
(1988) 04 CAL CK 0002
In the Calcutta High Court
Case No : F.M.A.T. No. 3080 of 1985

Sibnath Mukhopadhyay

APPELLANT

Vs

Sumita Mukhopadhyay (Chatterjee)

RESPONDENT

Date of Decision : 25-04-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Hindu Marriage Act, 1955 — Section 13, 21, 23A, 25, 25(2)
Penal Code, 1860 (IPC) — Section 406

Citation : 92 CWN 1196

Hon'ble Judges : Ajit Kumar Nayak, J; A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : P.K. Dey, for the Appellant; Partha Bose, for the Respondent

Judgement

A.M. Bhattacharjee, J.—A husband's petition for restitution of conjugal rights was not only opposed by the wife but was countered with a claim for dissolution of the marriage on the ground of cruelty committed by the husband. Section 23A of the Hindu Marriage Act, as inserted by the Amendment Act of 1976, has now expressly permitted such counter claim providing that -

in any proceeding - for restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counterclaim for only relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the Court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

2. This Section, to our mind, has again demonstrated carelessness and also "slovenliness in drafting" which, as pointed out by Bhagwati, J. in *Minerva Mills* (A.I.R. 1980 S.C. 1799 at 1823) "is becoming rather common these days". The spouse proceeded against for the restitution of conjugal rights is obviously entitled to oppose the claim not only on the ground of the petitioner's adultery,

cruelty or desertion, but also on any other ground on which a marriage may be dissolved u/s 13 of the Act, e.g., incurably of unsound mind or suffering from leprosy in a virulent and incurable form or from venal disease in a communicable form and the like. And if a spouse can do so, it is difficult to understand as to why he or she would not be entitled to make a counter claim for divorce of any such ground other than the three specified in Section 28A, namely, adultery, cruelty or desertion. This point, however, need not detain us as here the counterclaim of the wife for dissolution of marriage was on the ground of cruelty by the husband.

3. The trial court decreed the husband's petition for restitution of conjugal rights and dismissed the wife's counterclaim for divorce. On appeal to this Court, the decision of the trial court was completely overturned and a Division Bench of this Court, while dismissing the husband's petition for restitution of conjugal rights, decreed the wife's counterclaim for divorce and also granted the wife permanent alimony at the rate of Rs. 300 per month.

4. In her written statement in the main lis, the wife-respondent made a prayer for return of certain articles specified in the schedule thereto, but the trial Judge having decreed the husband's petition for restitution of conjugal rights, did not make any order in respect of that prayer. The Division Bench on appeal, after allowing the appeal and decreeing divorce, remanded the case of the wife for return of the articles to the trial court for fresh adjudication u/s 27 of the Hindu Marriage Act on the evidence on record and on further evidence to be adduced by the parties, but made it clear that it was expressing "no opinion whether or not the claim of the appellant in respect of the items of property or ornaments mentioned in the Schedule to her written statement can be entertained u/s 27 of the Hindu Marriage Act".

5. The trial Judge, after remand, treated the matter as "a proceeding u/s 27 of the Hindu Marriage Act" and after recording evidence and hearing the parties, allowed the claim of the wife holding that she was "entitled to get back from the petitioner (husband) 1 necklace, 8 pieces of Bangles, 1 Bala, 1 pair Earrings, all of gold, or 8 Bharies of gold in lieu thereof, 4 Benarasi Sarees, 1 big plate of stainless steel, 1 small dish of stainless steel and 1 glass of stainless steel" and directed the petitioner-husband to return the aforesaid articles to the wife-respondent. Being aggrieved, the petitioner-husband has filed this appeal.

6. If this was, as the trial court thought it to be, a separate proceeding u/s 27 of the Hindu Marriage Act, then we are afraid that no appeal could lie against any order passed under that Section. As Section 28 of the Act makes it clear, all decrees passed under the Act, being decrees for restitution of conjugal rights, of nullity of marriage, of judicial separation and of divorce, are appealable u/s 28(1) and as it would be clear from Section 28(2), the only orders under the Hindu Marriage Act that are appealable are orders for permanent alimony u/s 25 and post-decretal orders for custody, maintenance and education of minor children. Therefore, if Section 27 contemplates a separate proceeding de hors a decree

under the Act, an order thereunder would not be appealable. Section 27 reads as hereunder:

In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

7. The Section, therefore, at once makes it clear that the determination in accordance with the provisions of this Section must take form, in the shape of provisions in the decree and as part thereof and would be appealable as such.

8. Here in this case, the original petition of the husband for restitution of conjugal rights, numbered as Matrimonial Suit No. 66 of 1977, was decreed by the trial court and the counterclaim made therein by the wife for divorce was dismissed. On appeal by the wife to this Court, being AFOD No. 174 of 1979, a Division Bench allowed the appeal, reversed the judgment and decree of the trial court, dismissed the husband's petition for restitution of conjugal rights, decreed the wife's counterclaim for divorce, ordered grant of permanent alimony to the wife, but referred the claim of the wife for return of the articles back to the trial court for fresh adjudication, obviously under the provisions of Rule 25 of Order 41 of the Code of Civil Procedure, by which matrimonial proceedings under the Hindu Marriage Act are regulated because of Section 21 of the Act. Now that the trial court has returned the evidence and its findings thereon, it would be for this Court to determine the appeal finally by disposing of the matter relating to the return of the articles which was remanded to the trial court, the other matters, namely, the husband's claim for restitution and the wife's counterclaim for divorce having already been finally disposed of by the Division Bench by its Judgment, dated 24th August, 1981.

9. As already noted, the finding of the trial court after remand is that the wife is entitled to get back from the husband "one necklace, eight, pieces of Bangles, one Bala, one pair of Earrings, all of gold, or eight Bharies gold in lieu thereof, four Benarasi sarees....one big plate of stainless steel, one small. dish of stainless steel and one glass of stainless steel" and the husband has been "directed to return the above mentioned articles" to the wife, within two months from the date of the order. This order has, however, been stayed by this Court till the disposal of this appeal on the husband's handing over four Fixed Deposit Certificates amounting in all to Rs. 20,000 as security with the Registrar, Appellate Side, of this Court.

10. But both. the parties have now filed before us a joint petition for compromise signed by them and their respective lawyers praying that the matter be disposed of on the terms and conditions contained in the petition which are briefly, as, hereunder, namely, that the husband has agreed to pay to the wife a sum of Rs. 15,000 only in full and final satisfaction of her claim for return of the articles specified in the order of the trial court and has in fact handed over to the wife a

Bank Draft of that amount, that the wife having now been employed and earning her livelihood is relinquishing and agreeing not to enforce her right to the permanent alimony of Rs.300 per month payable by the husband, that the husband will be entitled to withdraw the Fixed Deposit Certificates deposited with the Registrar as security in accordance with the order of stay as aforesaid and that the parties would bear their respective costs. We have now been asked to record this accord or compromise and to dispose of the appeal in accordance therewith.

11. The approach of a Court to any agreement or compromise between the parties to the litigation must be to quote the oftquoted Latin maxim, *ut res magis valeat quam pereat*, i.e., let it flourish and not perish. Interest Republicae being *finis litium*, and lawful compromise being the most descent burial for all lis with no scope for further agitation in the higher Courts, the Court must record a compromise wherever and whenever it can and should refuse to do so only when it can not but. The terms of the compromise, however, must, is expressly provided, in Order 23, Rule 3 of the Code of Civil Procedure, be lawful and, in our view, nothing unlawful can be gleaned from the terms providing that the party shall bear their respective costs and that now that the appeal is going to be disposed of, the appellant-husband would be entitled to withdraw the Security Deposit made in compliance with the order granted by this Court staying the execution of the impugned order. The condition providing that the wife would not enforce but would relinquish her right to the amount of permanent alimony granted by this Court, is also quite lawful as it is the wife's own admission in the petition that she is now in a position to earn her livelihood and to support herself and there is thus "a change in the circumstances" within the meaning of Section 25(2) of the Hindu Marriage Act which would justify a rescission of the order. To satisfy ourselves further, we also directed the parties to appear before us in person and the wife has reiterated before us what she has stated in the compromise petition.

12. We, however, have our doubts as to whether all the articles which the wife claimed and which the trial Judge has directed the husband to return back to the wife could be the subject matter of an order u/s 27, Hindu Marriage Act. As quoted hereinbefore the Section on its express terms would apply to such property only which - (a) has been "presented at or about the time of marriage" and (b) "may belong jointly to both the husband and the wife". It is common knowledge that properties presented at or about the time of the marriage may belong to the bride only or the bride-groom, only or to both. For example, if articles for the exclusive use of the ladies like ladies' ornaments or ladies' garments are presented, those would obviously belong to the wife; if articles used exclusively by men are presented, those would then belong to the husband. But articles which are of common use, e.g., furniture, utensils and the like, may be meant for and thus belong to both. We are inclined to think that Section 27 of the Hindu Marriage Act is meant to provide for such properties only which thus belong or have come to belong to both and which, because of such joint

belonging would require Court's adjudication at the time of the dissolution of the marriage and is not intended to cover properties which belong to the wife alone or the husband alone. There is nothing in the majority judgment of the Supreme Court in *Pratibha Rani Vs. Suraj Kumar and Another*, referred to and relied on by the trial Judge, to the effect that Section 27 will apply even to properties which, though presented at or about the time of marriage, belong exclusively to one of these spouses only and all that has been decided there is that a wife is entitled to initiate criminal proceeding for misappropriation of her Stridhana properties even though the same were in the custody of the husband or the in-laws, and that the latter shall be deemed to have been entrusted with such properties within the meaning of Section 406 of the Indian Penal Code. The view of the Full Bench of the Punjab and Haryana High Court in *Vinod Kumar Sethi and Others Vs. State of Punjab and Another*, to the effect that during coverture the wife's exclusive properties or Stridhana become subject of joint ownership and possession has been over-ruled; but it may be noted that, as would appear from paragraph 17 of the majority judgment of the Supreme Court, the view in *Vinod Kumar* (supra) to the effect that "the Statute expressly recognise that property which is exclusively owned by the wife is not within ambit, of Section 27" has been referred to rather approvingly. The trial Judge, in our view, misunderstood paragraphs 15 and 16 of the Supreme Court judgment in treating them as authority for the proposition that Section 27 provides for an alternative remedy to the aggrieved wife even in respect of her exclusive Stridhana properties. In paragraph 15, it has been clearly held by the majority that "if the husband refuses to return the Stridhana property of his wife it would be open to the wife to recover the same by a properly constituted suit". It is true that in paragraph 16, the Punjab Division Bench decision in *Bhai Shar vs. Virinder* (1979 CLJ 413) has been approvingly referred to with the observation that "it was very rightly pointed out by the.... High Court that Section 27 of the Hindu Marriage Act provides an alternate remedy to the wife even in respect of her Stridhana property belonging to her alone. But as it would appear from the Punjab decision itself in *Bhai Sher* (supra) and from the extracts quoted therefrom with approval, in paragraph 16 of the majority judgment, all that has been decided by the Punjab Division Bench is that "Section 27 of the Hindu Marriage Act empowers a Court while deciding a matrimonial dispute to also pass a decree in respect of property which may jointly belong to both the husband and the wife". Therefore, to read the decision of the Supreme Court in *Pratibha* (supra) or the Punjab Division Bench decision in *Bhai Sher* (supra) as any authority for the view that Section 27, Hindu Marriage Act would also apply to properties exclusively belonging to one of the spouses only, would be to misread the decisions and, it should be noted that Section 27 was being considered by the Supreme Court in *Pratibha* (supra) only to emphasise that nothing therein has abolished the concept of Stridhana or has taken away the remedy available to a wife under the criminal law for breach of trust in respect of such Stridhana property even against her husband even though the property was in the custody of the latter.

13. A learned Single-Judge of the Allahabad High Court has, however, held in *Kamta Prasad Vs. Smt. Om Wati*, that Section 27 of the Hindu Marriage Act only seeks to expressly confer additional powers on the Matrimonial Courts and even though that Section would apply only to such property "which may belong jointly to both the husband and the wife", nothing therein would "exclude the jurisdiction or the power of the Court to pass an appropriate decree in regard to the property which may belong solely to the husband or solely to the wife". The learned Judge is of the view that such power "must be inherent in the legal proceedings which appropriately arise under the Hindu Marriage Act" and must also be otherwise available under the provisions of Section 151 and also Order 7 Rule 7 of the CPC which regulate all proceedings under the Act in view of Section 21 thereof. We need not decide this question but would only add that this view, if accepted, might go a long way to make the reliefs awardable by the matrimonial Court much more comprehensive and to avoid multiplicity of proceedings and we would like to go into this question as and when it would be necessary for the proper disposal of a case before us and for the present all that we would like to say with respect is that the view would deserve anxious consideration. It may be that this view, if maintainable, might go to that length to empower a matrimonial Court, while granting the divorce or other matrimonial reliefs under the Hindu Marriage Act, also to decree declaration of title and recovery of possession of any property, moveable or immovable, which one spouse may claim against other as his or her separate property. But, as already noted, this question need not be pursued any further in view of the facts and circumstances of the case at hand.

14. In this case, however, even if we hold that the articles directed to be returned by the impugned order are not properties belong jointly to the husband and the wife and accordingly are not properties covered by Section 27 of the Hindu Marriage Act, nothing would prevent us from recording a compromise to the effect that the wife-respondent has agreed to receive and has in fact received Rs. 15,000 in lieu of those articles belonging to her in full and final settlement of her claim for return of those articles. For, even if those articles do not come within the ambit of Section 27 or any other provisions of the Hindu Marriage Act and are not, therefore, matters which can relate to matrimonial proceedings under the Act, a compromise can still be struck in respect thereof between the parties under the provisions of Rule 3 of Order 23 of the Code of Civil Procedure, as they now stand after the Amendment of 1976. Rule 3, as it stood before the Amendment of 1976, provided that the Court on recording an agreement, satisfaction or compromise "shall pass a decree in accordance therewith so far as it relates to the suit". The words "as it relates to the suit" have now been substituted by the words "so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit". Therefore, under Rule 3, as it now stands, a Court can pass a decree in accordance with the agreement, satisfaction or compromise between the parties even though the same relates to or covers matters which may not form the subject matter of the suit provided they relate

to the parties to the suit and the terms of such a decree would now be executable and are not to be enforced by a separate suit, as was the position prior to the Amendment of 1976. Therefore, even if the articles in question were or could not *stricto sensu* be the subject matter of a matrimonial proceeding under the Hindu Marriage Act, as they nevertheless relate to the parties to the proceeding, we would direct recording of the compromise as prayed for. The appeal, therefore, which, as noted hereinbefore, has already ended in a decree for divorce in favour of the respondent-wife against the appellant-husband, shall now stand fully disposed of in accordance with the terms and conditions of the agreement, compromise and satisfaction as recorded in the joint petition filed by the parties, which shall thus form part of the decree. No costs as agreed by and between the parties.

Ajit Kumar Nayak, J.

15. I agree.