

(2014) 11 AHC CK 0243
In the Allahabad High Court
Case No : First Appeal No. 86 of 2008

Rajesh Dwivedi

APPELLANT

Vs

Additional Prin. Judge Family Court Lko.

RESPONDENT

Date of Decision : 21-11-2014

Acts Referred:

Hindu Marriage Act, 1955 — Section 13, 9

Citation : (2014) 10 ADJ 627 : (2015) 2 ALJ 257 : (2015) 108 ALR 337 : (2015) 1 DMC 445

Hon'ble Judges : Rajiv Sharma, J; Mahendra Dayal, J

Bench : Division Bench

Advocate : Amarjeet Singh Rakhra and Sudeep Seth, Advocate for the Appellant; Anupam Mehrotra, Jitendra Singh and Pradeep Kumar Pandey, Advocate for the Respondent

Judgement

@DELETEUPPERDATA

Mahendra Dayal, J.—This first appeal from decree arises out of a judgment and decree passed by Additional Principal Judge, Family Court, Lucknow in Regular Suit No. 1162 of 2006 and Regular Suit No. 1939 of 2007 both dated 3.5.2008, whereby the suit for divorce on the ground of cruelty being Regular Suit No. 1162 of 2006 was dismissed and the suit for restitution of conjugal rights being Regular Suit No. 1939 of 2007 filed by the respondent No. 2 under Section 9 of the Hindu Marriage Act, was decreed with costs. The facts in brief are that the appellant was married to the respondent No. 2 on 29.1.1996 as per hindu customs at Pratapgarh and after marriage, the respondent No. 2 came to live with the appellant at his matrimonial home. After the marriage, the appellant being in provincial police service left for training and the respondent went to the house of her parents. The respondent No. 2 on 28.7.1997 gave birth to a female child who is now aged seventeen years. The allegations of the appellant in his suit filed for divorce are that the respondent No. 2 is an open minded lady and has always been discourteous to the appellant. She always used to enter into

scuffle with the appellant on petty matters and treated him with physical as well as mental cruelty. The cruelty of the respondent No. 2 was to such an extent that when the younger brother of the appellant was going to be married on 19.1.2004, the respondent No. 2 did not attend the marriage on the pretext that she did not want to keep any relation with her in-laws. It has further been pleaded by the appellant that sometimes the respondent No. 2 used to threaten to consume poison, in case he did not agree to her demands. The appellant was residing in the official residence allotted to him, but when the relations between them became strained and the appellant found it difficult to live with the respondent No. 2, he took another house on rent. On the aforesaid allegations, the appellant sought decree for divorce dissolving the marriage between them on the ground of mental and physical cruelty.

2. The respondent No. 2 contested the suit by filing written statement in which she admitted the factum of marriage, but denied the allegations with regard to any type of cruelty. She pleaded that she has always been obeying not only to her husband but also to her in-laws and discharged her marital obligations till she lived with the appellant. When the respondent No. 2 was pregnant and was not keeping good health, she had to shift to her parental house. The appellant at that time was posted at Calcutta, where she also lived with the appellant for some time. After giving birth to a female child, as soon as the respondent No. 2 became fit, she again came to her matrimonial home and served them to their satisfaction. It has also been stated by the respondent No. 2 in her written statement that since the respondent No. 2 had given birth to a female child, the in-laws were not happy and did not even provide her a proper diet as a result of which, she developed complications and again had to shift to the house of her parents. The younger brother of the appellant, namely Anand was having affairs with a Bengali girl and it was only because of the efforts made by the respondent No. 2 that the parents of the appellant agreed to the marriage of Anand with that Bengali girl. She has also stated that in spite of all these, she was not invited to attend the marriage of her brother-in-law. However, when she came to know about the marriage, she herself proceeded to attend the marriage by car from Lucknow to Allahabad but unfortunately the car met with an accident near Bachhrawan and as such she could not attend the marriage. The respondent No. 2 in her written statement also made allegations of illicit relationship of the appellant with some other girl. It has been stated by her that during the period she lived with the appellant, she noticed that the appellant used to talk on mobile phone during late night hours and some times used to remain out during night also. When the respondent No. 2 contacted the other staff of the office of her husband, they disclosed that the appellant was having illicit relations with some girl and even during duty hours, he used to, talk with that girl for hours. When the respondent No. 2 made a detailed inquiry, she came to know that her husband was having a affair with a girl, namely, Stuti Tiwari, resident of Kanpur, who was residing at Delhi. When the respondent No. 2 complained about this extra marital affair, the appellant admitted having relations with that girl. The

respondent No. 2 then made complaint to the other Senior Officers of the Police Department, but they refused to intervene saying that it was their personal matter and they did not want to interfere in it. The respondent No. 2 having no other alternative wrote a letter to the Director General of Police for settlement upon which a departmental inquiry was set up in which the statement of all concerned were recorded. On the basis of the aforesaid pleadings, the respondent No. 2 prayed that it was the appellant, who treated her with cruelty and as such the appellant should not be given any decree of divorce.

3. The appellant while controverting the written statement submitted by the respondent No. 2 filed replication and reiterated the averments made by him in the plaint. It was stated by him that on account of the complaint made by the respondent No. 2, he was placed under suspension while as a matter of fact the appellant had a very good service career and he was awarded a president medal when he killed seven criminals including renowned dacoit namely, Nirbhay Gurjar in a police encounter. The appellant denied the allegations with regard to the demand of dowry and stated that after marriage and after service, he himself purchased all the household articles out of his own income. The appellant reiterated the averments with regard to the cruel treatment of the respondent No. 2 towards him and other members of his family. In reply to allegations of having extra marital affair, it was stated by the appellant that being in police service he had to make a routine visit during late night hours for checking and had to use the computer and internet in order to keep himself updated with the latest information. The appellant further stated in the replication that when the respondent No. 2 did not attend the marriage of his younger brother, where several senior police officers were present, the appellant felt insulted. It has also been stated by the appellant that the lady namely, Stuti Tiwari was already married and had been living with her husband and as such the question of maintaining any extra marital affair with her did not arise. It was on account of the repeated harassment that the appellant was forced to live apart and has been living separately since April, 2006.

4. The respondent No. 2, after filing of the divorce petition by the appellant, filed a suit under Section 9 of the Hindu Marriage Act for restitution of conjugal rights with the allegations that when she got married with the appellant in the year 1996, the appellant was working with the Reserve Bank of India. It was only after the marriage that the appellant was selected in the provincial police service and it became possible only because the respondent No. 2 not only morally supported him but also encouraged him in several ways. She again made allegation of illicit relations between the appellant the Stuti Tiwari and it was alleged that she overheard the conversation between them and on inquiry it was found true that the appellant was having affair with Stuti Tiwari. She further stated that she has always been willing to live with the appellant and in order to reach an amicable settlement several efforts were made not only by her family members but also by the senior officers of the police department but every time the appellant himself did not agree to keep the respondent No. 2 as his wife. In

these circumstances, having no other alternative, the respondent No. 2 filed the suit for restitution of conjugal rights.

5. The appellant contested the suit filed by the respondent No. 2 by filing written statement and reiterated all the allegations made by him in the suit for divorce.

6. The learned Court below on the basis of the pleadings of the parties proceeded to decide both the suits together and framed five issues, which are as under:

The parties produced oral as well as documentary evidence and also produced a CD containing conversation between them and some other functions. Learned Family Judge while deciding issue No. 1 recorded a finding on the basis of the evidence on record that it has not been proved that the respondent No. 2 treated the appellant with cruelty in any manner. On the contrary, while deciding issue No. 4, it was held that the appellant had himself deserted the respondent No. 2 without any sufficient reason. It was only on the basis of the aforesaid findings that the suit for divorce was dismissed and suit filed by the respondent No. 2 for restitution of conjugal rights was decreed.

7. From the perusal of the record, we find that when the appellant filed this first appeal before this Hon''ble Court, the Court while admitting the appeal stayed the judgment and order passed in the suit under Section 9 of the Hindu Marriage Act. However, subsequently, by the order dated 26.8.2009, the interim order was vacated on the ground that a decree for restitution of conjugal rights cannot ordinarily be executed. The husband or wife cannot be compelled by the Court to restore the conjugal relations against their will by executing a decree.

It also needs mention that during the course of this first appeal, further effort was made by the Court to amicably settle the matter between the parties and for this purpose, the dispute was referred to the Mediation and Conciliation Centre of this Hon''ble Court but unfortunately the parties could not arrive at any settlement and the mediation failed.

8. We have heard learned counsel for the appellant, namely, Shri Sudeep Seth and Shri Amarjeet Singh Rakhra, Advocates and learned counsel for the respondent, namely, Shri Anupam Mehrotra and Shri Pradeep Kumar Pandey, Advocates.

Learned counsel for the parties have also given written submission alongwith case laws on the subject.

This case like other matrimonial disputes is also an example as to how on account of strained relations and ego, the family life of a young couple is shattered and again the children are made to suffer. The parties have a daughter, who is now seventeen years old and is grown up enough to understand the relations of her parents. The manner in which the proceedings of this case have initiated and allegations and counter allegations have been made by the parties against each other, we find that even if the suit for divorce is dismissed and parties are directed to live together as husband and wife, no Court can compel

them to reunite. The Court with a hope that better sense will prevail, referred the matter to the Mediation and Conciliation Centre of this Court, but unfortunately for some reason, the parties could not reach a settlement and left it open for the Court to decide the controversy. The parties were also asked to appear before this Court in person and they in fact appeared also but even then the Court could not succeed to settle the controversy between the parties. The appellant has faced disciplinary inquiry and also remained under suspension for considerable period of time but ultimately the inquiry officer did not find any evidence with regard to illicit relationship of the appellant with Stuti Tiwari and it was after the inquiry report that the order of suspension was revoked and the appellant was reinstated in service. However, the appellant was awarded with major punishment of withholding of five increments permanently and censure entry was also awarded against which he filed a claim petition before the U.P. Public Service Tribunal, which was allowed and the order of punishment was quashed. Whatever may be the truth with regard to the alleged illicit relations of the appellant with the lady, but it cannot be denied that on account of the complaint made by the respondent, the appellant passed through mental stress while facing charges of illicit relations and also faced the departmental inquiry and after a long gap he succeeded in getting justice and the order of punishment was quashed. The period over which the appellant remained under mental stress on account of departmental inquiry, cannot be restored back to him and similarly the prestige which the appellant has lost cannot be restored back to him. Thus, it is not disputed rather proved that in the department inquiry, the allegations of the respondent with regard to the illicit relations of the appellant with the lady, were not found proved and in view of the law laid down by the Hon''ble Supreme Court in the case of Smt. Mayadevi Vs. Jagdish Prasad, , it is not only the physical cruelty which can be a ground for a divorce but the mental cruelty also constituted a good ground for divorce. In the case of Smt. Sadhana Srivastava Vs. Sri Arvind Kumar Srivastava, , our own High Court has held that making a false allegation against the husband of having illicit relationship and extramarital affairs by wife in her written statement constitute mental cruelty of such nature that husband cannot be reasonably asked to live with wife. In such case, the husband is entitled to a decree of divorce. Similar views have been expressed by Hon''ble Delhi High Court in the case of Jai Dayal Vs. Shakuntala Devi, , in which it has been held that levelling of false allegation by one spouse about the other having alleged illicit relations with different persons outside wedlock amounted to mental cruelty.

9. As we have observed hereinabove that deciding the appeal on merit will not resolve the dispute between the parties because irrespective of the fact that as to whether appeal is dismissed or allowed, the parties are not going to live together and reunite but being a Court of law, this Court is under obligation to consider the appeal on its merits.

The appellant Rajesh Dwivedi has sought divorce under Section 13 of the Hindu Marriage Act on the ground that the respondent No. 2 has treated him and his

family members with cruelty while the respondent No. 2 after filing of the divorce petition filed another suit under Section 9 of the Act for restitution of conjugal rights on the ground that the appellant has left her company without any sufficient reason and has treated her with cruelty. The respondent No. 2 also made allegation against the appellant that he was having illicit relation with another woman, which has been confirmed in the preliminary inquiry conducted by the Department. The learned Court below has proceeded to decide both the cases together and has decided them by a common judgment and decree. The learned Family Judge during the course of hearing also viewed the CD on a laptop provided by the parties which was recorded during telephonic conversation. Apart from the aforesaid evidence, the statement of the parties and two witnesses, namely, Shri Ravindra Kumar Singh and Smt. Tuhina Dwivedi was also recorded. The learned Family Judge has observed in the impugned judgment that during the preliminary inquiry conducted by the Department, the appellant was placed under suspension and in the preliminary inquiry, he has been found to have relation with another woman. Learned Family Judge has further mentioned in the judgment that the final inquiry was pending. The statement of other two witnesses has also been referred by the learned Judge in the judgment. The witness PW-1 Shri Ravindra Kumar Singh has stated that the respondent No. 2 had given a complaint against the appellant upon which the inquiry was set up and the appellant was placed under suspension. However, he could not explain as to what was content in the said complaint. He has further stated during his cross-examination that the appellant had told him that the said woman, namely, Stuti Tiwari was known to his family.

10. Another witness, namely, Smt. Tuhina Dwivedi examined as PW-3 is the wife of younger brother of the appellant. She has stated that she has heard the name of Stuti Tiwari, but she denied Stuti Tiwari having visited the house of the appellant. The learned Family Judge however on the basis of the telephonic conversation recorded in the CD and the report of the preliminary inquiry assumed that there was some relation between the appellant and Stuti Tiwari. Another reason given by the learned Family Judge for coming to this conclusion is that the appellant never introduced Stuti Tiwari to his wife and other family members. The learned counsel for the appellant submits that the learned Family Judge on the basis of assumption recorded a finding that the appellant was having some relation with Stuti Tiwari. It has nowhere been found by the learned trial Judge that the relation between them was objectionable. Shri Sudeep Seth appearing on behalf of the appellant has argued that every relation between a male and female cannot be said to be a illicit relation. In order to come to a conclusion as to whether the relationship between a male and a female is illicit and objectionable, there has to be some strong and concrete evidence. The two independent witnesses, namely, Shri Ravindra Kumar Singh and Smt. Tuhina Dwivedi have not stated anywhere in their statement that they had ever seen the appellant and Stuti Tiwari in a compromising position or meeting separately without the knowledge of any one. Thus, the conclusion arrived by the learned

Family Judge with regard to the relation between them is based on surmises and conjunctures. On the issue of cruelty, the learned Family Judge has found that it is not the respondent No. 2 but the appellant, who has treated his wife with cruelty and has left the company of the respondent No. 2 without any sufficient reason. It was on the basis of the aforesaid findings that the suit filed by the appellant for divorce was dismissed and the suit filed by the respondent No. 2 for restitution of conjugal rights was decreed.

11. Shri Sudeep Seth, learned counsel for the appellant has submitted that after the judgment of the learned Family Court, the final inquiry against the appellant has been concluded and the order of suspension of the appellant has been revoked. The inquiry officer in his inquiry report has clearly observed that there was no evidence to prove that there was any relation between the appellant and Stuti Tiwari. On the basis of the inquiry report, a punishment of withholding five increments was awarded to the appellant against which the appellant preferred claim petition before the U.P. Public Services Tribunal and the said claim petition has been allowed and the order of punishment has been quashed. This fact has not been disputed by the learned counsel for the respondent No. 2.

12. The learned Family Judge while taking up the issue of cruelty has found that the appellant has always been living in the guest house or in the house of his friends since the time of marriage and as such he himself has deserted the respondent No. 2 without any sufficient reason. The learned Family Judge has further recorded a finding that since the issue No. 1 framed has been decided against the appellant and it has been found that there was relation between the appellant and Stuti Tiwari, the appellant himself treated his wife with cruelty and there is no evidence on record to show that the respondent No. 2 has ever treated the appellant with cruelty.

13. From the judgment of the learned Court below and evidence on record, we find that there is no evidence with regard to the fact that the appellant was having any illicit relation with Stuti Tiwari. Even the Court below has not recorded any such finding. The learned trial Judge only on the basis of assumption has come to the conclusion that there was some relation between both of them and this assumption is based on the report of the preliminary inquiry. It is not disputed that after the final inquiry, the said story of illicit relation was not found true. It is also not disputed that the inquiry was insisted on the basis of the complaint made by the respondent No. 2 to DGP upon which the appellant was placed under suspension but later on, the suspension was revoked and he was reinstated in service. Even punishment of withholding increments awarded by the competent authority has been quashed by the Tribunal.

14. Learned counsel for the appellant has submitted that the matrimonial relation between a husband and a wife, is a very delicate in nature which is based on faith. As soon as one spouse loses faith in other, the relation between them is weakened which in most of the cases ultimately results in breaking of

matrimonial relationship. In this case, the respondent No. 2 lost faith in her husband only on the suspicion that her husband was having relation illicit with Stuti Tiwari while admittedly the said lady Stuti Tiwari has been residing at Delhi and she was also a married woman. The respondent No. 2 not only harassed the appellant in several ways but also privately probed the matter and made a written complaint to DGP. It was because of the complaint made by the respondent No. 2 that an inquiry was initiated and the appellant was suspended. However, after the inquiry and after the judgment of Tribunal, none of the charges could be found proved and the appellant was exonerated from all the charges. The submission on behalf of the appellant is that although the appellant has now been absolved from all the charges, the mental stress through which he has passed in last so many years and his reputation has lowered amongst his friends and seniors, the same cannot be returned to him. The charge of illicit relation levied by the respondent No. 2 against the appellant has not been found proved in the final inquiry and it has been held by the Hon''ble Supreme Court in several cases that making false allegation by one spouse against the other, is mental cruelty and is a good ground for divorce. One of such case is Vijaykumar Ramchandra Bhate Vs. Neela Vijaykumar Bhate, . In this case, the Hon''ble Apex Court has observed that the allegation of character in the written statement and subsequent withdrawal of such allegation does not absolve a spouse from being held liable for having treated the other spouse with cruelty by making earlier such injurious allegations. The cruelty as held by the Hon''ble Supreme Court depends upon the type of life, the parties are accustomed to or their economic and social conditions. It can be inferred from the entire course of conduct and incident showing display of temperament, emotion and perversion by one spouse causing hurt and humiliation to the other spouse. The matrimonial disputes in the opinion of Hon''ble the Supreme Court should be decided by the Courts keeping in view the ground reality. In the case in hand, the appellant is a police officer serving in the U.P. Police and as such his status is such that even a slight allegation with regard to his character can harm his reputation and he can be found unfit for service. Although it has been held in several cases that cruelty as a ground for divorce is available only in those cases where the Courts find that the cruelty is to such an extent that it has become impossible between the parties to live together. In the case in hand, although there is no direct evidence to prove that the respondent No. 2 treated the appellant or his family members with physical cruelty but the allegations made by the respondent No. 2 against the appellant are such in nature that it cannot reasonably be expected for a person of high character to live in the company of such wife, who has lost faith in her husband. The respondent No. 2 has not only made allegation of illicit relation of her husband with some other woman, but has also given written complaint with the intention that her husband may be punished. If this is the intention of a wife that her husband should be punished, it cannot be expected from them that they will ever live together as husband and wife.

15. The learned counsel for the appellant has submitted that so far as the

petition filed by the respondent No. 2 for restitution of conjugal rights under Section 9 of the Hindu Marriage Act is concerned, the same has been filed by her only as a defence to the divorce petition. He submits that if a wife can go to the extent of making a complaint against her husband then how she could pray for a direction to the Court that the husband should be directed to live with her. The allegations made by the respondent No. 2 with regard to cruelty of her husband have not been found proved but the learned Family Court has passed the decree for restitution of conjugal rights only on the ground that the appellant-husband has left the company of the respondent No. 2-wife without any sufficient reason. This approach adopted by the learned Family Judge appears to be erroneous. Learned counsel for the respondent No. 2 has relied upon several call details which were collected during the course of inquiry to show that the appellant has so much talked to Stuti Tiwari, sometimes even during late night hours which prima facie suggests intimate relation between them. Learned counsel has drawn the attention of the Court towards the evidence collected during the inquiry by the Department in which the statement of Stuti Tiwari was also recorded. From the statement of Stuti Tiwari recorded during the inquiry, it is clear that there was some affair between them. However, after sometime, their affair came to an end when Stuti Tiwari got married. Learned counsel for the respondent No. 2 further argued that although the learned Family Judge has not come to the conclusion that the relation between the appellant and Stuti Tiwari was objectionable but keeping in view the affair with a woman by a husband is itself cruelty to his wife. The respondent No. 2 having no other alternative had made a complaint to the Department keeping in mind that her husband will improve and forgot Stuti Tiwari but where there was no improvement in the conduct and behavior of the appellant and he did not mend his ways, respondent No. 2 pursued the inquiry and in the preliminary inquiry the allegation made in the complaint were found true. Since the respondent No. 2 was having a daughter born out of the wedlock and did not want to live without the company of the husband, she filed a suit for restitution of conjugal rights under Section 9 of the Hindu Marriage Act and the learned Family Judge after considering the evidence on record, decreed the suit directing the appellant to live in the company of the respondent No. 2. However, the learned counsel for the respondent No. 2 does not deny that in the final inquiry, the relation between the appellant and Stuti Tiwari were not found proved and the punishment awarded to the appellant has also been quashed by the Tribunal in a claim petition filed by him. It is also not disputed that several efforts were made by the Court to resolve the controversy and amicably settle the dispute between the parties and with a view to amicable settlement, the matter was referred to the Mediation and Conciliation Centre but the parties did not agree to resolve the dispute. In these circumstances, when both the parties do not intend to live together as a wife and husband, it would be better to free both of them from the matrimonial obligation so that they may lead their independent life in the manner they want.

After considering the matter in the aforesaid background and also taking into

account various facts and circumstances of the case, we are of the view that the marriage between the parties should be dissolved by a decree of divorce and as such the appeal deserves to be allowed.

In the result, the appeal is allowed and the judgment and decree passed by the learned Court below in Regular Suit No. 1939 of 2007 and 1162 of 2006 is set aside. The Regular Suit No. 1162 of 2006 is decreed and the marriage between the parties is dissolved by a decree of divorce and the Regular Suit No. 1939 of 2007 filed by the respondent No. 2 for restitution of conjugal rights is dismissed.

In the circumstances of the case, we do not pass any order with regard to the costs. The parties are directed to bear their own costs.