

## **First Appeal No.119/2010**

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### **Mamta Vs. Rajesh**

**08.07.2014**

Shri Rajeev Jain, Advocate, for appellant.

None for respondent.

Aggrieved by the judgment and order dated 26.02.2010 passed by District Judge, Ashok Nagar, in HMA Case No.23-A/2009 "Rajesh Vs.Mamta",, the non-applicant/appellant has filed this appeal under Section 28 of the Hindu Marriage Act, 1955. The learned District Judge has allowed the application for restitution of conjugal rights and directed the appellant/wife to join the respondent at her matrimonial home and discharge her obligations as married wife.

It is not disputed that the marriage of the respondent was ceremonized with the appellant according to Hindu rites at village Sironj, District Vidisha in a "*Samuhik Vivah Sammelan*" (common Marriage Plat form).

Brief facts unfolded before the Trial Court is that the respondent/husband filed an application for restitution of conjugal rights on the ground that after the marriage, the appellant had gone to the matrimonial home thrice but the relation between them was not good. She had been pressurizing the respondent to sell out his share of land and to go to live with her at her maternal home. The respondent refused to do so, because his

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parents were of old age. Appellant left her matrimonial home and was threatening to implicate the respondent in false case. The respondent tried to bring her to his home but could not succeed. The appellant has been living separately without any reason and has been depriving him of his marital life. A notice was given by the respondent which was not replied. Therefore, it was prayed to pass an order of restitution of conjugal rights against the appellant/wife.

Per contra, the appellant/wife denied all averments and submitted that she was subjected to cruelty and for demand of dowry. She was subjected to तंत्र-मंत्र and झाड़ू-फूँख (Black magic) because of which she became mentally disturbed. When her parents came to take to her parental home, the respondent refused to send her. Her father lodged a report at Police Station Kachnar. When the report was lodged, the appellant was sent to her maternal home alone in a public transport bus. She received medical treatment at her parental home. It is the respondent/ husband who deserted her.

Learned District Judge after adducing evidence pronounced the impugned judgment on 26.02.2010.

The appellant/wife has assailed the same by filing this appeal on the ground that the impugned judgment and decree is against the provision of law. The learned Trial Court erred in passing the same without taking into

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consideration the pleading, oral and documentary evidence brought on record. The appellant was ill-treated, because of which she was medically unfit. Due to the ill-intention of the respondent's father and the activities of "black magic", the demand of dowry and the illness of the appellant was ignored by the learned Trial Court. The respondent and his family members tortured the appellant mentally and physically which caused her to live separately. The appellant's father lodged a report which was also not considered. The appellant has also filed an application under Order 41 Rule 27 of C.P.C. for taking additional evidence on record.

The primary question involved in this appeal is that whether the appellant has withdrawn from the society of the respondent without any reasonable excuse.

From the evidence adduced by both the parties it is very well found that the appellant had stayed at her matrimonial home for about 15 days. Appellant's father Lakshman examined as NAW-2 has stated that when he had gone to bring his daughter, the respondent's family refused to send her. Therefore, he lodged a report at Police Station Kachnar. Exhibit D-1 is the carbon copy of the report dated 25.06.2009. Subsequent report Exhibit P-3 lodged by the father of the respondent is dated 09.09.2009. This show that the Exhibit P-3 after thought.

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True, after the appellant came to her maternal home, no report has been lodged by her as regarding the cruelty or demand of dowry. It is not uncommon that such type of reports are generally not lodged, especially by the bride or her family members, expecting that the matter may be resolved. If such reports are lodged, the issue becomes aggravated and the chances of resolving the matter becomes bleak. Therefore not reporting about cruelty and demand of dowry doesn't rule out that the appellant was subjected to cruelty. The appellant/ wife was sent to her maternal home alone by bus and since then not attempting to bring her to her matrimonial home shows the indifferent behaviour of the respondent/ husband.

The appellant/wife was maltreated, harassed and "black magic" was applied on her. Therefore, she became apprehensive of being unsafe in her husband's house. As regarding her maltreatment and subjected to cruelty at her matrimonial home, no outside witness can be available. When evidence stands " Oath Vs. Oath" the Court has to appreciate the same by preponderance of probability. In the present case, it is found that the appellant/wife 's evidence stood to reason being plausible and supported by report Exhibit D-1. Therefore, the appellant's evidence is plausible whereas the respondent's stand that she went away without reason,

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did not.

In the case of **Milan Vs. Sunil** reported in **2008 Vol.II S.N.36**, it is held that,

**“Hindu Marriage Act (25 of 1955), Section 9** – Restitution of Conjugal Rights -Decree for restitution of conjugal rights challenged by wife – Wife did not agree to live with husband and not even agreed to live with her sons – It can be presumed that there is something panic which compelled her to live abandoned life – She cannot be compelled to live together against her wishes – A decree for restitution of conjugal rights to give a tool to husband to harass her through the process of Court – Therefore decree set aside.

In this circumstances, the appellant/wife had more than reasonable excuse for withdrawing from the society of the respondent/husband. Therefore restitution of conjugal right granted in favour of respondent by the learned Trial Court seems to be erroneous. The application for additional evidence under Order 41 Rule 27 C.P.C. is disposed of without going into merits. Consequently, this appeal is allowed. The impugned judgment and decree dated 26.02.2010 is set-aside.

No order as to costs.

**(S.K. Gangele)**  
**Judge**

**(S.K. Palo)**  
**Judge**

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