
(1970) 03 BOM CK 0023
In the Bombay High Court
Case No : S. A. No. 899 of 1969

Shakila Banu Golam Mustafa Momin

APPELLANT

Vs

Gulam Mustafa Abdul Hamid Momin

RESPONDENT

Date of Decision : 12-03-1970

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 488

Citation : (1970) MhLj 904

Hon'ble Judges : G. N. Vaidya, J

Bench : Single Bench

Advocate : A. A. Omar, for the Appellant; V. S. Katwal, for the Respondent

Final Decision : Allowed

Judgement

G. N. Vaidya, J.—[His Lordship after stating the facts and dealing with points not material to this report, proceeded]. Apart from this, it appears that the attention of both the Courts below was not drawn to the judicial principles which ought to be followed in suits for restitution of conjugal rights, as authoritatively laid down by Sir Amberson Marten G. J. and Madgavkar J. in *Bai Jivi v. Narsing* (1926) 29 Bom. L R 332. The relief of granting restitution of conjugal rights in a husband's suit means ordering an unwilling wife to go to her husband. This, in lay view, was rightly criticised as barbarous by Lord Herschell in *Russell v. Russell* (1897) A C 395 referred to in *Bai Jivi's* case by Marten C. J. It is a relic of ancient times when slavery or quasi-slavery was regarded as natural. This is particularly so after the Constitution of India came into force, which guarantees personal liberties and equality of status and opportunity to men and women alike and further confers powers on the State to make special provisions for their protection and safeguard. Whatever may be the ancient law, it is now difficult to appreciate this compulsion on an Indian wife when she has a reasonable apprehension that her life with her husband is impossible or dangerous to her. The Courts must be slow and cautious in these matters,

2. The learned Civil Judge in the present case, although his attention does not

seem to have been drawn to Bai Jivi's case, refused the relief stating that the circumstances in the case were such as to make it unsafe to the wife to return to her husband and the relief of restitution of conjugal rights was discretionary. Marten C. J. has observed in Bai Jivi's case at pages 336 and 337 as follows:

...I think they (lower Courts) have lost sight of the nature of the suit, which after all, is one rather akin to an action in personam on the Original Side, or in the Equity Courts in England. I have already pointed out that in the arguments in Moonshee Buzhor Ruheem's cases (1867) 11 M I A 551 it was described as akin to a specific performance action. In two other cases Lord " Herschell has been disposed to apply to such a suit some of the principles with which we are all familiar sitting in a Court of Equity. I refer to the principle that he Who seeks equity, must do equity or must come into equity with clean hands. Accordingly, in Mackenzie V. Mackenzie (1895) A C 384, Lord Herschell remarks (p. 390);

It is not a notion strange to our law that the Court should refuse its aid to one who does not come into it with clean hands, and when the question arises for decision I think it may well be considered whether the Court would be bound to entertain an action, and grant relief as the suit of one whose misconduct, though falling short of a matrimonial offence, has been the primary cause of the difficulty, and has led to the refusal to adhere". And then in Russell v. Russell Lord Herschell states (p. 456):

"Indeed, if the broadest definition of cruelty which has been contended for in this case were accepted, it would still be to my mind unsatisfactory that a husband who, though stopping short of cruelty in that sense, bad by insult and outrage driven his wife to leave him, should, without repentance for the past or any assurance of amendment for the future, be able to invoke the assistance of the Court and call for the strong arm of the law to force his wife under pain of imprisonment to resume cohabitation. One would think that the Court might well refuse to afford its assistance to one who acted thus." "

3. With respect, even though a wife cannot be imprisoned now in execution of a decree for restitution of conjugal rights, I entirely agree with the views expressed by Lord Herschell, which appear to have been approved by Marten C. J. It is true that these were not the principles that were, in terms, followed by the trial Judge. But, in substance, he followed the principles as he was satisfied that though cruelty as required by matrimonial law was not established, the circumstances of the case made it unsafe for the wife to return to her husband.

4. The learned Assistant Judge, on the contrary, ignored these principles, perhaps because they were not brought to his notice, and proceeded to decree the suit wholly because he held that the wife failed to prove cruelty as required by matrimonial law and hence her apprehension of danger to her was not reasonable. Such is not the law governing suits for restitution of conjugal rights. In the present case it is clear that the suit was filed for restitution of conjugal rights only after the wife had filed an application for maintenance u/s 488,

Criminal Procedure Code. Merely because her application was dismissed during the pendency of the suit, it could not be inferred that there was no justification for the apprehensions of the wife that she would not be safe in her matrimonial home with her husband. The learned Assistant Judge was of the view that he was not satisfied that the apprehension of the wife was reasonable ; but he has not approached this question, as he ought to have done, from the point of view of an average reasonable wife, to whom no maintenance was offered, as in the present case, for more than a year before the suit and thereafter till now. It is true that she failed to go to the husband's house after the decision of the Panchayat for the third time; but it appears from the evidence of the panchas of the community that the husband had undertaken at least twice earlier to behave himself. The apprehension of the wife is particularly reasonable because the husband failed to behave himself. The husband, who is a Muslim, has not only a right to marry another wife but also a right to divorce the wife by merely pronouncing "Talaq" as required by Mohamedan Law. As all these relevant matters were not considered by the learned Assistant Judge, his finding that the wife's apprehension was not reasonable, must be held to be contrary to good sense. It may be noted that Prophet Mohammed said:

"Ye are not able, it may be, to act equitably to your wives, even though Ye covet it; do not however be quite partial, and leave one as it were in suspense; but if Ye be reconciled and fear, then God is forgiving and merciful; but if they separate, God can make both independent out of His abundance, for God is abundant, wise" (.Koran, Surah IV 125 Translation by E. H Palmer).

5. For these reasons the decree passed by the learned Assistant Judge is set aside and the decree passed by the learned Civil Judge is restored. The appeal is allowed. The respondent to pay the costs of the appellant in this Court and In the lower Appellate Court.