AFR

Court No. - 03

Case :- FIRST APPEAL No. - 700 of 2022
Appellant :- Azizurrahman
Respondent :- Hamidunnisha @ Sharifunnisha
Counsel for Appellant :- Mahendra Pratap Yadav

Hon'ble Surya Prakash Kesarwani,J.
Hon'ble Rajendra Kumar-IV,J.

(Per: Surya Prakash Kesarwani, J.)

1. Heard learned counsel for the plaintiff appellant/husband.

2. This first appeal under Section 19 of the Family Courts Act, 1984 has been filed praying to set aside the judgment dated 04.08.2022 and the decree dated 12.08.2022 in Matrimonial Case No.188 of 2015 (Azizurrahman vs. Hamidunnisha @ Sharifunnisha) passed by the Principal Judge, Family Court, Sant Kabir Nagar whereby the plaintiff's suit for restoration of conjugal rights, has been dismissed.

3. Briefly stated facts of the present case are that the defendant-respondent/ wife was married with the plaintiff-appellant/ husband on 12.05.1999. The defendant-respondent has only one sister and no brother. The other sister had died. Thus, the defendant-respondent is the only surviving issue of her father. From the wedlock of the plaintiff-appellant and the defendant-respondent, four children were born, out of which one has died and thus, two sons and one daughter remain surviving children of the plaintiff-appellant and defendant respondent. The father of the defendant-respondent has gifted his immovable property to the defendant-respondent and she is living with her old father who is stated to be more then 93 years old and is looking all his care. The plaintiff-appellant has contracted second marriage and suppressed the fact, but the fact of second marriage and also that some

children were born from the wedlock with the second wife, was admitted by own witnesses of the plaintiff-appellant. The plaintiff-appellant/ husband has admittedly neither told the defendant-respondent/ wife either about his intention to contract second marriage nor explained the defendant-respondent that he shall give equal love, affection and treatment to both the wives. Briefly, on these facts the impugned judgement has been passed which has been challenged by the plaintiff appellant-husband.

4. We have carefully considered the submissions of the appellant and perused the appeal.

DISCUSSION AND FINDINGS

5. Sura 4 Ayat 3 of the Holy Quran throws light on second marriage by a Muslim, which is reproduced below:

> *"If ye fear that ye shall not*
> *Be able to deal justly*
> *With the orphans,*
> *Marry women of your choice,*
> *Two, or three, or four;*
> ***But if ye fear that ye shall not***
> ***Be able to do justly (with them),***
> ***Then only one, or (a captive)***
> ***That your right hands posses.***
> ***That will be more suitable,***
> ***To prevent you***
> ***From doing injustice."***

6. In the case of **Dilbar Habib Siddiqui Vs. State of U.P. and Others 2010 (69) ACC 997** a Division Bench of this Court held in paragraph 8 as under:

> *"Thus for a valid muslim marriage both the spouses have to be muslim.*

In the present writ petition this condition is not satisfied as the writ petition lacks credible and accountable material in this respect on which reliance can be placed.

Coming to another limb of argument raised by counsel for the petitioner that a muslim man is entitled to marry four time, we once again revert back to recognised treatises. ***We find that Sura 4 Ayat 3 of The Holy Quran provides for giving due care and provisions for a Muslim women.*** *The said Ayat, as is referred to in the treatise by I.Mulla, is referred to below:-*

"(vi) Number of wives- If ye fear that ye shall not be able to deal justly with the orphans (orphan wives and their property); marry woman of your choice, two or three or four; But if you fear that ye shall not be able to deal justly (with them), then only one.....that would be more suitable to prevent you from doing injustice."

From the perusal of above Ayats it is abundantly clear that bigamy is not sanctified unless a man can do justice to orphans. The said Ayat mandates all Muslims men to 'deal justly with orphans and then they can marry women of their choice two or three or four but if they fear that they will not be able to deal justly with them then only one. *We are of the view, that such a religious mandate has been given to all the Muslims for a greater social purpose. If a Muslim man is not capable of fostering his wife and children then he cannot be allowed the liberty to marry other women as that will be against the said Sura 4 -Ayat-3.This aspect of the matter should not vex our mind further as the same came up before the apex court as well in Javed And Others versus State of Haryana: AIR 2003 SC 3057 and therefore we conclude this aspect of the submission by referring to the words of the apex court in that decision, which are as follows:-*

"The Muslim Law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. The question of the impugned provision of Haryana Act being violative of Art. 25 does not arise."

(Emphasis supplied by us)

7. In **Itwari vs. Smt. Asghari and others, AIR 1960 All. 684 (Paras-7, 9, 11, 16 and 18),** this court considered the question of restitution of conjugal rights by a Muslim husband against his first

wife and held, as under:

> *“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.*
>
> *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."*
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> *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.*
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> *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.*
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> *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:*
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> *"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.

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."

8. Hon'ble Supreme Court in the case of **A.K. Gopalan Vs. The State of Madras AIR 1950 SC 27** observed that the people of India have in exercise of their sovereign will as expressed in the preamble, adopted the democratic ideals **which assures the citizen the dignity of the individuals and other cherished human values as a means to the full evolution and expression of his personality**, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, because they have been re-tained by the people and made paramount to the delegated powers, which has been translated into positive law in Part III of the Indian Constitution, the high purpose and spirit of the Preamble as well as the constitutional significance of a Declaration of Fundamental Rights should be borne in mind in construing a provision of Part III of the Indian Constitution. **This declaration is the greatest charter of liberty of which the people of this country may well be proud. The foundation of this republic have been led on the bedrock of justice.**

9. In **Maneka Gandhi Vs. Union of India (1978) 1 SCC 248** and also in the case of **Olga Tellies Vs. Bombay Municipal Corporation (1985) 3 SCC 545**, Hon'ble Supreme Court held that the concept of right to life and personal liberty, granted under Article 21 of the Constitution could include "the right to live with dignity".

10. **Concept of equality enshrined in Article 14, concept of non discrimination on the ground of sex etc. enshrined in Article 15(2) and the concept of right to life and personal liberty which includes the right to live with dignity as enshrined in Article 21**

read with preamble of the Constitution, are the foundation and the basic features of the Constitution. Breach of any of these, by any law or practice, shall render such law or practice to be unconstitutional. Whether it is collective right of citizens or individual right, both are protected by philosophy and ethos of the Constitution. In the garb of Personal Law, citizens cannot be deprived constitutional protection. The equality clause is not merely the equality before the law but embodies the concept of real and substantive equality which strikes at the inequalities arising on account of vast social and economic differentiation. Horizons of the constitutional law are expanding. The right to life and personal liberty under Article 21 of the Constitution, has been expanded by Hon'ble Supreme Court in the case of Chameli Singh Vs. State of U.P. 1995 (Supp) 3 SCC 523 by declaring that **decent and civilized life is fundamental right** which also includes food, wather and decent environment. In Francis Coralie vs. Union Territory 1981 (1) SCC 608 while interpreting Article 21 of the Constitution of India, Hon'ble Supreme Court held that **the right to life includes the right to live with human dignity** and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. **The right to life or personal liberty under Article 21 of the Constitution enlarge its sweep to encompass human personality in its full blossom.** It includes right to livelihood, better standard of living, hygienic conditions in the work place and leisure. In Ghisalal (supra), Hon'ble

Supreme Court held that mandate of wife's consent for adoption and conferring independent right upon a female Hindu to adopt a child, Parliament sought to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution.

11. In **Voluntary Health Association of Punjab (supra)**, Hon'ble Supreme Court held that woman has to be regarded as an equal partner in the life of a man. **A society that does not respect its women, cannot be treated to be civilized. Civilization of a country is known how it respects its women.** It is the requisite of the present day that people are made aware that it is obligatory to treat the women with respect and dignity so that humanism in its conceptual essentiality remains alive.

12. In view of mandate in the Holy Quran it is amply clear that bigamy is not sanctified unless a man can do justice to orphans, who in the present set of facts are the respondent and her children. As per mandate of the Holy Quran as noted above all Muslims men have to deal justly with the orphans. A married Muslim man having his wife alive cannot marry with another muslim women, if he cannot deal justly with the orphan. A mandate has been given that in such circumstances a Muslim man has to prevent himself to perform second marriage, if he is not capable of fostering his wife and children. The religious mandate of Sura 4 Ayat 3 is binding on all muslim men which specifically mandates all Mulim men to deal justly with orphans and then they can marry women of their choice two or three or four but if a Muslim man fears that he will not be able to deal justly with them then only one. If a muslim man is not

capable of fostering his wife and children then as per above mandate of Holy Quran, he cannot marry the other woman.

13. Thus, in the absence of any cogent explanation for the second marriage or in the absence of any explanation to the first wife with respect to matters aforementioned, the action of the plaintiff-appellant would amount to cruelty to his first wife. Therefore, it would be inequitable for the court to compel the first wife against her wishes to live with such a husband, i.e. the plaintiff-appellant.

14. **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, 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. In other words, 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. 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.

15. When the plaintiff-appellant has contracted the second marriage suppressing this fact from his first wife, then such a conduct of the plaintiff-appellant amounts to cruelty to his first wife. Under the circumstances, if the first wife does not wish to live with her husband-plaintiff appellant, then she cannot be compelled to go with him in a suit filed by him for restitution of conjugal rights. If the contention of the plaintiff-appellant/ husband for grant of decree of conjugal rights is accepted, then from point of view of the defendant-respondent/wife, it would amount to breach of her fundamental rights guaranteed under Article 21 of the Constitution of India.

16. For all the reasons afore-stated, the present appeal is totally frivolous and deserves to be dismissed at the admission stage. Consequently, **the appeal is dismissed**.

Order Date :- 19.09.2022
NLY/OK