Solomon Devasahayam Selvaraj Vs. Chandriah Mary

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Court : Chennai

Decided On : Sep-21-1967

Reported in : (1968)1MLJ289

Appellant : Solomon Devasahayam Selvaraj

Respondent : Chandriah Mary

Judgement :

ORDER

A. Alagiriswami, J.

1. This is a petition under Section 32 of the Indian Divorce Act by a husband for restitution of conjugal rights against his wife. The parties are Indian Christians. They were married on 26th May, 1955. The husband was then living with his brother and his family and the wife was taken to that house. Soon after about the middle of July, 1355, the wife was taken to her parents' house for the month of 'Adi' as is usual in the south in the case of newly married brides. She came back to the husband's house not at the end of Adi but much later. It appears that the wife used to go to her parents' house off and on and once the husband's brother's father-in-law had to go and persuade the wife's parents to send her to her husband's house and another time one Rev. Chinniah had to be approached. Ultimately in 1959, the wife filed a petition before the Chief Presidency Magistrate under Section 488, Criminal Procedure Code, for maintenance. As a result of what happened in the Court, the husband set up a separate home to which both the parties moved on 19th November, 1959. After about three weeks, the wife was taken away by her father to his house and thereafter, the parties had not been cohabiting together. Immediately after the wife went to her parents' house, she filed another petition for maintenance and without much contest, she was awarded a sum of Rs. 25 per mensem as maintenance on 18th January, i960. In 1965, she filed another petition for enhancement of maintenance and it was enhanced to Rs. 35, per month with the consent of both the parties. Thereafter, the husband sert a notice demanding that his wife come and live with him and followed it up with the present petition.

2. The wife's contention is that she was treated with cruelty by her husband and his sister-in-law and that therefore, she was forced to leave. She also alleged that her husband had illicit intimacy with his sister-in-law and that because she found it out her husband and his sister-in-law began to ill-treat her. She further alleged that after they set up a separate establishment soon after the first petition for maintenance, the husband never lived in the house and was always taunting her saying that as she wanted a separate house and he had provided it, she should be satisfied with it and that she could not expect any other husbandly actions or attitudes from him, and that

was why, she had to leave on the 14th December, 1959. On the other hand, the petitioner's case was that the respondent had already, even before her marriage, given her heart to another young man and that she was, therefore, unwilling to have normal sexual relations with the petitioner, and that the respondent's father was trying to get a divorce for her and also a lump sum from the petitioner so as to enable the respondent to be married to another young man.

3. I am satisfied that the allegation of the respondent that she found her husband and his sister-in-law in compromising circumstances is wholly untrue. This could, not have happened in the case of a newly married husband within 10 days of the marriage, nor is it likely that the husband was sleeping separately and that this enabled him to have illicit intimacy with his sister-in-law. The particulars, as to the happenings on the night on which the respondent says she Found her husband and his sister in-law in bed together, are too artificial to be believed. The husband could not have come into the 100m in which the respondent was lying down and immediately gone out to lie with his sister-in-law. He should certainly have expected that his wife would be awakened and might even notice what he was doing. Nor am I able to accept the respondent's evidence that she and her husband had sexual relations only on the first two days and not thereafter. The story of the respondent about her husband having taken away her chain, necklace, earrings and ring also sounds too artificial. They could not have needed repairs so soon after the marriage, having only recently been made; nor can I accept her evidence that her husband gave the necklace, which was presented to her by her father to her husband's sister-in-law and that she was wearing it. Indeed, the respondent had to change her Version and say that it was converted into a chain and given to his sister-in-law. The petitioner and his sister-in-law could certainly not have shown their relationship so openly; nor can I believe the respondent when she says that when she found fault with her husband the next morning, he and sister-in-law beat her and fisted her and her husband's brother kept quiet even though he came to learn of his wife's illicit relationship with his brother. The whole story is thoroughly artificial and the incident is unlikely.

4. What has happened about the necklace given to the respondent by her father is that because of his needs and because he had to incur some debts in connection with the respondent's marriage, her father seems to have pledged it. This is clear from the letter Exhibit P-6 written by the respondent herself to her father. I cannot accept her evidence that that letter was not written by her and that she cannot read well. This is only a pretence; nor can I accept her father's evidence that he is not able to say whether it is a letter written by his daughter. I accept the petitioner's evidence with reference to this letter. Respondent's, father also accepts that he pledged it. In fact, it is this fact of having pledged the necklace and also probably respondent's father's inability to provide the things necessary to set up-a household, that seems to have been responsible for the delay in the respondent being sent back to her husband's house.

5. Equally, I must say, I am not convinced of the petitioner's case that from the beginning the respondent was showing an unwillingness and disinclination to have sexual relations with him and that she said that she had already given her heart to another young man and that she had been forced to marry him and that, therefore she was not willing to have sexual intercourse and that she was giving various excused like pain in the chest etc. Indeed, it is obvious from the evidence of petitioner that he had sexual relations quite frequently with the respondent. I am not able to accept his evidence that he had sexual relations with respondent either while she was

sleeping or by forcing her. His story about the respondent having told him about her having given her heart to another young man, cannot be true. The betrothal took place three months before the marriage and if the respondent was unwilling to marry the petitioner and had already given her heart to another young man. she could have refused to marry him. I accept the evidence of the respondent and her father on this point that the respondent never expressed her unwillingness to marry the petitioner. This is only an excuse thought of by the petitioner to buttress his case. It is unfortunate that both sides have freely lied about the facts of this case, and it is therefore rather difficult to arrive at the truth. Even the respondent had said that she had sexual relations with the petitioner only for two days and that thereafter, the petitioner refused to have sexual relations with her

6. We probably get a picture fairly near the truth from the evidence of the petitioner's sister-in-law. She said that the petitioner and the respondent had to go to the open terrace in order to speak to one another and that she thought a separate establishment should be set up for them. I cannot accept the evidence of Srinivasa Mudaliar in regard to what the petitioner is said to have told him about the sexual relations between the husband and the wife. He and the petitioner's brother are very old friend, having started their life together in school and later as labourers in the Buckingham and Carnatic Mills, though he is now in prosperous circumstances. It is obvious that all his sympathies are with the petitioner and his brother. The truth seems to be that the petitioner having been brought up by his brother and sister-in-law from his childhood and got married by them, was very much attached to them and did not.want to leave, them, and set up a separate establishment. That he should have been very much attached to his brother and his sister-in-law is obvious, and that he should have shown respect to his sister-in-law is also obvious. This would also, prove that the story of the respondent about the illicit intimacy between her husband and his sister-in-law cannot be true. What seems to have really happened is that the respondent wanted a separate establishment to be set up. In addition, she also does not seem to have been of very robust health and on that account and on account of her mother's illness, she used to go to her parents' house now and then This is clear from the evidence of the petitioner's sister-in-law herseif She only says that whenever the respondent went to her parents' house that was for a justifiable reason and they only found that the respondent found it difficult to come back She also says that both the husband and wife were happy, and even the petitioner had to admit that except in the matter of sexual relationship' to all outward appearances during day time, the respondent was behaving normally. So, the inference, which we can draw, from the circumstances, is that the respondent was insisting upon a separate establishment being set up, that the petitioner was not willing to leave his brother and sister-in-law and that the petitioner also apparently had his grievance about the respondent going away to her parents' house off and on and taking her own time for coming back. These things naturally led to the feelings the coming embittered, which ultimately resulted in the wife filing a petition for maintenance.

7. As happens in most cases, when the wife files a petition for maintenance, the Tiusband comes forward with an offer to set up a separate establishment. It was also aided in this case by the advice of the Magistrate that young people should live together and a separate establishment should be set up. In fact much of the trouble in this case could have been avoided, if only the husband had set up a separate establishment soon after the marriage, especially when the respondent was wanting a separate establishment and even the sister-in-law says that she thought that is was better to have a separate establishment. After all, when a man marries, he is bound to

provide a matrimonial home for the wife and he cannot go on living with his brother and his sister-in-law. The very suggestion put to the respondent on behalf of the petitioner that his brother had put up a big house seems to imply that the respondent and the petitioner should live with the petitioner's brother and that the respondent was being unreasonable in insisting upon a separate establishment.

8. According to the respondent after a separate establishment was set up, the petitioner did not stay in that house at all. He did not even provide her with the things necessary for cooking. He used to go in the evenings, stay in the verandah and go away and when asked, he said that the respondent had insisted upon having a separate establishment, that he had given it to her and that she should be satisfied with it. He also said that because the Court asked her to go and live with him she should not have agreed and she should suffer for that and he would not be a husband to her. I cannot accept the evidence of the petitioner that he was a dutiful husband during this period, that he had provided all the necessities for the living, that he used to sleep there and that he does not know why his wife went away. I accept the evidence of the respondent's father on this point as also that of the respondent. A woman, who has been insisting upon a separate establishment and has got one, would not leave it without sufficient reason. In fact we get an indication of the truth of this from the evidence of Srinivasa Mudaliar himself though Srinivasa Mudaliar wanted to make it appear that the respondent's father merely anxious to get a lump sum from the petitioner, so as to enable him to get his daughter married again. He had to say that the respondent's father came and told him that his daughter was not properly treated, but like a dog, and that he should arrange for payment of a lump sum. He also had to admit that the respondent's father had told him that he was not anxious in getting maintenance because his daughter would always be weeping and therefore, he should arrange as he had asked for. Thus, even from the mouth of a witness favourable to the petitioner, it is established that it was not the respondent that was anxious to live separately from the husband, that it was not she who wanted maintenance and that she was feeling unhappy over having to live away from her husband. It Was because the respondent and her father realised that the petitioner did not want her and that he was more particular about living with his brother and sister-in-law rather than living in a separate house with his wife, they thought that it would be better to put an end to the misery of both parties; by getting a divorce and getting the respondent married off to another person. There is nothing unreasonable about this.

9. It is unfortunate that the law being what it is, nothing could be done about such a situation. The facts of this case clearly show that the respondent had to leave the matrimonial home not because she did not want to live with the petitioner, but she realised that it was not possible to live with the petitioner and because the petitioner had compelled her to do so. In law that is sufficient reason to resist the petition for restitution of conjugal rights.

10. In Rayden on Divorce, Ninth Edition, at page 175, the following passage occurs:

Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife; and the case of a man who compels his wife by his conduct, with the same intention to leave him; and the case of one who persists in treating his wife

in a way which he knows she will probably not tolerate and which no ordinary woman would tolerate and she leaves him.

11. See also the, decision in Bipinohmdra Juisingbai Skahv. Probhavati.

12. At page 179 of the same work it is mentioned as follows:

Where conduct of the required nature is established, the necessary intention is readily inferred for prima facie a person is presumed to intend the natural and probable consequences of his acts and it is not necessary to show in a case of constructive desertion some definite evidence of a clear intention on the part of one spouse to drive the other away.

13. At page 195 it is mentioned as follows:

The Court has power to refuse a decree for restitution of conjugal right wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause contrary to the real truth of the case.

14. At page 200 it is mentioned as follows:

It is a husband's duty to provide his wife with a home according to his circumstances. There is no absolute rule whereby either party is entitled to dictate to the other where the matrimonial home shall be; the matter is to be settled by agreement between the parties, by a process of 'give and take' and by reasonable accommodation.

15. That, the husband has not done in this case.

16. I must make it clear that the sole object of the petitioner in instituting these proceedings is to get rid of the maintenance order against him. Otherwise, he need not have waited from i960 to 1965 having practically consented to an order for maintenance both in i960 as well as in 1965. It is obvious that his action is instituting these proceedings is because the maintenance rate had been increased by the 1965 order and he wants to get rid of it. In view of the fact that his case is that the respondent was unwilling to offer him sexual satisfaction, one cannot believe that he is still hoping that when she comes back, she would do so. The wife's attitude in refusing to go back to her husband is clear when she says that if the offer had come much earlier she would have accepted and that it is now too late. He had never made an offer after 1959 to get back his wife. The wife's evidence on this point has a ring of truth about it. At page 266 of Rayden's the following passage occurs:

The motives for seeking relief must be bona fide and direct; the sense of injury must not be wanting and a decree may be refused, after a long delay during which the remedy was known, when the true motive of the petitioner (this particularly applies to a wife) appears to be a collateral nature.

Though at page 269 it is mentioned that the delay occasioned, for instance, by poverty, does not affect a suit for restitution of conjugal rights, it is also mentioned that unexplained delay in bringing the suit might influence the mind of the Court in a subsequent suit for dissolution and that the Court must be satisfied of the petitioner's sincerity. I am satisfied that in this case, the sincerity is lacking in the petitioner's

action and his sole object is to get rid of the maintenance order against him. To make an order in his favour would be contrary to the facts of this case and the petitioner being allowed to take advantage of his own wrong:

17. The petition must therefore stand dismissed. The result is unfortunate. The respondent continues to get maintenance, which is Very poor satisfaction for a young woman in her thirties. The husband has no wife and that again is unfortunate for a young man in his thirties. But the law being what it is, there is nothing which this Court can do to help the parties.

18. The petition is dismissed, but in the circumstances both parties will bear their own costs.

19. Before parting with this case, I want to make a few general observations. The Indian Divorce Act, 1869 is wholly out of date. Its provisions were exact copies of the English Matrimonial Causes Act of 1857. Under that Act, it was enough if the husband proved adultery in order to enable him to get a divorce from his wife. On the other hand that was not enough for a wife to get a divorce against her husband. Something more must be proved. The law had been amended in England as early as 1923 by the Matrimonb.1 Causes Act, 1923, putting the husband and the wife on equal footing. The Matrimonial Causes Act of 1937 added some more grounds for divorce. The law in India under the Hindu Marriage Act is practically the same as in England at present. The Parsi Marriage Act was amended in 1936 to put it more or less on the same basis as the English law of 1937. Only the Divorce Act which applies to Christians is at least 50 years behind the times. No one will consider that the Christians are a backward community compared to the other communities in the country. It is high time that the Indian Divorce Act is brought into line with the Hindu Marriage Act, the Parsi Marriage Act and the Special Marriage Act, 1954. Indeed, the Special Marriage Act even provides for divorce by consent of parties.

20. Another important matter is that under the Indian Divorce Act for cases arising inside the city of Madras, the High Court is the Court competent to try such cases whereas in the case of other communities, the City Civil Court, Madtas, can deal with the cases. What is more a decree for dissolution of marriage of nullity of marriage passed by a District Judge has to be confirmed by a Bench of three Judges of the High Court. In the case of the other communities the Subordinate Courts are competent to deal with these matters and the ordinary provisions of appeal in civil cases apply. It is unnecessary and wholly incongruous that the causes under the Indian Divorce Act, should be heard by a High Court Judge, in the city and decrees passed by District Judges should be confirmed by a Bench of three Judges of the High Court. It is necessary and it would be advisable, to bring the provisions of the Indian Divorce Act, in regard to divorce and judicial separation, in line with the provisions of the other three Acts already mentioned. While that is a matter for the Legislature to consider in its own good time the question relating to the forum of trial as well as of appeal under the Indian Divorce Act is an urgent matter. There is no need to waste the time of the Judges of the High Court over matters which relate to the Christian community which are no more important than similar matters relating to the other communities.