
(1994) 02 CAL CK 0024
In the Calcutta High Court
Case No : Appeal No. 459 of 1988

Himansu Sekhar Rana

APPELLANT

Vs

Smt. Tapati Rana

RESPONDENT

Date of Decision : 23-02-1994

Acts Referred:

Hindu Marriage (Amendment) Act, 1956 — Section 9

Citation : AIR 1995 Cal 110

Hon'ble Judges : S.K. Mookherjee, J;R. Bhattacharyya, J

Bench : Division Bench

Advocate : Sukumar Guha, Mrs. Swapna Bhuinya and Miss Kumkum Das, for the Appellant; Mrs. Maitraya Ghose and S. Medda, for the Respondent

Judgement

S. K. Mookherjee, J.—The instant appeal is directed against a decree of dismissal, passed in a matrimonial suit, arising out of application under S. 9 of the Hindu Marriage Act, for a decree of restitution of conjugal rights, instituted by the husband against the wife.

2. The admitted facts are that the marriage was on 13-5-82, though registered on 15-5-82. The wife left the matrimonial home on 26-4-83.

3. It was pleaded on behalf of the petitioner husband that his sister was married to the brother of the wife, their matrimonial life was not happy and ultimately the said sister was driven out of her matrimonial home. She started residing with the husband/petitioner. Protest against cruelty of sister by the wife's family members enraged the wife; the wife started to ill-treat the petitioner and ultimately left the house on 26-4-1983, as stated.

4. Wife's defence was that the petitioner's sister, after leaving her matrimonial home and after coming back to her brother's house, instigated the petitioner to inflict physical and mental torture on the wife/respondent for trifles; the wife, occasionally, was beaten up and abused along with her parents and brother; she had marks of injuries; the wife was used to be locked up by the husband, when

the husband attended his office; on 26th April, 1983 after forcibly taking away the ornaments, the wife was driven out of the house; on wife's attempt to go back to the matrimonial home, on 23rd July, 1983, she was threatened with death and thereafter lodging diaries, she had to go back.

5. The impugned judgment dated 17-9-1988, contains the following findings :--

(i) Since both the parties adduced evidence, question of onus on the wife to show that she withdrew from the company of the husband on justifiable grounds was not of much importance.

(ii) The case pleaded on behalf of the husband about ill-treatment meted out to him by the wife on his protest against cruelty and torture imposed on his sister was given up by introducing story of non-payment of dowry in the marriage of the sister and consequent ill-treatment, assault and pressurisation of the petitioner by the wife for payment of such dowry, culminating with the withdrawal of company by the wife. Such evidence did not deserve consideration because of variance with pleadings.

(iii) Ground required to be made out for getting an order under S. 9 of the Hindu Marriage Act did not exist.

(iv) Plaintiffs witnesses were disbelieved on shifting of their evidence.

(v) Non-production of any witness from the locality where the husband resided was believed upon acceptance of a statement of the wife that she was not allowed to mix with neighbours.

(vi) The incident on 23-7-1983 was disbelieved against the petitioner.

(vii) GD entries were accepted as true.

6. Section 9 of the Hindu Marriage Act requires establishment of two conditions for passing an order, in favour of an applicant namely, (a) whether there has been a withdrawal by the other party from the society of the applicant and, secondly, (b) whether such withdrawal is justified in the facts and circumstances of the case. By the explanation added to the section, the burden of proving existence of justification or reasonable excuse has been placed on the person against whom, the allegation of withdrawal is made. In other words, a careful reading of the section unequivocally indicates that once the factum of withdrawal from society by one of the spouses is proved, the reasonableness of the withdrawal has to be proved by the withdrawing spouse. It is needless to point out that society would mean conjugal society.

7. In the instant case, admittedly the wife withdrew from the matrimonial home on 26th April, 1983. In terms of the explanation, therefore, the onus to show that there, was reasonable excuse for such withdrawal from society, lay on the wife, who started residing in her paternal house. Mr. Guha, appearing in support of the appeal, has strenuously argued that this burden was not discharged by the wife and as such the impugned judgment is untenable in law. No submission was

made on behalf of the wife. It was stated before us by Mrs. Ghosh, representing the wife, that she has not been given necessary instructions to contest the appeal. By way of reasonable excuse, it was pleaded, as noted above, on behalf of the wife that physical and mental tortures were inflicted on her by beating and abusing her, by locking up the respondent during the absence of the appellant and also by taking away the ornaments and driving her out of the house on 26th April, 1983. Even it appears from the statements of the wife, in course of cross-examination, that on occasions neighbours had to request her husband to abstain from beating her up. No such neighbour, however, was examined nor the name of any of the neighbours could be stated by the wife. According to wife's evidence, she reported to the relation about the interference by the neighbours but failed to examine any such relation. In her evidence, the wife further admitted that there were many flats and about 16 families used to live but it was not possible for her to name any one of the family member of the said families, as she was not allowed to go out by the husband of her flat. Admittedly, also, the wife did not make any complaint to any neighbour, even when, she was driven out on 26th April, 1983 nor did she go to the police station on that day. The attempt of the wife to impart a colour of truth of physical assaults being hidden by closure of doors and windows was contradicted by herself in course of her cross-examination by admitting that only door was closed about but windows remained open. In spite of having alleged severe assault, the wife had to admit absence of marks of injury except swellings on her head. She did not get herself examined by Doctor except on 26th April, 1983, when there was allegedly no beating up by the husband. The Doctor, who was family physician, and allegedly examined her on 26-4-1983, and prescribed, was also not examined nor any prescription was produced. RW 2, who was the mother of the wife, was confronted with two letters written by the wife, which were marked as exhibits A(1) and A(a)(1). These letters were relied upon to substantiate or corroborate the case of assault by the husband on the wife. In our view, the statements of the wife do not inspire credence because of the, inherent absurdity and improbability. The attempt to tender explanation about absence of knowledge on the part-of the neighbours in a building, where there were 45 flats, and subsequent concession thereof by admission about such fact of assault being known to the neighbours and interference of such neighbours at the time of actual assault, coupled with the non-examination of any such neighbours as witness, cut at the very root of veracity of such statements. The statements appear to have been made for the purpose of creating evidence to fill up the gaps therein, which had been created by non-production of the prescription, admittedly, given by the family physician of the wife's paternal family or non-examination of such physician. The letters, which were marked as exhibits and were sought to be proved by the wife's mother, deposing as RW 2, cannot be taken into evidence for compliance with O. 13, Rr. (1) and (2) of the Code of Civil Procedure. Out of the two letters, again, the one dated 17-3-1983, embodied statements to describe the husband as drunk on that day though neither in the written statement nor in course of evidence, the fact of husband being addicted

to drinking had even been pleaded or averred. This omission lends support to our view of an attempted embellishment of evidence to satisfy the requirements of the explanations to S. 9 of the Hindu Marriage Act. In fine, we are of the view that withdrawal from conjugal society had not been justified properly by the wife. The learned trial Judge's finding about onus being of no importance of non-existence of grounds u/s 9 or failure of the husband to prove his case cannot have any bearing in the background of the admitted position of unreasonable withdrawal by the wife from the company of the husband.

8. The appeal, therefore, is allowed. The impugned judgment is set aside. There will be no order as to costs.

9. The withdrawal having been admitted and reasonable justification for such withdrawal not having been established, the husband deserves a decree and the application u/s 9 by the husband is allowed and the suit is decreed. The wife should return and live with the appellant and render him conjugal society.

R. Bhattacharyya, J.

10. I agree.

11. Appeal allowed.