

Allahabad High Court

Itwari vs Smt. Asghari And Ors. on 29 August, 1959

Equivalent citations: AIR 1960 All 684

Author: S Dhavan

Bench: S Dhavan

JUDGMENT S.S. Dhavan, J.

1. This is a Muslim husband's appeal against the decision of the learned District Judge, Rampur, dismissing his suit for restitution of conjugal rights against his first wife who refused to return to him after he had taken a second wife and accused him of cruelty to her. The appellant Itwari was married to Smt. Asghari about the year 1950 and lived with her for sometime. Then things went wrong and the wife ultimately left him to live with her parents; but he took no steps to bring her back and married another woman.

The first wife filed an application for maintenance under Section 488 Cr. P. C. Thereupon the husband filed a suit against her for restitution of conjugal rights. For some reasons he impleaded her father and two brothers as co-defendants. The wife contested the suit and alleged that she had been turned out by her husband who had formed an illicit union with another woman whom he subsequently married. She alleged that he had beaten her, deprived her of her ornaments and thus caused her physical and mental pain. He had also not paid her dower.

2. The learned Munsif decreed the husband's suit and held that the wife had failed, to prove that she was really ill-treated and that the husband had not been guilty of such cruelty as would disentitle him to a decree for restitution of conjugal rights against her. He held that the mere fact that the husband had taken a second wife raised, no presumption that Smt. Asghari had suffered inequitable treatment at his hands, and was influenced by the husband's explanation, that he had not taken his second wife to live in his house with Smt. Asghari.

He also took the view that if the wife felt aggrieved, by her husband's second marriage she should have obtained a decree for dissolution of marriage and expressed surprise that she had not done so, thereby adopting the strange and inconsistent view that the husband's conduct in taking a second wife is a good ground for the first wife to sue for dissolution of her marriage and put an end to all the rights of the husband but no ground for contesting the husband's suit for assertion of the same rights under the same marriage.

The fact that the wife had taken things lying down weighed with the learned Munsif in disbelieving her allegation of cruelty against Itwari. He decreed the husband's suit and also passed an order directing Smt. Asghari's father and brother not to prevent her from going back to him.

3. On appeal, the learned District Judge, Rampur reversed the finding of the trial court and dismissed the husband's suit with costs. He was of the opinion that Itwari had filed his suit for restitution of conjugal rights only as a counter-blast to the wife's claim for maintenance under Section 488 Cr. p. C., and pointed out that, after the wife had left him and been living with her parents for so many years, he took no steps to get her back and that his long silence was an

indication that he never really cared for her. He observed, "In view of this circumstance I am prepared to believe Smt. Asghari's evidence that she was ill-treated and turned out by her husband and that the latter is now putting up a show to get her back only to escape from the liability to pay maintenance allowance."

He took the view that the wife who had been deserted and not taken care of by the husband for so many years would not find peace with him after another woman had already been installed as his wife. Accordingly he allowed the wife's appeal. Against this decision Itwari had come to this Court in second appeal

4. Mr. N. A. Kazmi, learned counsel for the appellant urged the following arguments in support of the appeal. First, in a suit for restitution of conjugal rights the question whether the husband has been guilty of such cruelty as will defeat his right to consortium is a mixed question of law and fact, and the High Court in second appeal can re-examine the evidence and form its own conclusion whether cruelty has been established against the husband.

Secondly, the mere fact that the husband had taken a second wife is no proof of cruelty as every Muslim has the right to take several wives upto a maximum of four and the view taken by the District Judge is wrong in law. Thirdly, to defeat a husband's suit for assertion of his conjugal rights there must be proof of cruelty of such a character as to render it unsafe for the wife to return to her husband's dominion. I, shall now proceed to consider these contentions on merits.

5. The first question is whether the conduct of the husband in taking a second wife is any ground for the first wife to refuse to live with him or for dismissing his suit for restitution of conjugal rights. Learned counsel for the husband vehemently argued that a Muslim husband has the right under his personal law to take a second wife even while the first marriage subsists. But this right is not in dispute in this case.

The question before the Court is not whether the husband had the right to take a second wife but whether this Court, as a court of equity, should lend its assistance to the husband by compelling the first wife, on pain of severe penalties, to live with him after he has taken a second wife in the circumstances in which he did.

6. A marriage between Mohammedans is a civil contract and a suit for restitution of conjugal rights is nothing more than an enforcement of the right to consortium under this contract. The Court assists the husband by an order compelling the wife to return to cohabitation with the husband. "Disobedience to the order of the Court would be enforceable by imprisonment of the wife or attachment of her property, or both". *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, 11 Moo Ind App 551 (609). *Abdul Kadir v. Salima*, ILR 8 All 149 (FB).

But a decree, for specific performance of a contract an equitable relief and it is within the discretion of the Court to grant or refuse it in accordance with equitable principles. In *Abdul Kadir's* case ILR 8 All 149 (FB), it was held that in a suit for conjugal rights, the Courts in India shall function as mixed Courts of equity and be guided by principles of equity well-established under

English Jurisprudence. One of them is that the Court shall take into consideration the conduct of the person who asks for specific performance.

If the Court feels, on the evidence before it, that he has not come to the Court with clean hands or that his own conduct as a party has been unworthy, or his suit has been filed with ulterior motives and not in good faith, or that it would be unjust to compel the wife to live with him, it may refuse him assistance altogether. The Court will also be justified in refusing specific performance where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

7. It follows, therefore, that, in a suit for restitution of conjugal rights by a Muslim husband against the first wife after he has taken a second, if the Court after a review of the evidence feels that the circumstances reveal that in taking a second wife the husband has been guilty of such conduct as to make it inequitable for the Court to compel the first wife to live with him, it will refuse relief.

8. The husband in the present case takes his stand on the right of every Muslim under his personal law to have several wives at a time upto a maximum of four. He contends that if the first wife is permitted to leave the husband merely because he has taken a second, this would be a virtual denial of his right. It is necessary to examine this argument.

9. Muslim Law permits polygamy but has never encouraged it. The sanction for polygamy among Muslim is traced to the Koran IV. 3, "If Ye fear that ye cannot do justice between orphans, then marry what seems good to you of women, by twos, or threes, or fours or if ye fear that ye cannot be equitable, then only one, or what your right hand possesses."

This injunction was really a restrictive measure and reduced the number of wives to four at a time; it imposed a ceiling on conjugal greed which prevailed among males on an extensive scale. The right to four wives appears to have been qualified by a 'better not' advice, and husbands were enjoined to restrict themselves to one wife if they could not be impartial between several wives -- an impossible condition according to several Muslim jurists, who rely on it for their argument that Muslim Law in practice discourages polygamy.

10. A Muslim has the undisputed legal right to take as many as four wives at a time. But it does not follow that Muslim Law in India gives no right to the first wife against a husband who takes a second wife, or that this law renders her helpless when faced with the prospect of sharing her husband's consortium with another woman. In India a Muslim wife can divorce her husband, under his delegated power in the event of his taking a second wife, *Badu Mia v. Badrannessa*, 40 Ind Cas 803: (AIR 1919 Cal 511 (2)).

Again a Muslim wife can stipulate for the power, to divorce herself in case of the husband availing of his legal right to take another wife *Sheikh Moh. v. Badrunnissa Bibee*. 7 Beng LR App 5 (sic), *Badarannissa Bibi v. Mafiattala*, 7 Beng LR 442. In *Ayatunnessa Beebee v. Karam Ali*, ILR 36 Cal 23, it was held that a Muslim wife, who has the power given to her by the marriage contract to divorce herself in the event of the husband taking a second wife does not lose her option by failing to

exercise it the very moment she knows that he has done so, for "a second marriage is not a single but a continuing wrong to the first wife."

The court significantly described a second marriage as a "continuing wrong" to the first wife. The implications of these rights of the first wife are unmistakable. To say the least, a law cannot regard the husband's right to compel all his wives to submit to his consortium as fundamental and inviolate if it permits a wife to make a stipulation that she will break up her marriage on his taking a second wife. Further, the moral foundation of this right is considerably weakened if the law, while tolerating it, calls it "a continuing wrong" to the first wife and permits her to stipulate that she will repudiate her marriage vows on the coming of a second wife.

If Muslim law had regarded a polygamous husband's right to consortium with the first wife as fundamental and inviolate, it would have banned such stipulations by the wife as against Muslim public policy. But it has done 'no such thing. On the contrary Muslim law has conferred upon the wife's stipulated right to dissolve her marriage on her husband taking a second wife a force overriding the sanctity of the first marriage itself.

If Mohammadan Law permits and enforces such agreements it follows that it prefers the breaking up of the first marriage to compelling the first wife to share her husband with the second. The general law, too, recognises the sanctity of such agreements, and it has been held that a contract restraining a Muslim husband from entering into a second marriage during the life time of the first is not void under Section 23 of the Contract Act which bans agreements in restraint of marriage.

11. I am, therefore, of the opinion that Muslim Law as enforced in India has considered polygamy as an institution to be tolerated but not encouraged, and has not conferred upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances. A Muslim husband has the legal right to take a second wife even while the first marriage subsists, but if he does so, and then seeks the assistance of the Civil Court to compel the first wife to live with him against her wishes on pain of severe penalties including attachment of property, she is entitled to raise the question whether the court, as a court of equity, ought to compel her to submit to co-habitation with such a husband. In that case the circumstances in which his second marriage took place are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first.

12. Mr. Kazmi contended that the first wife is in no case entitled to consider the second marriage as an act of cruelty to her. I cannot agree. In *Shamsunnissa Begum's case* II Moo Ind App 551, the Privy Council observed that "the Mohammedan Law, on a question of what is legal cruelty between man and wife, would probably not differ materially from the English Law". It follows that Indian Law does not recognise various types of cruelty such as 'Muslim' cruelty, 'Christian' cruelty, 'Hindu' cruelty, and so on, and that the test of cruelty is based on universal and humanitarian standards that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health.

13. What the Court will regard as cruel conduct depends upon the prevailing social conditions. Not so very long ago in England a husband could inflict corporal chastisement on the wife without causing comment. Principles governing legal cruelty are well established and it includes any conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or as to give a reasonable apprehension of such a danger. Ray-dyn On Divorce 5th Edition p. 80.

But in determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties and their character, and social status *ibid* p. 80. In deciding what constitutes cruelty, the Courts have always taken into consideration the prevailing social conditions, and the same test will apply in a case where the parties are Mohammadans. Muslim society has never remained static and to contend otherwise is to ignore the record of achievements of Muslim civilisation and the rich development of Mohammedan jurisprudence in different countries. Muslim jurisprudence has always taken into account changes in social conditions in administering Mohammedan Law.

"Necessity and the wants of social life are the two all-important guiding principles recognised by Mohammedan Jurisprudence in conformity to which Laws should be applied to actual cases, subject only to this reservation that rules, which are covered by a clear text of the Quran" or a precept of indisputable authority, or have been settled by agreement among the learned, must be enforced as we find them. It seems to me beyond question that, so long as this condition is borne in mind, the Court in administering Mohammedan Law is entitled to take into account the circumstances of actual life and the change in the people's habits, and modes of living: Mohammedan Jurisprudence by Sri Abdur Bahim, Tagore Law Lecture -- 1908 p. 43."

14. The most convincing proof of the impact of social changes on Muslim Law is the passing of the Dissolution of Muslim Marriages Act 1939 by which the legislature enabled a Muslim wife to sue for the dissolution of her marriage on a number of grounds which were previously not available. One of them is the failure of the husband who has more wives than one to treat all of them equitably in accordance with the injunctions of the Quran.

It is but a short step from this principle to ask a husband who has taken it into his head to have a second wife during the subsistence of the first marriage to explain the reasons for this conduct and in the absence of a convincing explanation, to conclude that there is little likelihood of the first wife, receiving equitable treatment from him.

"By this Act the legislature has made a distinct: endeavour to ameliorate the lot of the wife and. we (the Courts) must apply the law in consonance with the spirit of the legislature." -- Sinha J., in *Mt. Sofia Begum v. Zaheer Hasan*, AIR 1947 ALL-16.

I respectfully agree, and would like to add that in considering the question of cruelty in any particular case, the Court cannot ignore the prevailing social conditions, the circumstances of actual life and the change in the people's habits and modes of living.

15. Today Muslim woman move in society, and it is impossible for any Indian husband with several wives to cart all of them around. He must select one among them to share his social life, thus making, impartial treatment in polygamy virtually impossible-under modern conditions. Formerly, a Muslim husband could bring a second wife into the household without necessarily meaning any insult or cruelty to the wife. Occasionally, a second marriage took place with the consent or even at the suggestion of the first wife.

But social condition and habits among Indian-Mussalmans have changed considerably, and with it the conscience of the Muslim community. Today the importing of a second wife into the household ordinarily means a stinging insult to the first. It leads to the asking of awkward questions the raising of unsympathetic eyebrows and the pointing of derisive fingers at the first wife who is automatically degraded by society: All this is likely to prey upon her mind and health if she is compelled to live with her husband under the altered circumstances.

A husband who takes a second wife in these days will not be permitted to pretend that he did not realise the likely effect of his action on the feelings and health of the first wife. Under the law, the husband will be presumed to intend the natural consequences of his own conduct. *Simpson' v. Simpson*, (1951) 1 All ER 955. Under the prevailing conditions the very act of taking a second wife, in the absence of a weighty and convincing explanation, raises a presumption of cruelty to the first. (The Calcutta High Court called it a "continuing wrong").

The onus today would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first. For example, he may rebut the presumption of cruelty by proving that his second marriage took place at the suggestion of the first wife or reveal some other relevant circumstances which will disprove cruelty. But in the absence of a cogent explanation the Court will presume, under modern conditions, that the action of the husband in taking a second wife involved cruelty to the first and that it would be inequitable for the Court to compel her against her wishes to live with such a husband.

16. Mr. Kazmi relied on an observation of the late Sir Din Shah Mulla in his *Principles of Mohammedan Law*, 14TH edition page 246, that:

"cruelty, when it is of such a character as to render it unsafe for the wife to return to her dominion, is a valid defence"

to a suit for restitution of conjugal rights by the husband. Learned counsel argued that cruelty which would fall short of this standard is no defence. I do not read any such meaning in that eminent author's observation which is really borrowed from the judgment of the Privy Council in *Shamsunnissa Begum's case*, 11 Moo Ind App 551. But I have indicated that the Privy Council observed in that case that the Mohammedan Law is not very different from the English Law on the question of cruelty.

The Court will grant the equitable relief of restitution in accordance with the social conscience of the Muslim community, though always regarding the fundamental principles of the Mohammedan Law

in the matter of marriage and other relations as sacrosanct. That law has always permitted and continues to permit a Mohammedan to marry several wives upto the limit of four. But the exercise of this right has never been encouraged and if the husband, after taking a second wife against the wishes of the first, also wants the assistance of the Civil Court to compel the first to live with him, the Court will respect the sanctity of the second marriage, but it will not compel the first wife, against her wishes, to live with the husband under the altered circumstances and share his consortium with another, woman if it concludes, on a review of the evidence, that it will be inequitable to compel her to do so.

17. Counsel for the appellant argued vehemently that dismissal of the husband's suit against the first wife virtually means a denial of his right to marry a second time while the first marriage subsists. I do not agree. A Muslim husband has always the right to take a second wife. If he does so, he cannot be prosecuted for bigamy, the second marriage is valid, the children of the second wife are legitimate and he is entitled to the enjoyment of his rights (subject to his obligations) under the second marriage.

But it is not at all necessary for the enjoyment and consummation of his rights under the second marriage that he should apportion his consortium between two women. On the contrary, nothing is more likely to mar the conjugal bliss of his second marriage than that his new wife should be asked to share it with the old. The second wife is not likely to view with sympathy her husband's attempt to compel the old wife to return to his consortium and, to put it very mildly, the dismissal of the husband's suit for restitution against the first wife is not likely to break the second wife's heart.

Therefore, if, in his conjugal greed, the husband does not rest content with the enjoyment of his new connubial bliss but, like Oliver, asks for more, and is refused relief by the Court, he cannot complain that his rights under the first marriage "have been impaired. The Court will be justified in inquiring whether it will be equitable to compel his "first wife to submit to his consortium in the altered circumstances

18. Even in the absence of satisfactory proof of the husband's cruelty, the Court will not pass a decree for restitution in favour of the husband if, on the evidence, it feels that the circumstances are such that it will be unjust and inequitable to compel her to live with him. In *Hamid Hussain v. Kubra Begum*, ILR 40 All 332: (AIR 1918 All 235), a Division Bench of this Court dismissed a husband's prayer for restitution on the ground that the parties were on the worst of terms, that the real reason for the suit was the husband's desire to obtain possession of the wife's property and the Court was of the opinion that by a return to her husband's custody the wife's health and safety would be endangered though there was no satisfactory evidence of physical cruelty.

In *Nawab Bibi v. Allah Ditta*, AIR 1924 Lah 188 (2), *Shadi Lal C. J. and Zafar Ali, J.* refused relief to a husband who had been married as an infant to the wife when ,she was a minor but had not even cared to bring her to live with him even after she had attained the age of puberty. In *Khurshid Begum v. Abdul Rashid*, AIR 1926 Nag 234, the Court refused relief to a husband because it was of the opinion that the husband and wife had been "on the worst of terms" for years and the suit had been brought in a struggle for the possession of property.

19. These principles apply to the present case. The lower appellate court has found that the appellant never really cared for his first wife and filed his suit for restitution only to defeat her application for maintenance. In the circumstances, his suit was mala fide and rightly dismissed.

20. Lastly, the appellate court, reversing the finding of the trial court, believed the wife's allegation of specific acts of cruelty committed by the husband and held that she had been deserted and neglected by the husband for so many years. In the circumstances, I concur in the opinion of the District Judge that it will be inequitable to compel the first wife to live with such a husband. The appeal is dismissed under Order 41, Rule 11, C. P. C.