
(1999) 09 BOM CK 0044

In the Bombay High Court

Case No : Family Court Appeal No. 3 of 1993

Vandana Vithal Mandlik

APPELLANT

Vs

Vithal Namdeo Mandlik

RESPONDENT

Date of Decision : 06-09-1999

Acts Referred:

Evidence Act, 1872 — Section 59
Hindu Marriage Act, 1955 — Section 23(1), 9
Limitation Act, 1963 — Section 3, 5

Citation : (2000) 1 ALLMR 183 : (2000) 2 BomCR 640 : (2000) 1 CivCC 230 :
(2000) 2 DMC 515 : (1999) 3 MhLj 898

Hon'ble Judges : V.K. Barde, J;S.B. Mhase, J

Bench : Division Bench

Advocate : C.K. Shinde, for the Appellant; S.T. Shelke, for the Respondent

Judgement

V.K. Barde, J.—The appellant filed Hindu Marriage Petition No. 17 of 1991 in the Court of Civil Judge (Senior Division), Aurangabad, for restitution of conjugal rights, u/s 9 of the Hindu Marriage Act, 1955. On establishment of Family Court at Aurangabad, the petition stood transferred to the Family Court, Aurangabad, and then was numbered A. 72/93. The learned Judge of the Family Court by her order dated 3-7-1993 dismissed the petition. Hence, the appeal.

2. The petitioner, Vandana, contended that she got married with respondent, Vithal, on 17-12-1987 at Aurangabad, as per Hindu rites and customs. After the marriage, the husband and wife cohabited for about 8 months at Borgaon Nandur (Taluka : Rahuri, District : Ahmednagar). At the instance of the family members, the respondent started to ill-treat her because she could not fulfil his demand of bringing money and gold articles from her parents. Her father fulfilled some of the demands but not to the satisfaction of the family members of the respondent and, therefore, the petitioner had to suffer the ill-treatment. However, she continued to stay with the respondent. In July 1988, the respondent was pressing the petitioner to go to her parent's house to bring money and golden ornaments. She refused. Then the respondent and his family

members, severely beat the petitioner and drove her out of the house and since then she is staying with her parents.

3. The petitioner has further contended that she herself and her relatives made various attempts for resumption of matrimonial relations between her and the respondent. However, the respondent did not take her back for cohabitation. On 24-11-1990, the respondent flatly denied to have matrimonial relations with the petitioner, and that too, without any cause.

4. The respondent sent notice by registered post, dated 15-11-1989, through his Advocate and made false allegations in the said notice against the petitioner. The petitioner replied that notice on 30-11-1989 and again requested the respondent to take her back for cohabitation. Lastly, on 24-11-1990, the petitioner and her relatives approached the respondent at his house. But he again refused to allow her to cohabit with him. She has also contended that since July 1998, the respondent had not provided for her maintenance and, therefore, she has prayed a decree for restitution for conjugal rights.

5. The respondent in the written statement, admitted that he got married with the petitioner. However, he has denied all other allegations made in the petition. He has contended that he was always ready and willing to cohabit with the petitioner. But the petitioner was insisting upon him to leave the village and to reside at Aurangabad. He refused to reside at Aurangabad and therefore, petitioner had not come to reside with him. He made 3-4 attempts to take her back for cohabitation. However, she did not come to reside with him.

6. The learned Judge of the Family Court has held that the petitioner failed to prove that the respondent, without reasonable excuses, withdrawn from her society and she also held that the petition was filed with considerable delay, without any explanation for the delay and, therefore, petitioner is not entitled to a decree for restitution of conjugal rights, under the provisions of section 23(1) of the Hindu Marriage Act, 1955.

7. The learned Counsel for the appellant has argued that the petitioner was cohabiting with the respondent. But during that period, she was ill-treated because the demands of the respondent and his family members could not be fulfilled and ultimately she was driven out from the house. Even then, she made various attempts to go back to her husband's house. But he did not allow her to cohabit. The learned Judge of the Family Court has not properly appreciated the evidence on record and she has wrongly placed reliance on the evidence of the respondent.

8. It is, therefore, necessary to go through the evidence of the parties. The deposition of the petitioner, Vandana, is Exhibit 50 and she has stated that she cohabited with the respondent for 8 months. In the beginning for 2-3 months, she was treated very well. Thereafter, the respondent used to ask her to bring money from her father's house and when she refused, she was being beaten. She has also stated that her father paid some amount to the respondent. But

there was no change in the behaviour of the respondent. She has stated that her husband took her to her father's house and left her there and thereafter did not come back to take her back. She made various attempts to resume cohabitation. But the respondent did not allow her to cohabit.

9. In the cross-examination, she has denied that she left the house of the respondent because she was not ready and willing to cohabit with the respondent. She also denied that she was quarrelling with the respondent and his relatives. She has also denied that the respondent and his brother had been to her father's house to take her back. But it is nowhere suggested to her in the cross-examination, that she and her father wanted that the respondent should reside at Aurangabad and not at the village, and that, it is also not suggested that as the respondent refused to stay at Aurangabad, she did not return to his house. So, the stand taken by the respondent, in the written statement, is not put to the petitioner in her cross-examination. The cross-examination of the petitioner does not, in any way, create doubt about her statements in examination-in-chief.

10. The petitioner's next witness is her father, Uttamrao. He in his deposition at Exhibit 52 has stated that about 4 months after the marriage of the petitioner and respondent, the respondent demanded money and he gave him Rs. 5,000/-. However, the respondent was not satisfied and he was again and again asking for money. In July, 1988, the respondent asked petitioner to leave his house. He has stated that before Diwali festival, he had taken the petitioner to the house of the respondent. But he refused to take her back.

11. In the cross-examination, he has denied that the respondent and his relatives had come to take back the petitioner to the house of respondent. Here again, there is no suggestion that he was asking the respondent to stay at Aurangabad and as the respondent was not willing to stay at Aurangabad, the petitioner was not going back to his village for cohabitation.

12. The respondent has examined himself. His deposition is at Exhibit 56. He has stated that because of his service, he was posted at Mirajgaon and the petitioner was residing with his parents at village Borgaon Nandur. He has stated that when he was at Mirajgaon, the petitioner had left his house. When he returned to Borgaon Nandur, he came to know that the respondent had gone to her father's house. He then went to her father's house and then petitioner returned with him to Borgaon Nandur. He again went back to Mirajgaon. But again the petitioner left his house for her father's house.

13. The respondents has further stated that then he, his brother Gorakshnath, and one Shri Bhosle had been to the house of father of the petitioner to take her back. She again went with him but stayed at his house only 4-5 days and again went back to her father's house.

14. The respondent has further stated that then his brother, Mahmood Deshmukh and Bhosle had gone to the house of the father of the petitioner. But the

petitioner was not ready to cohabit and she refused to return. Then he sent the notice by registered post. The petitioner then replied the notice and called panchas to take her back for cohabitation. On receiving reply, his brother and brother-in-law had gone to the house of father of the petitioner to take her back. But she was not ready to return.

15. The respondent has also stated that he served a notice which was published in Dainik Lokmat in its issue dated 27-5-1990. The copy of that issue is marked as Article "A". He has denied that he ever asked the petitioner to bring money from her father's house. He has further stated that when his brother was at the house of the father of the petitioner, father of the petitioner asked him to make arrangement for separate residence of the petitioner and respondent and told that she cannot live in joint family. In the cross-examination, there are only the denials with respect to the suggestions made.

16. The respondent has examined his brother Gorakshnath and Tukaram Bhosle. Their depositions are at Exhibit 58 and 59 respectively. They have given the evidence regarding how they had been to the house of father of the petitioner to take back the petitioner for cohabitation with the respondent. Gorakshnath has stated that he had been to the house of the father of the petitioner along with his brother-in-law Tukaram Bhosle and Mahmood. But the petitioner refused to return for cohabitation. He has stated that after reply to the notice was received, he had gone to bring back the petitioner. But at that time, her father refused to send her and said that the respondent should reside at Aurangabad separately from his family. So, for the first time, this stand taken in the written statement is stated by the witness of the respondent.

17. Tukaram Bhosle is the brother-in-law of the respondent. His sister is married with the brother of the respondent. He also states that he had been to Aurangabad with his brother-in-law to take back the petitioner to the house of the respondent and the petitioner had returned to the house of the respondent. But 2-3 months thereafter, again he received message that the petitioner had left the house of the respondent. So, in the month of July, he again went to the house of father of the petitioner at Aurangabad. But at that time, father of the petitioner said that if the respondent wanted to cohabit with the petitioner, then he should reside at Aurangabad. The witness has further stated that again he had been to the house of the father of the petitioner after the reply to the notice was received and at that time, the petitioner told that she was not ready to cohabit with the respondent and she further stated that if she were forced to come with him, she would commit suicide.

18. No doubt, the respondent has examined two witnesses in support of his case to show that he made attempts to bring back the petitioner to his house. But his evidence does not indicate as to why the petitioner was leaving his house again and again. The explanation is coming neither from him nor from his witnesses. Is it believable that as the respondent's family was residing at village Borgaon Nandur, the petitioner was not ready to stay at the village? This was arranged

marriage. The petitioner as well as his father were knowing that the petitioner was in service posted at Mirajgaon. His joint family was residing at Borgaon Nandur where there are agricultural lands of the family. If the petitioner or her father wanted that the husband of the petitioner should reside at Aurangabad then the marriage itself would not have taken place. Just to show some reason as to why the petitioner was not residing with him, the stand is taken by the respondent in his written statement. In the given circumstances, that reason given by the respondent does not appear to be true.

19. When the marriage had taken place and the petitioner had gone for cohabitation at the village of the respondent, we do not find any substance in the contention that she left the house. It clearly appears that the circumstances were such that she was unable to cohabit with him. It cannot be said that as there is no other witness to support the petitioner with respect to her contention, that she was being ill-treated at respondent's house, her evidence be discarded. Generally, no such witness will come forward to corroborate the statement of the wife who was residing at the house of her husband. The uncorroborated testimony of the wife has to be taken into consideration and it has to be given due weight. If there are circumstances which indicate that whatever she states must be the truth, then even without corroboration, such evidence has to be accepted.

20. Even if the case of the respondent is taken as it is, it appears that the petitioner left the house of respondent when respondent was at Mirajgaon, on two occasions. But on both the occasions, she had returned to the house of respondent. If she really did not want to cohabit, she would not have returned to the house of respondent. She must have received ill-treatment at the house of the respondent during the absence of the respondent and, therefore, she had to go to her father's house. The very circumstance that on two occasions, the respondent and his relatives had been to the father's house and she had returned to her father's house indicate that she was ready and willing to cohabit with him. But the circumstances were such that she had to return to her father's house again and again. The learned Judge of the Family Court has not properly appreciated this circumstance and has disbelieved the evidence of the petitioner.

21. The demand of money from the parents of the wife is not a new thing. Similarly, ill-treatment on account of non-fulfilment of the demand is also not a new thing. In many cases, it happens. So, the present case cannot be considered as an exception. The evidence of the petitioner that she was being ill-treated by the respondent and his relatives because the demand of money and golden ornaments was not fulfilled can be relied upon.

22. Here, one more circumstance has to be taken into consideration to find out whether the respondent was ready and willing to cohabit with the petitioner. The respondent sent notice dated 15-11-1989 to the petitioner wherein he has specifically stated that as per the custom, he was giving divorce to her and he further declared that since then, the relations husband and wife has come to an

end. He did not stop there. But a similar notice is published in the newspaper "Dainik Lokmat" in its issue dated 27-5-1990. The copy of the same is Article "A".

23. If the respondent really wanted to cohabit with the petitioner and as per his case, that he was always ready and willing to cohabit with the petitioner, then he would not have given such notice to the petitioner and would not have published similar notice in the newspaper. This act on the part of the respondent clearly shows that he is not ready to recognize the marriage tie and he has gone even further by declaring that the marriage tie is broken that too, not by illegal procedure but so called custom. The learned Judge of the Family Court ought to have placed more importance on these two notices to find out the mentality of the respondent. There is no substance in the contention of the respondent that he is ready and willing to cohabit with the petitioner.

24. The circumstances clearly indicate that the petitioner was forced to reside with her parents. The respondent did not care to take her back for happy and peaceful cohabitation. Whatever attempts were made to take her back, had failed because in the beginning, the petitioner returned to the house of the respondent, she was not treated well on her return and she had to go back to her father's house. The contention of the respondent, that the petitioner and her father wanted that he should reside at Aurangabad and, therefore, she was not residing with him at Borgaon Nandur, is not at all believable. The petitioner has proved that the respondent has without reasonable excuse withdrawn from her society. The finding recorded in this respect by the learned Judge of the Family Court has to be reversed.

25. The learned Judge of the Family Court has observed that the petitioner started to reside separately from her husband in July 1988. But the petition was filed in January 1991. The delay is not properly explained and because of that, by resorting to the provisions of section 23(1)(d) of the Hindu Marriage Act, 1955, the learned Judge has held that the petitioner is not entitled to the decree for restitution of conjugal rights. In this respect, she has relied upon the judgment of Kerala High Court, in the case of Ramakrishna Pillai v. Vijayakumari Amma, reported in 1989(2) D.M.C. 512, equivalent to 1989(2) Ker LT188. No doubt, in the said matter also, there was a petition for restitution of conjugal rights u/s 9 of the Hindu Marriage Act, 1955. But the Court found that the husband filed the petition 7 years after the spouses were separated. There was no explanation about this delay in filing the petition and, therefore, it was observed that the husband would not be entitled to the decree for restitution of conjugal rights, u/s 23 of the Hindu Marriage Act, 1955. The facts in the said case were peculiar. The principle, as stated, cannot be disputed. But it cannot be made applicable to the present case.

26. Here, the wife is residing separately from her husband since July 1988. The stand taken by both sides indicate that the attempts were made by both sides for reconciliation but the attempts failed. The husband declared his intention of breaking the marriage tie by his notice dated 15-11-1989. The notice was replied

by the petitioner on 30-11-1989. So, till that day, and even thereafter, attempts were made for reconciliation and when all attempts failed the petition is filed on 31-1-1991. The deposition of the petitioner clearly indicates that there were attempts of reconciliation even after exchange of notices. So, it cannot be said that there was unreasonable delay, or that, there was no explanation as to why the delay was caused.

27. It also has to be noted that no opportunity was given to the petitioner to meet the case on the ground of delay. The learned Judge of the Family Court has without seeking any explanation from the petitioner, when she was in witness box, came to the conclusion that the delay was there and the delay was not properly explained. The learned Judge of the Family Court erred in applying provisions of section 23(1)(d) of the Hindu Marriage Act, 1955, to the present case. In the given circumstances, there was no delay in filing the petition. If at all there was any delay, there was reasonable explanation on the record. If the learned Judge was not satisfied with that, then she had not given any opportunity to the petitioner to explain the so called delay.

28. Therefore, the rejection of the decree for restitution of conjugal rights by applying provisions of section 23(1)(d) is not at all legal and proper. We, therefore, hold that the petitioner is entitled for decree for restitution of conjugal rights.

29. In the result, Family Court Appeal No. 3/1993 is allowed. The judgment and order passed by the learned Judge of the Family Court. Aurangabad, on 3-7-1993, in petition Appeal No. 72/93, is set aside. The petition of Vandana w/o Vithal Manlike is allowed. The decree for restitution of conjugal rights is granted. The respondent to pay the costs of the petitioner and bear his own throughout.

30. Appeal allowed.