here a reasonable cause to stay away from the husband. He has found that the wife and had almost condoned the husband's previous acts. He appears to have approached the case from an erroneous legal approach in considering as he has done in para 8 of his judgment that the wife has to prove just Court has first to

decide with there the wives had withdrawn from the husband's society without any reasonable excuse. although he has then observed that even though the burden would be on the husband the husband can show by evidence that he was keeping and was still ready and willing to keep his wife with him and that there was no reason fro the wife to refuse to stay with him and if in answer to these allegations. the wife comes with a case that there was physical and mental cruelty. she has to prove cruelty. The learned Judge has then considered the correspondence exchanged between the parties and seems to have formed an opinion that the correspondence showed the husband's anxiety for the welfare of the wife and children. But the learned Judge has not considered the oral evidence of the parties on record although he has incidentally referred to some part of the evidence. In this approach to the case. the learned Judge has allowed the appeal the reversed the decision of the learned trial Judge.

2. Mr. H. K. Gandhi, learned advocate appearing on behalf of the appellant wife, has contended before me that the learned Judge has made a wrong legal approach in so far as he has not followed the decision of a Division Bench of the Gujarat High Court give in First Appeal No. 180 of 1960 on 25-11-1960 wherein in has been held that the evidence on record should beveled from the correct angle provided by sub-section (1) of Section 9 of the Hindu Marriage Act which requires that there must be satisfaction on the part of the Court about the statement made in the petition and that the wife must be shown to have withdrawn from the society of the husband without reasonable cause. There two factors must necessarily be present before the court for granting a decree of restitution of conjugal rights. He contended that it was wrong to place the entire burden to prove these ingredients on the wife Mr. Gandhi contended that the learned Judge has merely considered the correspondence between the parties which is a neutral circumstance and that he has failed to consider the relevant oral evidence and the relevant circumstance record. Mr. D. D. Vyas, learned advocate appearing on behalf of the respondent--husband has supported the decree of the trial Court.

3. Now, it is not in dispute that the parties to this are respectively the wife and the husband whose marriage was solemnized according to Hindu religious rites at Rajkot on June 26, 1961. The parties belong to "Kadia: (mason) community. The husband was aged 33 and the wife 27. The husband was serving in Air Force as a corporal at the time of this marriage and was posted at Khadagpur. near Calcutta. At present,. he is posted at Jammunagar since Aug. 1968 and is drawing a total salary of Rs. 195/- including deadness allowance per month. The prate went to live at Khadagpur some time after the marriage where the parents of the husband were also residing. The wife was pregnant in the later had of the year 1961 and was sent for delivery to her parental home at Rajkot. It appears that the husband has also gone to Rajkot some time before the time of the delivery which took place on May 17, 1962. A child (son) was born to the wife, but it died son thereafter. The husband took away the wife with him to Khadagpur on the 17th day of the delivery, although the wife was in a weal state

of heathen d the required period of rest or confinement was not over and although she had felt distressed because of the death of the first child. The wife's case is that at first they stayed at Khadagpur for about two years and during this period, her husband, who was ill-tempered. was beating her an was not allowing her free movements. After two years. the husband was transferred to Siligauri in Assam and there they stayed alone. that is to say, without their parents who continued to stay at Khadagpur. They stayed at Siligauri for a period of about two years. During this period, she again became pregnant and was admitted in a Maternity Hospital at Siligauri for delivery and son Rajesh was born to her. According to the wife, within the 9th day of her delivery, the husband left for Khadagpur alone without making any arrangement for the treatment or care of his wife and child. At Siligauri also. she was not well treated and on one occasion the husband had thrown a lantern at there which has left a permanent scar on her forehead on the right side which is visible to the naked eye. The husband has tired to explain his absence from Siligauri during the wife's confinement period by staying that he had gone to Khadagpur to pay respected to his aged parents because it was Diwali time. On completion of two years" service at Siligauri, the husband was again transferred to Khadagpur where he took his wife and son Rajesh. They continued to live in Khadagpur and the wife again pregnant while at Khadagpur some time in that latter held of the year 1966. during her stay at Kharagpur. she was given the same cruelly treatment. Even when her brother Mansukhalal had gone there on a courtesy visit. she was not allowed to talk with him. She was then sent away by her husband to her parental home at Rajkot for her third delivery on 15-9-1966 via Bombay where her sister was residing. She delivered a child -- son Sunil at Rajkot on 11-3-1967. Ever since she had to continued to stay at Rajkot at her parental home with their two sons and they have been neglected by the husband and not provided for. The husband case as set up returning to the matrimonial home in spite of his repeated requests and in spite of his having gone to call her personally and this was without any reasonable excise. It was on these pleading that the relevant issues were raised by the learned trial Judge and the parties did not joint the issues. The learned trial Judge has considered the oral evidence of the parties. he has analyzed the evidence of the wife and discussed it in paragraph 7 of his judgment. Besides referring to the incident of throwing of a lantern by the husband on the forehead of the wife while she want at Siligauri. the learned Judge has also referred to the incident of the husband giving a push to the wife in the presence of the wife's parents. He has also considered the evidence of the wife's brother Mansukhalal who has been examined at Exhibit 56 and who has stated that he had gone to Khadagpur and he had found that his sister Khachangauri's condition was delicate and her body had become quire learn and she could not be recognized at first sight. The evidence of Khachangauri (wife) saying that she was ill-treated while at Khadagpur and Siligauri and again at Khadagpur was accepted by the learned Judge. He had rejected the plaintiff case that there was no justifying cause for the wife to stay away from the husband. But, the learned District Judge has not considered the oral evidence and the relevant circumstance an demurely

drawn inferences. from the correspondence between the prate without reference to the oral evidence and forgetting that a Hindu wife does not ordinarily show the causes of friction in such correspondence until a point of no return is reached. He has approached the whole case from an erroneous legal angle. He has not even framed specific points for determination as required by Order 41 R. 31 of the CPC and the only point for determination that he has raised is "whether the decree for restitution of conjugal right should be granted?" I must say that this is n "point" at all. The exact question which arise in the appeal and which require determination must be stated in the judgment so as to focus the attention of the Court and the parties on the specific and rival contentions which arise for determination. Apart from that. it appears that the learned Judge has without considering the relevant material circumstance accepted the husband's case on a mere reading of the correspondence and granted a decree for restitution of conjugal rights.

4. Now, Section 9(1) of the Hindu Marriage Act. 1955 (Act No. 25 of 1955) which is hereinafter referred to as "the Act" reads as under:

"9 (1). When either the husband or the wife has, without reasonable excuse, withdrawn from the society of other, the aggrieved party may apply, by petitioner to the district Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statement made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly".

5. Sub-section (2) Section 9 reads as under:--

"9 (2). Nothing shall be pleaded in answer to a petition for restitution of conjugal right which shall not be a ground for judicial separation or for nullity of marriage or for divorce".

It is clear that the above-referred two sub-sections are distinct ones,. Sub-section (2) relates to the respondents' defence to the petition for restitution of conjugal rights and is not to be construed as part of sub-section (1). Sub-section (1) stands by itself. Sub-section (1) requires that the Court must be satisfied (i) of the truth of the statement made in such petition, namely that the husband or wife, has without reasonable excuse, withdrawn from the society of the other, and (ii) that there is no legal ground why the application should not be granted which has reference to the provisions of Section 23 of the Act. Thus, it is the petitioner, may be the husband, may be the wife, who files the petition for restitution of conjugal rights that has to make good the statements in the petitioner's allegation that the other spouse has, without reasonable excuse, withdrawn from the society of the petitioner. The initial burden to prove such a statement is on the petitioner. Sub-section (2) deals with defence plea in answer to the petition showing that there is no ground for granting the petition. The defence may not be proved in a given case. but absence of such proof cannot prove the petitioner's case. As observed by a Division Bench of this High Court in

the unreported decision in First Appeal NO. 180 of 1960 filed by the wife and decided on November 25/28, 1960 by S. T. Desai. C. J. and Bakshi H. (Judgment by Bakshi J.):

"The Section therefore, requires that there must be satisfaction on the part of the Court about the statement made in the petition, and that the wife must have withdrawn from the society of the husband , without reasonable cause. It is, therefore, clear that in the case of a husband, who files a petition for restitution of conjugal rights these two factors must necessarily be present before the Court can grant a decree for restitution. It was, therefore, in our opinion, wrong to place the entire burden of proof on the appellant to prove cruelty and to say that unless and until the appellant established conclusively her defence of currently, the suit of the respondent must necessarily be decreed. It appears, therefore, that the learned District Judge has viewed the entire evidence of the case from a wrong angle and has, therefore, come to the conclusion which cannot be supported".

6. It is thus clear that the defence plea of cruelty raised by the respondent to the petition is a distinct plea from the petitioner's plea for obtaining a decree for restitution of conjugal right u/s 9 of the Act. Both may co-exist in a given case; but what is material is that the petitioner party must prove that the other spouse has withdrawn from the society of the petitioner without reasonable excuse and for the purpose must prove the truth of the statement made in the petition. It is from this angle that the case must be approached but is not approached. I have, therefore, allowed the learned advocates of the parties to take me through the entire evidence -- oral and documentary. (Para 7 to 10 x x x x x)

11. As aforesaid, the husband had a violent temper and did not treat the wife as he ordinarily should have. He was frequently beating her and had exhibited such bad temper even while the wife was at her parent's home and in their presence. This was only on the 17th day of the first delivery and while the wife was in the morning. Her first child having died soon after his birth. The treatment that he meted out to the wife during the second pregnancy and especially while she was in the maternity home at Siligau when he had gone away to Khadagpur, the incident of throwing a burning lantern at her face which has left on her forehead an indelible scar visible even to-day. And to add to all this, the fact that during the third pregnancy of Kanchan while she was at Rajkot, the petitioning husband wrote letter Ex. 39 are circumstances which show a systematic course for cruel conduct of the petitioner justifying the wife's withdrawal from the society of the husband. The subsequent conduct of the petitioner also shows that he did not care for his wife and two sons, but had neglected them. The accusation of theft which was sought to be made by Ex. 40 also shows such a working of the mind of the husband. In my opinion, these circumstances clearly indicate that the wife had a justifying cause to remain away from the husband. This is apart from the fact that the husband has failed to show the reason why the wife has withdrawn from the society and has failed to prove the truth of the statement made by the

him in his petition. The defence of cruelty must also be upheld in the context of the evidence and the circumstance aforesaid. Thus, the petitioning husband is not entitled to a decree for restitution of conjugal right. I must accordingly set aside the decree passed by the learned District Judge, allow this appeal and dismiss the petition of r restitution of conjugal rights.

(Para. 12 x x x x x x x x)

13. Appeal allowed with costs throughout. Application No. 1454 of 1972 allowed with no order as to costs).

14. Appeal allowed.