

Bombay High Court

Vijendra B. Singh vs Uma Vijendra Singh on 21 April, 2010

Bench: A.S. Oka

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.579 OF 2010

Vijendra B. Singh

versus

Uma Vijendra Singh

Petitioner

Respondent

Mr.Ketan R. Parekh a/w Ms.Kunjali Sanghavi i/by K.R.Parekh & Co. for
petitioner.

Mr.Sasi Nair for respondent.

CORAM : A.S.OKA, J.

DATE : 21st April 2010

JUDGMENT :

1. The submissions of learned counsel appearing for the parties were heard on the earlier date. Parties were put to notice that the petition will be finally decided at the stage of admission. With a view to appreciate the submissions made by learned counsel for the parties, it will be necessary to consider the facts of the case. The petitioner is the husband and the respondent is the wife. They got married on 22nd April 1996. In the year 1998 the respondent-wife filed a petition for restitution of conjugal rights under section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the said Act"). In the said petition, a decree of restitution of conjugal rights was passed on 3rd October 2002. As the said decree remained unexecuted, the petitioner-husband filed a petition for divorce under

section 13(1-A)(ii) of the said Act for a decree of divorce. The learned Judge of the Family Court dismissed the said petition for divorce by judgment and decree dated 23rd August 2006. A Family Court appeal preferred by the petitioner for challenging the said decree is pending in this Court. The said appeal has been admitted. An application for execution was made by the respondent-wife for execution of the decree for restitution of the conjugal rights. By the impugned order, the learned Judge of the Family Court directed that the petitioner-husband shall obey the decree of restitution of conjugal rights within a period of one month from the date of impugned order i.e. 6th November 2009. The learned Judge directed that upon failure of the petitioner to obey the said decree within the time prescribed under the said order, he shall pay an amount of Rs.20,000/- p.m. to the respondent-decree holder from the date of passing the decree of restitution of the conjugal rights.

2. The learned counsel appearing for the petitioner has made detailed submissions. He submitted that while passing the decree, the Court had not fixed any time limit for compliance of the decree. He submitted that the impugned order amounts to going beyond the decree and adding to the decree something which is not permissible in law. He submitted that the notice under Rule 22 of Order XXI of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code") was not served and, therefore, the impugned order has been vitiated. He submitted that the time for complying with the decree of restitution of conjugal rights could have been fixed only by the Court which passed the decree either at the time of passing the decree or any time afterwards but the Executing Court had no jurisdiction to pass an order fixing an outer limit for complying with the decree of restitution of conjugal rights. He submitted that the Executing Court was powerless to pass an order fixing the period of one month for compliance with the decree. He submitted that the Executing Court has added a direction in the decree for restitution of the conjugal rights which is completely prohibited. He submitted that after the petitioner had filed the petition under section 13(1-A)(ii) of the said Act on the basis of the decree for restitution of conjugal rights, the said decree ceases to be executable. He submitted that in execution of a decree which was not executable, no such direction could have been issued.

Without prejudice to the aforesaid contentions, he submitted that the Executing Court proceeded on assumption that what was required to be fixed was the maintenance amount and the payment contemplated by Sub- Rule 2 of Rule 33 of Order XXI of the said Code cannot be equated with maintenance payable under the said Act. He submitted that in any case, such a drastic order could have been passed only on the basis of a finding that there was willful disobedience of the decree on the part of the petitioner-husband and no such finding has been recorded. He pointed out that an application for execution was filed earlier which was not pressed by the respondent and therefore, a fresh application was not maintainable. The learned counsel for the respondents supported the impugned judgment and order. He submitted that the Executing Court is the same Court who has passed the decree of restitution of conjugal rights. He submitted that the learned Judge had jurisdiction to pass an order in exercise of powers under Rule 33 of Order XXI of the said Code.

He submitted that periodical payment referred to in Sub-Rule 2 of Rule 33 of Order XXI of the said Code is a payment by way of penalty and not by way of maintenance. He submitted that the tests which are applicable for fixing the amount of interim alimony or maintenance will not apply in the present case. He submitted that the learned Trial Judge was justified in fixing the amount of

Rs.20,000/- considering the income of the petitioner.

He pointed out that even the petition for divorce filed by the petitioner-

husband has been dismissed by holding that the petitioner was not ready and willing to co-habit and, therefore, power under Rule 33 of Order XLII of the said Code has been rightly exercised by the Trial Court.

3. I have given careful consideration to the submissions. There is no dispute about the decree for restitution of conjugal rights passed on a petition filed by the respondent which has attained finality. The decree was passed on 3rd October 2002. There are two provisions relating to execution of such a decree. The said two provisions are Rule 32 and Rule 33 of Order XXI of the said Code. Before proceeding further, it must be noted here that in view of Section 21 of the said Act, the proceedings under the said Act shall be regulated as far as may be by the said Code.

The decree for restitution of conjugal rights was passed by a Family Court established under the Family Courts Act, 1984. Under section 10 of the Family Courts Act, 1984, the provisions of the said Code apply to the proceedings before the Family Court subject to provisions of said Act of 1984. Section 18 of the said Act of 1984 provides that a decree or order passed by a Family Court shall have same effect as a decree or order of a Civil Court and shall be executed in the same manner as is prescribed by the said Code. Sub section 3 of section 18 provides that a decree passed by the Family Court can be executed either by the same Court or by ordinary Civil Court to which it is sent for execution. Rule 32 of Order XXI of the said Code reads thus:-

ORDER XXI : EXECUTION OF DECREES & ORDERS Rule 32 : ig Decree for specific performance for restitution of conjugal rights, or for an injunction.-

(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub- rule (2) has remained in force for six months if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be

sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance if any to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree."

Sub Rule 1 of Rule 32 of Order XXI of said Code provides that a decree for restitution of conjugal rights may be enforced by attachment of the property of the party against whom the decree has been passed. This is the mode prescribed for executing a decree for restitution of conjugal rights under Rule 32 of the said Code.

4. Rule 33 of Order XXI of the said Code reads thus:-

ORDER XXI : EXECUTION OF DECREES & ORDERS Rule 33 : Discretion of Court in executing decrees for restitution of conjugal rights.-

(1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree against a husband for the restitution of conjugal rights or at any time afterwards, may order that the decree shall be executed in the manner provided in this rule.

(2) Where the Court has made an order under sub-rule (1), it may order, that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money."

Sub-Rule 1 of Rule 33 of Order XXI of the said Code starts with non-

obstante clause. Thus, Rule 33 will have overriding effect over the rule

32. Under Sub-rule 1 of Rule 32 it is provided that the decree for restitution of conjugal rights can be enforced by attachment of property of the party against whom the same is passed, provided, the party had an opportunity of obeying the decree and has willfully disobeyed it. Thus, what is contemplated by Sub-rule 1 of Rule 32 is willful disobedience on the part of the party against whom such a decree has been passed.

However, Rule 33 overrides Rule 32 because of non-obstante clause and it confers power on the Court passing a decree either at the time of passing a decree against the husband for restitution of conjugal rights or any time afterwards to direct that the decree for restitution of conjugal rights shall be executed in the manner provided in Rule 33. Thus, it is not necessary that at the time of passing a decree for restitution of conjugal rights, the Court has to pass an order that the decree shall be complied with in accordance with Sub-rule 2 of Rule 33. Even after passing a decree, the Court can issue a direction that the decree shall be executed in the manner provided in Rule 33. In such event, under Sub-rule 2 of Rule 33, the Court has power to direct that in the event the decree not being obeyed within such a period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just. In a given case the Court may require the judgment-debtor to secure to the decree-holder such periodical payments.

As distinguished from Sub-rule 1 of Rule 32, willful disobedience is not a condition precedent for passing an order under Sub-Rule 2 of Order 33 directing the judgment-debtor to make periodical payments to the decree-

holder. The Court gets power when it is found that the decree has not been complied with within such period as may be fixed in this behalf. The power can be exercised under Sub-rule 2 of Rule 33 once the Executing Court finds that the decree is not obeyed within the period as may be fixed in that behalf. The provision of Sub-rule 1 of Rule 33 requires that the Court passing a decree should issue a direction at any time after passing a decree that the decree shall be executed in the manner provided in the Rule. Sub-rule 2 of Rule 33 provides that where the Court has made an order under Sub -Rule 1 that the decree shall be executed in the manner provided in Rule 33 , it may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf , the judgment-debtor shall make periodical payments as may be just. Thus, the power under Sub-rule 1 of Rule 33 of Order XXI of the said Code directing that the decree shall be executed in the manner provided under Rule 33 is of the Court passing the decree. The power under Sub-Rule 2 of Rule 33 is to be exercised by the Court in execution. Sub-rule 4 of Rule 33 provides that periodical payments ordered to be made under Sub-Rule 2 of Rule 33 may be recovered as if the same is payable under a decree for payment of money. The effect of Sub-rule 4 is that if the judgment-

debtor fails to make periodical payments, as ordered under Sub-rule 2 of Rule 33, the said direction can be executed as if it is a money decree.

5. As far as the date from which the periodical payment is payable, Sub-rule 2 of Rule 33 confers discretion on the Court. It is not necessary that in every case periodical payment shall be ordered to be paid from the date of passing the decree of restitution of conjugal rights or from the date on which the period provided for compliance comes to an end. In a given case the direction under Sub-rule 1 of Rule 33 may be issued by the Court after a lapse of considerable time from the date of decree as the rule provides that such a direction can be issued at time after passing a decree. In such a case, it may be unjust to direct that periodical payment shall be made from the date of passing the decree.

6. The Court gets power to pass a direction against judgment-debtor to make periodical payment in the event the decree is not obeyed within such time as may be fixed in this behalf. Therefore, while passing an order in terms of Sub-rule 2 of Rule 33, of fixing the date from which the periodical payment is payable, the Court will have to consider all the facts and circumstances and conduct of the parties. At the same time, it must be noted that it is not necessary for the wife (decree-holder) to establish that there is willful disobedience of the decree on the part of husband-

judgment debtor. The Court gets jurisdiction to pass a direction for periodical payments when the judgment-debtor fails to obey the decree within time limit provided. In a given case where time limit is provided while passing a decree and if there is non-compliance, there may be some justification for passing a direction against the judgment-debtor to make periodical payments from the date of passing the decree. In a given case, a direction may be issued to make such periodical payments from the date on which period provided for compliance of the decree is over.

No hard and fast rule can be laid down in that behalf.

7. As far as quantum of amount is concerned, it must be remembered that the Court can exercise the power under Sub-rule 2 of Rule 33 only if the husband-judgment debtor fails to comply with the decree of restitution of conjugal rights. In a way this is a provision to compensate the wife-

decree holder on account of non compliance of the decree for restitution of conjugal rights by the husband and, therefore, it is not possible to accept the argument that periodical payment contemplated by sub-rule 2 is in the nature of penalty. If a decree for restitution of conjugal rights would have been implemented, a wife could have enjoyed the benefit of the status of her husband in terms of the standard of living of the husband, life style of the husband and other material aspects of the life. If the object of directing periodical payments to be made by the husband-

judgment debtor is considered, the amount which is made payable under the said sub-rule 2 cannot exceed the maintenance or the alimony which may be payable to the wife in accordance with section 24 or section 25 of the said Act. Therefore, while determining the amount, the Executing Court has to apply the same yardsticks which are normally applied when the amount of maintenance is determined under the provisions of said Act.

As stated earlier, the argument that the amount is in the nature of penalty has to be discarded as there is no requirement of law that before the power under Sub-rule 2 of Rule 33 is exercised, it is necessary to establish willful disobedience on the part of the husband. What is required to be established is the fact that the husband has not obeyed the decree within the time fixed for compliance thereof.

8. The first issue raised by the learned counsel for the petitioner is that the Executing Court could not have passed a direction contemplated by Sub-rule 1 of Rule 33. In the facts of the case, the said objection is too technical. Application for execution is made to the same Court which passed the decree. The application may have been styled as one under Order XXI of the said Code but there is a specific prayer therein for passing a direction in terms of Rule 33. As a prayer has been made in the application for execution, considering the object of the provision, since the Executing Court was the same Court which had passed the decree, the power under Sub-Rule 1 read with Sub-rule 2 of Rule 33 could have been always exercised by the learned Judge of the Family Court while dealing with execution application.

9. On conjoint reading of Sub-rules 1 and 2 of Rule 33, it is very clear that the power under Sub-rule 2 of fixing the periodical payments has to be exercised by the Executing Court as such power has to be exercised only after the husband fails to comply with the decree and, therefore, in Sub-rule 2 of Rule 33, the husband has been referred to as the judgment-

debtor.

10. It is already held that the periodical payment cannot exceed the amount of the maintenance or alimony payable under section 24 or section 25 of the said Act.

11. One of the important submissions made by the learned counsel for the petitioner was on the basis of failure to serve notice under Rule 22 of Order XXI of the said Code. His submission was that as the decree is sought to be executed by filing an execution application after expiry of period of more than two years from the date of decree, it was mandatory for the Executing Court to issue notice calling upon the judgment-debtor to show cause as to why the decree should not be executed against him.

The object of Rule 22 of Order XXI is to provide an opportunity of being heard to the judgment-debtor, if the decree is sought to be executed two years after the date of decree. Reliance has been placed by the learned counsel for the petitioner on the decision of Madras High Court in case of Natarajan Vs. M/s. Chandmull Amarchand by Power of Attorney K.Milopchand and another (1971-Mh.L.J.-474). The learned counsel pointed out that what is held by the said High Court is that on failure to comply with Rule 22 of Order XXI of the said Code, the sale executed in execution stands vitiated. This is held in the context of the fact that the judgment-debtor should know that his property is going to be sold. What is held by the Madras High Court is that it would be most unjust and unfair to a judgment-debtor that the process of sale is initiated without issuing such a notice under Rule 22 of Order XXI. He has also placed reliance on a decision of this Court in case of M/s.Bhormal Kapurchand & Co. Vs. M/s.PLremier Machine Tools Ltd. (AIR-1977-Bom-305) where

this Court was dealing with issuance of insolvency notice under the Presidency Town Insolvency Act, 1909. This Court observed in the context of the drastic provisions of the said Act of 1909 that to sustain an insolvency notice, it must arise out of an enforceable decree. In this context this Court held that a decree which is more than two years old, by its own force, is unexecutable unless procedure under Rule 22 of Order XXI of the said Code is followed. At this stage it must be observed that provisions of the said Act of 1909 have drastic consequences which may have result of a civil death of an insolvent. In the context of validity of insolvency notice under section 9 of the said Act of 1909, this Court has examined the matter. The learned counsel also relied upon decisions of the Apex Court in case of State of Punjab Vs. K.D.Sharma (AIR-1990-

SC-2177) and Rameshwardas Gupta Vs. State of U.P. (AIR-1997-

SC-410) in the context of his contention that the Executing Court cannot go behind the decree. As held earlier, the power to fix the periodical payments is vested in the Executing Court. Therefore, the said submission is of no avail to the learned counsel for the petitioner. In this context he has also placed reliance on decision of Apex Court in the case of K.Rajamouli Vs. A.V.K.N.Swami (AIR-2001-SC-2316).

12. The argument based on failure to serve notice under Rule 22 of Order XXI of the said Code was of some consequence, provided, the petitioner was not heard before passing the impugned order. The object of Rule 22 of Order XXI is to enable the judgment-debtor to raise an objection to the executability and validity of the decree within the four corners of the said Code. In the present case, the Executing Court has not only given an opportunity to contest the execution application by filing a reply but even issues were framed on the basis of contentions raised by the petitioner about maintainability of the execution in view of pendency of Family Court appeal. Therefore, in substance, there is a substantial compliance with Rule 22 of Order XXI as more than sufficient opportunity was given to the petitioner to contest the execution application on all grounds. From the annexures to the petition it appears that even the parties were permitted to adduce evidence as affidavit in lieu of examination-in-chief of the respondent has been annexed to the petition.

Therefore, the said argument based on failure to issue specific notice under Rule 22 of Order XXI has to be rejected. Though in the points formulated by the advocate for the petitioner there is a contention raised as regards effect of the opting for the remedy under section 13(1-A)(ii) of the said Act, the learned counsel has not canvassed the said submission in view of pendency of Family Court appeal in this Court against the decree of dismissal of the said petition filed by the petitioner.

13. Now, coming back to the impugned order, another objection raised by the petitioner has to be considered that earlier there was an execution application filed by the petitioner which was dismissed. However, I find that in the earlier execution application, the only prayer was for enforcing the decree of restitution of conjugal rights. On the earlier execution application filed on 22nd September 2003, there is an order passed on 18th August 2007 by the learned Judge of the Family Court that the decree-holder has remedy of an application under Rules 32 and 33 of Order XXI. Therefore, the objection to the maintainability of the present execution application filed in the year 2007 has no basis.

14. By the impugned order, the learned Judge directed the petitioner to comply with the decree within one month i.e. on or before 5 th December 2009. On failure to pay, a direction was issued to pay the amount of Rs.

20,000/- p.m. to the respondent-wife from 3rd October 2002 which is the date of passing the decree. As stated earlier, the first execution application was filed by the respondent on 22th September 2003 when the respondent had not chosen to seek a direction under Sub-rule 1 of Rule 33 of Order XXI of the said Code. The said direction was sought by filing an execution application on 6th October 2007. It must be also noted that on 25th November 2003 the petitioner filed a petition for divorce on the ground that the decree for restitution of conjugal rights remained unexecuted for the statutory period. On 23th August 2006 the Family Court dismissed the said petition and thereafter present execution application has been filed. I am conscious of the fact that an appeal against a decree of dismissal is pending in this Court. Nevertheless, while dismissing the petition, the Family Court has recorded a finding that the petitioner himself has committed default and that on his own he never took any step for complying with the decree for restitution of conjugal rights. In short, the finding is that the petitioner himself is the wrongdoer.

As of today, the said finding stands. Considering these peculiar facts of the case, in the present case, the learned Judge could not have directed payment of monthly amount from 3rd October 2002 as the respondent herself waited for seeking a direction under Sub-rule 1 of Rule 33 of Order XXI till the year 2007. In the present case, the monthly amount ought to have made payable from October 2007 when the execution application was filed by the respondent and to that extent the order will need modification.

15. Now, as far as quantum is concerned, the amount is fixed at Rs.

20,000/- p.m.. Parties have adduced evidence in respect of their respective income. For the year 2007-08 the income of the respondent-

wife was Rs.1,72,388/- and for the year 2008-09 her salary income was Rs.2,02,240/-. As far as income of the petitioner-husband is concerned, for the year 2007-08 the same was Rs.8,08,422/- and for the year 2008-09 it was Rs.6,31,926/-. For the year 2006-07 the income was Rs.

10,06,585/-. Thus, from the year 2006-07 the total income of the husband has reduced. Taking the income of 2008-09, broadly the monthly income of the husband comes to Rs.52,000/- and the monthly income for said year of the respondent-wife is Rs.16,850/-. If the income for this year is considered and a sum of Rs.20,000/- is made payable by the husband, the income of the wife will be Rs.36,850/- and what will be left with the husband will be a sum of Rs.32,000/-.

16. As stated earlier, if the decree for restitution of conjugal rights would have been implemented, the respondent-wife could have enjoyed the status of her husband in relation to his income. The wife is entitled to say that she must have the same life style as that of her husband. But while fixing the amount under Sub-rule 2 of Rule 33 of Order XXI of the said Code, it cannot be that the wife gets more amount than what the husband will retain after payment of monthly amount to the wife.

Considering the manner in which the income of the husband has fluctuated, and considering the income of the wife, this is a case where the amount ought to have been reasonably fixed at Rs.12,000/- per month instead of Rs.20,000/- per month. To that extent the impugned order will have to be modified.

17. On 4th February 2010 this Court has passed an ad-interim order pursuant to which certain deposit has been made. The said deposit will have to be naturally considered. Before parting with this judgment, it must be also noted that Sub-Rule 3 of Rule 33 of Order XXI of the said Code gives power to the Court from time to time to vary or modify the order made of periodical payments of money. Obviously, said power can be exercised by the Court on the application made by either party. In the event of change of circumstances, both the petitioner and the respondent can always take recourse to Sub-Rule 3 of rule 33 of Order XXI of the said Code. The said remedy always remains open to both the parties.

18. Hence, the petition is disposed of by passing following order :-

A) Clauses (1) and (3) of the operative part of the impugned order are maintained.

B) Clause (2) of the operative part of the impugned order is modified and it is directed that the petitioner shall pay an amount of Rs.12,000/-

(Rs.Twelve thousand only) per month to the respondent-wife from 6th October 2007 till the date of compliance with the decree of restitution of conjugal rights;

C) Time of three months is granted to the petitioner to pay or deposit the arrears. However, the petitioner shall continue to pay a sum of Rs. 12,000/- per month from May 2010 onwards on or before 10th day of every calender month;

D) The impugned judgment and order is modified in above terms with no order as to costs;.

E) It is obvious that the petitioner will be entitled to adjustment of the amounts paid under the impugned order or under the ad-interim order passed by this Court.

(A.S.OKA, J.)