IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA

AND

THE HON'BLE MRS.JUSTICE M.G.UMA

MISCELLANEOUS FIRST APPEAL NO.5161 OF 2019(SMA)

Dated:27-01-2021

Martin Sujay vs. SMT.AMULYABRINDA

J U D G M E N T

M.G.UMA

Though this appeal is listed for admission, with consent of learned counsel on both sides, it is heard finally.

2. The appellant-husband is before this Court being aggrieved by the impugned judgment dated 03/04/2019 passed in M.C.No.395 of 2016 on the file of II Additional Principal Family Court At Mysuru, (hereinafter referred to as "the Trial Court" for the sake of brevity) dismissing the petition filed under Section 27(2)(ii) of the Special Marriage Act, 1954 (hereinafter referred to as "the Act of 1954" for the sake of brevity).

3. The facts of the case in brief are that, the appellant is the husband and the respondent is the wife. They are Christians by faith and their marriage was solemnized on 18/04/2008 at Wesley Cathedral in Mysuru. It is

alleged that the respondent used to harass and abuse the appellant in filthy language. She demanded for aseparate house. Even after shifting to a rented premises in Kuvempu Nagar, Mysuru, the respondent had not improvedher behavior. Instead, she filed a complaint against the appellant by making false allegations. Later, the respondent left the matrimonial house and started residing in her parents house without informing him.

4. It is stated that the appellant had filed the petition for divorce in M.C.No.81 of 2009, but subsequently he withdrew the same as the petition was filed within one year from the date of marriage. However, he was paying monthly maintenance of Rs.3,000/- to the respondent as per the direction of the Court. He paid the maintenance till April 2011. The respondent had filed C.Misc.No.48 of 2010 before the learned III Additional Civil Judge and JMFC, Mysuru under the provisions of Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the DV Act" for the sake of brevity) and got an ex-parte order, directing the appellant to arrange for a house and also got issued a non-bailable warrant against the appellant. It is stated that the appellant preferred the appeal in Criminal Appeal No.144 of 2013 before the learned I Additional District and Sessions Judge, Mysuru, which came to be allowed and the matter was remanded to the Trial Court. After contest,

C.Misc.No.48 of 2010 was again allowed directing the appellant to pay maintenanceof Rs.2,000/- per month. Subsequently, the appellant filed C.Misc.No.65 of 2014 seeking modification of the order directing him to pay maintenance, under changed circumstances, as he was suffering from hyper tension and chronicle kidney disease.

5. It is contended that the respondent filed MC No.182 of 2011 seeking restitution of conjugal rights, while the appellant filed M.C.No.435 of 2011 seeking dissolution of marriage. The petition filed by the appellant seeking dissolution of marriage came to be dismissed, while the petition filed by the respondent seeking restitution of conjugal rights came to be allowed by a common judgment dated 17/04/2015. In the meantime, respondent had filed the petition under Section 125 of the code of Criminal Procedure, 1973 seeking maintenance which came to be dismissed on 12/01/2016. Thus, it is stated that the respondent is harassing the appellant since the date of marriage and she has voluntarily deserted him and residingin her parental house.

6. It is stated that the appellant is unemployed as his services were terminated on medical grounds. The marital relationship between the parties is strained beyond conciliation and they are residing separately for more than seven years. Even though there is a decree for restitution of

conjugal rights in favour of the respondent vide judgment dated 17/04/2015, there was no cohabitation and the cause of action for the petition arose on 16/04/2016 i.e., after lapse of statutory period provided under Section 27(2)(ii) of the Act of 1954. Therefore, he prayed for allowing the petition by dissolving the marriage by a decree of divorce.

7. The respondent appeared before the Trial Court and resisted the claim of the appellant, denying that she treated him cruelly or deserted him at any time. On the other hand, she contended that it was the appellant who treated her cruelly and deserted her without any lawful excuse. It is contended by the respondent that the grounds urged by the appellant were also raised in the earlier petition for divorce and no new grounds are made out in the present petition. Since the earlier petition came to be dismissed on the very same grounds, the present petition is hit by principle of *res-judicata.* It is stated that the respondent is ready and willing to join the appellant to lead marital life. She is also ready to withdraw the complaint lodged against the appellant. The contention of the appellant that he is unemployed and suffering from illness are denied and it is contended that the appellant is trying to go for a second marriage. In fact, the respondent

had issued a notice calling upon the appellant to take her back in compliance with the decree for restitution of conjugal rights, but the same has not been replied to.

8. The Trial Court recorded the evidence of the appellant and respondent, and got marked Exs.P1 to P12 for the appellant and Exs.R1 to R10 for the respondent. After taking into consideration all these materials, the Trial Court dismissed the petition which is impugned in the present appeal.

9. We have heard Sri.V.S.Biju, learned counsel for the appellant and Sri.P.Rudrappa, learned counsel for the respondent and perused the material including the Trial Court records.

10. Learned counsel for the appellant submitted that the petition filed by the appellant before the Trial Court is one under Section 27(2)(ii) of the Act of 1954, which gives right to either parties to the marriage to present the petition for divorce, when there is no restitution of conjugal rights between the parties to the marriage for a period of one year or upwards after passing of a decree for restitution of conjugal rights in a proceedingto which they were parties. The decree granted in favour of the respondent for restitution was passed on 17/04/2015 and even after lapse of

one year, there was no restitution. Under such circumstances, either parties to the marriage could invoke this provision of law to seek divorce. The Trial Court committed an error in rejecting the petition without any valid reason.

11. *Per contra,* learned counsel for the respondent justifying the impugned judgment contended that the Trial Court rightly dismissed the petition as the same is devoid of merits.

12. Having heard learned counsel for the respective parties, the following points would arise for our consideration:

> *"1) Whether the judgment and decree of the Trial Court passed in M.C.No.395 of 2016 calls for interference in this appeal?*
>
> *2) What order?*

13. Section 27(2)(ii) of the Act of 1954, reads as under:

> *"**Section 27. Divorce -***
>
> *(1) xxx*
>
> *(2) Subject to the provisions of this Act and to the rules made thereunder, either party to a marriage, whether solemnized before or after the commencement of the Special Marriage (Amendment) Act, 1970 (29*

of 1970), may present a petition for divorce to the district court on the ground –

(i) xxx

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

14. A plain reading of the Section makes it clear that either party to the marriage can present the petition for divorce when there is no restitution of conjugal rights between the parties for a period of one year or upwards after passing of the decree for restitution. In the present case, it is not in dispute that the decree of restitution of conjugal rights was passed in M.C.No.182 of 2011 on 17/04/2015. Since then, there has been no restitution of conjugal rights and the parties have not resided together. There is also no stay of the said judgment and decree by this Court. Under such circumstances, Section 27(2)(ii) of the Act of 1954 squarely applies and either parties to the proceeding can present the petition for divorce and the appellant is entitled to succeed.

15. We have gone through the impugned judgment passed by the Trial Court which proceeded to dismiss the petition seeking dissolution of marriage on the ground that,

it is the appellant who is the wrong-doer as he has not complied with the decree for restitution of conjugal rights and therefore, he cannot take advantage of his wrong. Section 27(2)(ii) of the Act of 1954 extracted above does not bar filing of the petition for a decree of divorce by the spouse who is guilty of not complying with the decree for restitution of conjugal rights. On the other hand, it enables either parties to the marriage to present the petition for divorce on the ground that there has been no restitution of conjugal rights between the parties for a period of one year or more after passing the decree for restitution of conjugal rights in a proceeding in which they were parties.

16. We may also refer to Section 34(1)(b) of the Act of 1954 and contrast it with Section 27(2)(ii) of the Act of 1954, which reads as under:

> "***Section 34 – Duty of Court in passing decrees –***
>
> *(1) In any proceeding under Chapter V or Chapter VI, whether defended or not, if the Court is satisfied that, -*
>
> *(a) xxx*
>
> *(b) where the petition is founded on the ground specified in clause (a) of sub-section (1) of section 27, the petitioner has not in any manner been accessory to or connived at or condoned the act of sexual intercourse referred*

to therein, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty;"

17. This provision of law bars filing of the petition, if the petitioner has been accessory to or connived at or condoned the act of sexual intercourse referred to under Section 27(1)(a) of the Act of 1954, or if the petition is filed on the ground of cruelty and if the petitioner himself committed such cruelty.

18. By way of analogy, we may also refer to the corresponding section under the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act of 1955" for the sake of brevity). Section 13(1-A) of the Act of 1955 is the similar provision to that of Section 27(2)(ii) of the Act of 1954, which enables either party to the marriage to present a petition for dissolution of marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage fora period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties. This provision is in *pari materia* toSection 27(2)(ii) of the Act of 1954.

19. Similarly, Section 23(1)(a) of the Act of 1955, which is similar to Section 34(1)(b) of the Act of 1954, reads as under:

"***Section 23 – Decree in proceedings*** –

(1) In any proceeding under this Act whether defended or not, if the Court is satisfied that –

(a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, "

20. This Section bars filing of the petition by any of the spouses except in cases where the relief is sought by him is on the grounds specified under Section 5 (ii) (a), (b) or (c) of the Act of 1955. Both these Sections, i.e., Section 34(1)(b) of the Act of 1954 and Section 23(1)(a) of the Act of 1955 permit filing of petitions either under Section 27(1)(a) of the Act of 1954 or under Section 13(1)(i) of the Act of 1955, as the case may be, by the petitioner only if no wrong could be attributable to him/her. But, there is no such provision which bars filing of the petition under Section 27(2)(ii) of the Act of 1954.

21. It may be appropriate to refer to the decision of the Hon'ble Supreme Court in ***Dharmendra Kumar Vs***

Usha Kumar [(1977) 4 Supreme Court Cases 12], whereunder, the Court had an occasion to deal with Sections 13(1-A)(ii) and 23(1)(a) of the Act of 1955, with reference to the word 'wrong' appearing in Section 23(1)(a) of the Act of 1955 and in para 3, it is held as under:

> *"3. Section 13 (1A)(ii) of the Hindu Marriage Act, 1955 allows either party to a marriage to present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for the period specified in the provision after the passing of the decree for restitution of conjugal rights. Sub-section (1A) was introduced in Section 13 by Section 2 of the Hindu Marriage (Amendment) Act, 1964 (44 of 1964). Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce; the party against whom the decree was passed was not given that right. The grounds for granting relief under Section 13 including Sub-Section (1A) however continue to be subject to the provisions of Section 23 of the Act. We have quoted above the part of Section 23 relevant for the present purpose. It is contended by the appellant that the allegation made in his written statement that the conduct of the petitioner in not responding*

to his invitations to live with him meant that she was trying to take advantage of her own wrong for the purpose of relief under Section 13(1A)(ii). On the admitted facts, the petitioner was undoubtedly entitled to ask for a decree of divorce. Would the allegation, if true, that she did not respond to her husband's invitation to come and live with him disentitle her to the relief? We do not find it possible to hold that it would. In Ram Kali's case (supra) a Full Bench of the Delhi High Court held that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of Section 23 (1)(a). Relying on and explaining this decision in the later case of Gajna Devi v. Purshotam Giri (supra) a learned Judge of the same High Court observed:

"Section 23 existed in the statute book prior to the insertion of section 13(1A). … Had parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of Section 23 of the Act, not entitled to obtain divorce, then it would have inserted an exception to Section 13(1A) and with such exception, the provision of Section 13(1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it

was before the amendment. Section 23 of the Act, therefore, cannot be construed so as to make the effect of amendment of the law by insertion of Section 13(1A) nugatory.

…the expression "petitioner is not in any way taking advantage of his or her own wrong" occurring in clause(a) of Section 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by Section 13(1A) … In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree…".

In our opinion the law has been stated correctly in Ram Kali v. Gopal Dass (supra) and Gajna Devi v. Purshotam Giri (supra). Therefore, it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a 'wrong' within the meaning of Section 23 (1)(a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled."

22. We may also refer to the decision of Hon'ble Apex Court in ***Smt.Saroj Rani Vs Sudarshan Kumar Chadha [(*1984) 4 Supreme Court Cases 90]**, where again the Hon'ble Apex Court considered the facts of the case where the spouses have obtained a decree of restitution of conjugal rights with consent, but subsequently there was no co-habitation between the two. After lapse of one year as provided under Section 13(1- A)(ii) of the Act of 1955, husband moved the petition seeking divorce. The same was resisted by the wife contending that since the husband is not cohabited with the wife in compliance of the decree for restitution of conjugal rights, he cannot be permitted to take advantage of his own wrong. The Hon'ble Apex Court dealt with Sections 9, 13 and 23 of the Act of 1955, and held in para 9 as under:

> *"9. xxx*
>
> *Counsel for the appellant sought to urge before us was that in view of the expression 'wrong' in Section 23(1) (a) of the Act, the husband was disentitled in this case to get a decree for divorce. It was sought to be urged that from the very beginning the husband wanted that decree for divorce should be passed. He therefore did not deliberately oppose the decree for restitution of conjugal rights. It was submitted on the other hand that the respondent/husband had with the*

intention of ultimately having divorce allowed the wife a decree for the restitution of conjugal rights knowing fully well that this decree he would not honour and thereby he misled the wife and the Court and thereafter refused to cohabit with the wife and now, it was submitted, cannot be allowed to take advantage of his 'wrong'. There is, however, no whisper of these allegations in the pleadings. As usual, on this being pointed out, the counsel prayed that he should be given an opportunity of amending his pleadings and, the parties, with usual plea, should not suffer for the mistake of the lawyers. In this case, however, there are insurmountable difficulties. Firstly there was no pleading, secondly this ground was not urged before any of the courts below which is a question of fact, thirdly the facts pleaded and the allegations made by the wife in the trial court and before the Division Bench were contrary to the facts now sought to be urged in support of her appeal. The definite case of the wife was that after the decree for restitution of conjugal rights, the husband and wife cohabitated for two days. The ground now sought to be urged is that the husband wanted the wife to have a decree for judicial separation (sic restitution of conjugal rights) by some kind of a trap and then not to cohabit with her and thereafter obtain this decree for divorce. This would be opposed to the facts alleged in the defence by the wife.

Therefore quite apart from the fact that there was no pleading which is a serious and fatal mistake, there is no scope of giving any opportunity of amending the pleadings at this stage permitting the wife to make an inconsistent case. Counsel for the appellant sought to urge that the expression 'taking advantage of his or her own wrongs' in clause (a) of sub-section (1) of Section 23 must be construed in such a manner as would not make the Indian wives suffer at the hands of cunning and dishonest husbands. Firstly even if there is any scope for accepting this broad argument, it has no factual application to this case and secondly if that is so then it requires a legislation to that effect. We are therefore unable to accept the contention of counsel for the appellant that the conduct of the husband sought to be urged against him could possibly come within the expression 'his own wrongs' in Section 23(1)(a) of the Act so as to disentitle him to a decree for divorce to which he is otherwise entitled to as held by the courts below. Further more we reach this conclusion without any mental compunction because it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife; if such is the situation it is better to close the chapter."

23. Since, Sections 27(2)(ii) and 34(1)(b) of the

Act of 1954 and Sections 13(1-A)(ii) and Section 23(1)(a) of the Act of 1955 are respectively in *pari materia* and convey similar meaning, the decision of the Hon'ble Apex Court in ***Dharmendra Kumar*** *(supra)* and in ***Smt.Saroj Rani*** *(supra)* rendered under the Act of 1955, could be made applicable to the present case.

24. Similar to the amendment to Section 13 of the Act of 1955 by insertion of sub Section (1-A) by Act No.44 of 1964 with effect from 20/12/1964, Section 27 of the Act of 1954, was also amended by insertion of sub Section (2) Clauses (i) and (ii) by Act 29 of 1970 with effect from 12/08/1970. Just as Section 23 of the Act of 1955 was in force since the beginning, Section 34 of the Act of 1954, has also been in force from the inception. By amending the Act of 1954 by insertion of sub Section (2) Clauses (i) and (ii) of Section 27 of the Act of 1954, the Parliament has provided more grounds to the parties to seek divorce after commencement of the said Amendment Act, 1970. Even though Section 34 of the Act of 1954 was in force as on the date of amendment, the parliament has not thought it fit to include the amended provision under Section 34 of the Act of 1954 to bring it within its ambit and leaving it tothe decision of the Court to decide as to, whether, the spouse, who is seeking divorce has committed any wrong or not. The Parliament was fully conscious that

Section 34 of the Act of 1954 was in force but had not thought it fit to bring Section 27(2)(i) and (ii) under the umbrella of Section 34 of the Act of 1954. When, even after passing of a decree for restitution of conjugal rights, the parties could not cohabit together for any reason, it has been made a ground to seek divorce by either of the parties to the marriage. When the intention of the parliament is clear ona reading of the amended provision i.e., Section 27(2)(i) and (ii) of the Act of 1954 in not bringing the same within the ambit of Section 34 of the Act of 1954, we are of the opinion that the same cannot be brought under Section 34 of the Act of 1954 by reading between the lines or by importing words which are not inserted into the amended provision. As referred to above, we are supported by the decisions of the Hon'ble Apex Court on an interpretation of a similar provision, rendered under the Act of 1955.

25. The laws relating to divorce for special form of marriages in India have evolved since the time of the British era. Initially, the Special Marriage Act, 1872 was enacted to govern any special form of marriages. After the country's Independence, the need for adequate and reformed provisions to govern both marriages and divorce was felt. As a result, the Special Marriage Act, 1954 was enacted. However, as and when developments took place in the Society and there have been changes in the social

and economic status of persons governed by this enactment, the Parliament felt that the grounds that are available under the enactment are not sufficient to serve the needs of the society. In order to keep pace with the rapidly changing Indian society, necessary amendments were brought to the Special Marriage Act along with other enactments governing marriage, divorce, maintenance etc., mainly for Hindus, Christians or Muslims.

26. The amendments so brought about in this enactment reflect the thinking and changes in Indian Society. Once upon a time, there were no grounds at all for divorce especially for Hindus as the concept of divorce was alien to Hindu Society. With the passage of time, more number of grounds have been added for seeking dissolution of marriage both under the Act of 1955 and the Act of 1954. In the last few decades, Indian Society has undergone tremendous changes in family life and the married couple who feel they cannot pull on together for any reason are opting for divorce, so that they can look for better options in life. Of course, in such a process of adopting a changed outlook on marriage and divorce, several serious challenges are being faced by the Indian Society and there is need to find solutions for the same.

27. If in this background, we may analyze Section 27 of the Act of 1954 since its inception, which has undergone several changes. Section 27 of the Act of 1954 was renumbered as Sub Section (1), Clauses (i) and (j) were omitted and Section 27(2) (i) and (ii) of the Act of 1954 was inserted by Act 29 of 1970 with effect from 12/08/1970. Clauses (a), (b), (e) and (f) of the Act of 1954 were substituted and proviso was omitted and Section 27(1A) (i) and (ii) of the Act of 1954 were inserted by Act 68 of 1976 with effect from 27/05/1976. Clause (g) was omitted by Act 6 of 2019 with effect from 01/03/2019.

28. In case a decree for restitution of conjugal rights, is passed under Section 22 of the Act of 1954 and if there is no restitution of such right and no resumption of cohabitation for a period of one year, it is considered as a ground for divorce. The period of one year is the reasonable time within which the parties to the marriage can resume cohabitation after patching their differences. In a given situation, if such restitution of conjugal rights is not possible within a year, generally the marriage is considered to be a dead lock and it is a ground for seeking divorce for either of parties. The objective with which the amendment Act 29 of 1970 was introduced with effect from 12/08/1970 is to be borne in mind while considering this relevant provision under the enactment.

29. From the facts of the present case, it could be made out that there was a decree for restitution for conjugal rights passed in favour of the respondent-wife vide judgment dated 17/04/2015. Admittedly, there was no cohabitation between the spouses. It is not the contention of the respondent-wife that she had made any attempt to execute the decree for restitution of conjugal rights against her husband. There is a stray allegation to contend that even when she had gone to her matrimonial house, the husband was not ready and willing to take her back in compliance of the decree and there used to be quarrel between them. But no materials are placed before the Court to substantiate such contention. Even if it is to be taken that the appellant-husband was not ready and willing to cohabit with the respondent-wife in complianceof the decree of restitution of conjugal rights, the above pronouncements by the Hon'ble Apex Court make it clear that it cannot be considered as wrong on the part of the husband, to take advantage to file a petition seeking decree of divorce and the husband could not have been barred from invoking Section 27(2)(ii) of the Act of 1954 for non compliance of the directions for restitution of conjugal rights.

30. The material on record disclose that the spouses are residing separately since 2009 when the first petition seeking divorce was filed by the appellant within an year after their marriage and there is no possibility of

resumption of cohabitation. We have gone through the impugned judgment passed by the Trial Court. It has proceeded to dismiss the petition solely on the ground that there is no restitution of conjugal rights even after the divorce passed against the husband and therefore, he is not entitled to the relief of divorce, without considering the ambit and purport of Section 27(2)(ii) and Section 34 of the Act of 1954.

31. Therefore, we are of the opinion that the judgment and decree dated 03/04/2019 passed in M.C.No.395 of 2016 on the file of II Additional Principal Family Court At Mysuru, is liable to be set aside and the marriage between the parties is required to be dissolved by a decree of divorce under Section 27(2)(ii) or the Act of 1954.

In view of the above discussion, the appeal is ***allowed.***

The marriage between the appellant and respondent held on 18/04/2008 at Wesley Cathedral in Mysuru is dissolved by a decree of divorce.

Learned counsel for the respondent submitted that the respondent is entitled to seek maintenance form the appellant and her right to claim maintenance is to be preserved.

It is made clear that the disposal of this appeal would not come in the way of the respondent/wife seeking maintenance in accordance with law.

Parties to bear their respective costs.

Registry to draw the decree accordingly.