Madhya Pradesh High Court
Gindan And Ors. vs Barelal on 5 December, 1975
Equivalent citations: AIR 1976 MP 83
Author: Tankha
Bench: A Sen, R Tankha
JUDGMENT Tankha, J.

1. This is an appeal by appellant Mst. Gindan and four others against the judgment and decree dated 1st August, 1974 passed by the Additional District Judge, Parma, in Civil Suit No 3-A of 1973 by which the petition of the respondent, Barelal, under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights has been allowed.

2. Brief facts of the case are that Mst. Gindan (appellant No. 1) was married about fifteen years back to the respondent. From the wedlock three children were born out of whom two are dead and the third male child aged about 9 months is with appellant No. 1. Appellants Nos. 3 to 5 are brothers of appellant No. 1 and appellant No. 2 is her father. According to the respondent, his wife Mst. Gindan had no reasonable excuse to withdraw herself from his society along with all the ornaments given to her by him and as such he was entitled for a decree for restitution of conjugal rights against her and a direction to other appellants to refrain from stopping her from going with him as she is living with them.

3. In defence, appellant No. 1 Mst. Gindan denied the allegations made by the respondent and pleaded that she was ill treated by her husband to the extent of cruelty and was ousted from the house. She further denied to have taken away any ornaments. On the other hand, her allegation is that her ornaments are in possession of the respondent. She further stated that about two years back she was beaten by her husband (respondent) resulting in a fracture of her right wrist. The death of the two children has been alleged on account of poor feeding at the instance of the father who not only prevented her to give them proper food but she was also not properly fed with the result that her health had shaken considerably. On the persuasion of the respondent, her parents persuaded her to go with her husband, but on the way she was again beaten and she had to return back. According to her, in these circumstances she has ultimately decided to reside with her parents. She completely denied that the appellants 2 to 5 ever stopped her from going to her husband's place and they have been unnecessarily impleaded as parties in the case.

4. As regards the remaining appellants 2 to 5, they have supported the case of the appellant No. 1 but denied that they ever came in the way of appellant No. 1 in going to her husband's place and live with him.

5. The trial Court allowed the petition of the respondent and directed appellant No. 1 Mst. Gindan to return to cohabitation with her husband and live with him as claimed within two months from the receipt of the order. The other appellants have been ordered to abstain from harbouring the wife (appellant No. 1) or otherwise interfering with the rights of the respondent as her husband. Hence this appeal.

6. Having heard learned counsel of the parties, we are of opinion that this appeal has no merit and must be dismissed. At the outset we would like to mention that before the hearing of this appeal commenced, a written application was moved on behalf of the appellants to raise certain important questions of law and jurisdiction. The said application was not opposed and rightly so and it was allowed. Before us, learned counsel for the appellants raised four contentions; firstly, that the marriage between the appellant No. 1 and the respondent was void ab ini-tio being forbidden by law as under Section 5(iii) of the Hindu Marriage Act the bride must have completed the age of fifteen years at the time of the marriage, while in the present case the age of the wife (appellant No. 1) was about 10 years; secondly, that the trial Court could not entertain the present petition as the respondent had not complied with the provisions of Sections 19 and 20 of the Act and the rules made thereunder, i.e., the petition was not filed in the principal civil Court of original jurisdiction namely, the District Judge but in the Court of Additional District Judge, Panna, which was not specified by the State Government by a notification in the official Gazette as having jurisdiction in respect of such petitions. Thus, it was contended that the trial Court acted without jurisdiction and the decree passed by it is a nullity; thirdly, that the appellant No. 1 had a reasonable excuse to withdraw from the society of her husband (respondent) on the ground that she was being treated with cruelty by him and fourthly, that the granting of relief in the present case being discretionary, the learned Judge of the trial Court should have kept in view the provisions of Section 23 of the Act before passing the decree.

7. On the other hand learned counsel for the respondent contended that the judgment and decree passed by the trial Court are just and proper and based on proper exercise of jurisdiction and require no interference.

8. We shall deal with each point raised on behalf of the appellants separately. As regards the first contention raised on behalf of the appellants, we may say that it was not disputed before us that appellant No. 1 was of about 10 years of age when she was married. That being so, it is no doubt true that she had not attained the age prescribed for a marriage under Section 5(iii) of the Hindu Marriage Act, but, in our opinion, it cannot be declared as void or even voidable. The contravention of the provision is only punishable under Section 18 of the Act Marriage which can be declared null and void on a petition presented by either party thereto, by a decree of nullity, are those where they contravene any of the conditions specified in Clauses (i), (iv) and (v) of Section 5. The marriage can be voidable and may be annulled by a decree of nullity on any of the grounds mentioned in Section 12 of the Act. But breach of Clause (iii) of Section 5 does not find place either in Sections 11 and 12 of the Act. That being so, it is difficult to hold that in case of such a breach having been committed the marriage can be declared void or even voidable. In this connection we may quote with approval a passage from Mulla on Hindu Law, 14th Edn. page 688. which reads as under :

"A marriage solemnized in violation of the requirement as to age Laid down in this clause is not void or even voidable but the contravention of the condition is punishable as an offence under Section 18 of the Act."

Various other High Courts in India have also taken a similar view. [See : Mohinder Kaur v. Major Singh, (1970) 72 Pun LR 377; Smt Naumi v. Narotam, AIR 1963 Him Pra 15 and Budihi Sahu v.

Lohurani Sahuani, ILR (1970) Cut 1215]. No doubt, a contrary view has been taken by the Andhra Pradesh High Court in Panchireddi Appala Suramma v. GadeLa Gana-patlu, AIR 1975 Andh Pra 193 wherein an earlier decision of the said Court reported in Rayudu Pallamsetti v. Dommeti Sri-ramulu, AIR 1968 Andh Pra 375 has been relied upon. With great resjpect we disagree with the view expressed by the learned Judges. In both the decisions the provisions of Sections 11 and 12 of the Act have not been taken into consideration while it is not the consequence of a marriage being solemnized in breach of Clause (iii) of Section 5 of the Act. That being so, we are of opinion that a marriage solemnized in contravention of the age mentioned in Clause (iii) of Section 5 of the Hindu Marriage Act can neither be declared ab initio void nor voidable. The consequences, if any, which flow from that contravention are given in Section 18 and that is that a person who procures a marriage of himself or herself in such contra-

vention shall be punishable with imprisonment which may extend to fifteen days, or with fine Which may extend to one thousand rupees, or with both. In our opinion, no other result is stated in the Act to flow from the contravention of the type now under consideration of Clause (iii) of Section 5 to affect the tie of marriage itself and to render the marriage either void or voidable. If the Legislature intended otherwise, the Act certainly would have made a specific provision in that regard in the like manner as it has been done in the case of contravention of Clauses (i), (ii), (iv) and (v) of Section 5 in Section 11 of the Act. Thus, the marriage would remain valid in law and enforceable and recognizable in the Court of law,

9. As regards the second contention that the learned Additional District Judge had no jurisdiction to entertain and try the present petition, we may state that the learned counsel for the appellants fairly conceded before us, and rightly so that the point is squarely covered by two Division Bench decisions of this Court in Dharam Sheela Bai Ram Dayal v. Ram Dayal Bhatnagar, 1961 MPLJ 979 and Laxmansingh v. Kasharbai, 1965 MP LJ 702 = (AIR 1966 Madh Pra 166). That being so, the contention is devoid of any substance and is rejected.

10. Now, as regards the third contention, the learned counsel for the appellants contended that non-payment of maintenance allowance by the respondent as directed by this Court amounts to revival of cruelty by his wilfully neglecting to maintain his wife, we are of opinion that it has no force. The act of non-payment of interim maintenance allowance as ordered by this Court during the pendency of the appeal cannot be in any manner construed as an act of cruelty so as to constitute revival of earlier acts of condoned cruelty. Under Section 10(b) of the Hindu Marriage Act the word 'cruelty' has reference to before filing of the petition for judicial separation and not subsequent thereto. That being so, the non-payment of interim maintenance allowance as directed by this Court would not fall within the ambit of the term 'cruelty' so as to set aside the decree passed for restitution of conjugal rights. Even under Section 9(1) of the Act this ground advanced on behalf of appellant No. 1 would not meet the requirements of the provisions so as to hold that she had a reasonable excuse to withdraw herself from the society of her husband. Learned counsel for the appellants invited our attention to the decision of Dunn v. Dunn, (1962) 3 All ER 587. But that case has no application to the point at issue.

The earlier act of cruelty alleged as a ground on behalf of appellant No, 1 for withdrawing herself from the society of her husband was that about two years ago the respondent had beaten her resulting in a fracture of her palm as stated in her written-statement. It has come in the evidence that she came to her husband thereafter and stayed with him and as such the act of the wife clearly amounted to condonation of the act of cruelty. That apart, even from the evidence adduced by appellant No. 1 it is clear that she completely failed to prove the fact of sustaining of an injury to her palm as alleged by her by adducing cogent evidence in that regard. We find it difficult to believe the solitary statement of appellant No 1 on that score. On the other hand we may further point out that in para 11 of her written-statement she stated that on being beaten by her husband she had sent a message to her father and brothers for help. But she did not examine the person through whom she is alleged to have sent a message. It has come in the evidence of respondent husband that he made three attempts to bring back his wife (appellant No. 1). This fact was stated in pura 3 of his petition and it was not specifically denied by appellant No. 1 in her written statement. She in her deposition admitted that her husband-respondent had come to her twice to take her to his house. This shows that the respondent all through has been keen to take his wife back and live with her, but she always refused to oblige him. It has, therefore, to be construed that appellant No. 1 without any reasonable excuse had withdrawn from the society of her husband which Ultimately compelled him to file the present petition. The charge of cruelty on the part of the respondent as alleged completely fails and the submission in that regard is rejected.

11. With regard to the last contention that the relief under Section 9(1) of the Hindu Marriage Act being discretionary, the trial Court ought not to have granted the relief sought by the respondent under Section 23 of the Act for restitution of conjugal rights, we are of opinion that it has also no substance. From the circumstances as they appear on record, we are satisfied that the trial Court after keeping in view the provisions of Section 23 of the Act rightly decided to pass a de-

cree for restitution of conjugal rights and we find no reason for taking a different view.

12. In the result, this appeal fails and is dismissed. The judgment and decree passed by the trial Court are hereby affirmed. In the circumstances of the case, there shall be no order as to costs of this Court.