

(1976) 04 BOM CK 0021

In the Bombay High Court

Case No : Letters Patent Appeal No. 23 of 1976

A

APPELLANT

Vs

B

RESPONDENT

Date of Decision : 12-04-1976

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 18, 3
Hindu Marriage Act, 1955 — Section 10, 25, 27

Citation : (1978) 80 BOMLR 384

Hon'ble Judges : Vaidya, J;Mridul, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Vaidya, J.—The above Letters Patent Appeal is filed by the wife, against the judgment, dated September 24, 1975, in F.A. No. 92 of 1975, conforming the judgment and decree dated February 6, 1975, passed by a Judge of the Bombay City Civil Court, in her petition, u/s 10 of the Hindu Marriage Act, 1955, for a decree for judicial separation. In the petition, she had also prayed for an injunction restraining the husband and his servants and agents from entering flat No. 4, situate in Ganga Bhavan, 24th Road, Bandra, which is the matrimonial home of the couple, and for costs of the petition.

2. The petitioner was married to the respondent on March 10, 1954, according to the Hindu Vedic Rites. It was a love marriage. She is enrolled as an advocate of this Court; and she has been practising in the Courts in Bombay. The allegations which she made in the petition against the husband may be briefly summarised as under:

3. There is no issue of the marriage. The marriage with the respondent appeared to have gone on smoothly for sometime. They lived and cohabited at the petitioner's parents' place at Bhatia Bhavan, Parel, for six months. She managed to find a place; and they shifted to Santa Cruz to a single room tenement at a rent of Rs. 50 per month. As the respondent who was a trader of

some sort, was not at all doing well in his business and could give only Rs. 100 per month to the petitioner for household expenses, she had to live in miserable circumstances.

4. The wife was determined to improve the economic status by taking education. She joined Sophia College, Bombay, and continued her studies. She worked hard at her studies as well as household duties. She had also to cope up with what she has chosen to describe as her husband's "sexual vagaries." In 1955, the petitioner became pregnant. The husband did not show any concern or care and refused to help her in any way to lighten her burden.

5. This pained the wife. She began to pass through mental agony due to physical strain and mental torture in April 1956. The petitioner had a miscarriage. The husband did not care to nurse her back to normality or to give any medical treatment, as he stated that he could not afford it. She had to go to the doctor to get the medicines etc. The attitude of the husband upset her and disturbed her.

6. In October, 1956, again the petitioner conceived. As she was anxious to have a child, she requested her husband to be considerate towards her. The husband did not bother and started quarrelling with her and harassing her in various ways. She was shocked. Her health began to fail. She began to faint away very often on road and finally with the help of her sister, she went to the late Dr. Shirodkar for treatment.

7. On February 7, 1957, she complained of a severe pain" in the abdomen to the respondent; but he just ignored it and went to work. Later, on February 8, 1957, the petitioner had rushed with the help of the neighbours to the hospital in serious condition. At the hospital it was discovered that it was tuber-pregnancy. She was operated. After the operation she stayed with her parents for a month. Her parents looked after her until she gained back her normal health.

8. After a year, she consulted Dr. Shirodkar, who advised her to get operated once again in order to have a child. She told this to the respondent and his mother. They said that they did not need any more children in the family; as there were too many already. Years passed by, but the marriage continued to be childless. The desire of the wife to have a child was completely frustrated. She began to devote herself to studies with hardly any encouragement from her husband.

9. On the contrary, the husband and the members of his family began to harass her; and her life was becoming more and more impossible with the husband. In 1961, the husband asked the wife to go to Poona to look after his brothers and sister as his parents were going on a holiday. The wife went, she was treated very badly by Sharda, the younger sister of her husband. She left Poona at midnight and came early in the morning to Bombay. When she reached Bombay, she went straight to her house; but her husband instead of sympathising with her, asked her to go back to Poona and to apologise to his sister.

10. The petitioner refused to do that. The husband asked her to get out of the house. The wife did not know what to do, as she was fed up with this matrimonial misery. She left the house in December, 1961, took up a flat, 4-Ganga Bhavan, 24th Road, Bandra, in her name, and started living there all by herself.

11. After two months of her stay by herself, on or about February 1962, the husband came to the house of the petitioner and asked her to forgive him and requested her to allow him to stay with her. The wife did not refuse his request hoping that the love which was lost in their wedded life, would come back. Soon after he came and began to live with her, however, she discovered that the husband reverted to his old ways. He began to go on long business trips lasting from one to two months, and never sent any monies to her during these periods of absence.

12. This led the wife to think of finding her own independent source of income, and she joined the Law College in 1964. The husband did not want her to become independent and started harassing her in many ways. He started suspecting the petitioner on one pretext or another and called her a prostitute and threatened to stop her from going to college.

13. She was, however, determined to be economically independent. From October 1964 to 1968, she did complete her studies, while tolerating all that her husband was doing, inspite of the fact, that he was not paying her anything during this period for expenses unless demanded. The respondent did not like her to become independent and began to taunt her that the only way of earning independently was to become a prostitute. At last she obtained her Sanad in 1968. She started her practice as an advocate of this Court. She built up a fair practice on the criminal side.

14. In the year 1971, the husband and his brother, partners in the business were faced with the situation wherein their creditors filed innumerable suits against them. The petitioner appeared for them in these matters and saved their expenses by conducting their cases. The respondent's business reached the lowest ebb during this period; and the wife had to run the household with whatever little she earned as an advocate.

15. In 1972, this state of affairs continued till instalment decrees were passed against the husband. Even during this period, the husband wanted the wife to give up her practice as an advocate. But the wife was determined to be independent and was earning her income as an advocate. This led to quarrels. In the course of the quarrels, the husband accused the petitioner of having affairs with colleagues in the legal profession and made other such irresponsible allegations. He began to abuse her in flagrant language after getting drunk. When the wife returned home after a day's work in the Court, she was subjected to all kinds of indignities. This led to great mental harassment to her, with the result, that life became tragic and tense in the house.

16. This was the background of the unhappy wedded life, led by the couple, in which the four incidents relied upon in her petition by the petitioner-wife for the relief of judicial separation, are alleged by her.

17. The first was an incident of August 7, 1973. Once again, the husband told the wife that he had finally decided that the wife should give up her legal profession and stay at home. The wife refused. The husband went into a fit of rage. He gave threats of dire consequences. The wife went to sleep. While she was asleep at midnight, she felt a choking sensation.

18. She woke up in panic. She found the husband trying to strangle her. She shrieked and called for help. The husband had bolted the bedroom from within; hence she could not go out of the room to get the maid servant to come to her rescue. Besides the husband started beating her all over; and she screamed. She unbolted the door suddenly and went to the kitchen to save herself. She bolted the door of the kitchen and spent the night there.

19. In the morning, the husband left the house early and warned her that if she went to the Court again, it would be the end of her. She realised that her life was really in danger if she lived with her husband any longer. She, therefore, picked up a few of her belongings and left the house. She reported the matter to the police station concerned. She met the Deputy Commissioner in charge to seek protection; but in the meanwhile, the husband's brother and his wife persuaded her to go back to the matrimonial home giving an undertaking that, her husband would treat her well in future; and her life would be safe.

20. The second incident occurred on October 7, 1973, which was a Dassera day. The husband and wife were at home. The husband started the evening with alcoholic drinks. At about 10.00 p.m., he picked up a quarrel with the wife and started beating her. Unable to protect herself inside the house, she ran out of the house, and went to the husband's brother who had by chance come for a visit in the locality. She stayed with him till 12 O'clock at night and returned after the husband went to sleep.

21. The third incident is of February 3, 1974. The husband came home at 8 p.m.. At about 9.30 p.m., he went out and brought a bottle of whisky. He started drinking, and talking about his family affairs. At about 10.30 p.m. he started abusing the wife alleging that she was having affairs with different people. The wife denied. He started abusing the wife more and called her a prostitute, a bitch, and created a big scene. The wife went out of the house, took a taxi, went to Parel and brought her brother and his wife to the house. The husband insulted them and asked them to get out from his house and went to hit her brother. The wife intervened between the brother and her husband. The husband started beating her.

22. The wife went and lodged a complaint at the police station at 1.15 a.m.. The wife came back after lodging the complaint. She stayed there along with her brother and sister-in-law. Next morning on February 4, the respondent's brother

also came to the house, and in front of these people including the neighbour Mr. Thadani, the husband undertook to leave the house within forty-eight hours; and gave in writing that the wife could obtain judicial separation. The note is on the record at exh. A. Inspite of the note, however, he did not leave the premises, and told the wife that he was making arrangements to leave the house within a day or two.

23. The fourth incident is alleged to have taken place on February 10, 1974, when the husband came home drunk and told the wife that he would only leave, if she paid him Rs. 15,000. When she said that she had no money, he flew into a rage. He started beating her. Her brother saved her from this.

24. Contending that all these incidents and the background of unhappy matrimonial life had made her suffer extreme mental and physical cruelties at the hands of the respondent-husband, the wife submitted, in para. 22 of the petition, "that her life with the respondent is no more safe and it is harmful and injurious for her to live with the respondent, and therefore, she has become entitled to a decree of judicial separation from the respondent."

25. The husband resisted the petition by filing a written-statement denying all the four incidents of cruelty. In the course of his written-statement, the husband claimed to have come from a very rich and affluent family. He claimed to have financed the studies of the wife who was studying at the time of the marriage in Sophia College. He also alleged that the wife came from "a very low family". The husband's parents were not prepared to accept her as their daughter-in-law, even though they were generous enough to give him ample financial aid to help him set up his own business. The respondent set up his business, the particulars of which need not be stated as they are not relevant in any way in this Letters Patent Appeal.

26. Notwithstanding the admission made by the husband that he had alleged against her that she was having sexual relations with her professional colleagues, it was contended by him that there was no such cruelty as falling within the meaning of Section 10 of the Hindu Marriage Act. It is here necessary to note that in para. 48 of the lengthy written-statement, the husband had reiterated : "As a matter of fact the more the petitioner went into an independent life, she developed greater and greater aversion for the respondent and the household work; she developed extra-marital relationships with others and for which the respondent will make his grievance in a separate petition for divorce, which he intends filing against her."

27. Notwithstanding all these allegations and counter-allegations, however, what must be noted is that at present husband wants divorce; the wife wants judicial separation; the marriage is irretrievably broken down; and the bone of contention between the strained spouses is only the accommodation which is with the wife, namely the flat No. 4, in Ganga Bhavan, 24th Road, Bandra, Bombay 50, which is standing in the name of the wife as rented premises.

28. The learned trial Judge framed issues and recorded the evidence led by the parties. On behalf of the wife, herself, a constable by name Pawar and one Bhagwandas Tekchand Thadani, a neighbour residing in Ganga Bhavan were examined. On behalf of the husband only the husband himself was examined.

29. Curiously, the learned trial Judge dismissed the petition disbelieving the wife notwithstanding that her allegation that her husband falsely charged her with having developed extra-marital relationships with her professional colleagues and others and called her a prostitute, was admitted both in the husband's written-statement and in his evidence.

30. The dismissal of the petition was confirmed in the First Appeal, as a view appears to have been that it was difficult to believe the wife's story of the incidents involving acts of physical cruelty on August 7, 1973, on October 7, 1973, and on February 3, 1974, or even on February 10, 1974. The learned single Judge observed:

The result of the foregoing discussion is that the learned trial Judge's view that it would be unsafe to give a finding in favour of the petitioner on the basis of these alleged assaults which are claimed to have been perpetrated by the respondent on her on 7th/8th August, 1973, 7th/8th October, 1973, 3rd/4th February, 1974 and on 10th February, 1974, has to be upheld. It is not necessary for me to express agreement or disagreement with every aspect of the matter on which comment has been made by the trial Court. I have considered the incident of 7th/8th August, 1973 in detail. Such attention is not necessary to be lavished on the other incidents inasmuch as the nature of the assaults averred is not as serious as the attempted strangulation which was claimed to have been committed on the petitioner by her husband on the night of 7th/8th August, 1973.

31. In other words, the learned trial Judge in the City Civil Court, and the single Judge in this Court, disbelieved the story given by the wife with regard to the strangulation and the hitting, and came to the conclusion that physical cruelty was not proved. We do not think that in this Letters Patent Appeal, it is open for us to interfere with the finding based on appreciation of evidence.

32. However, the learned single Judge, further went on to consider the concept of mental and/or legal cruelty under the matrimonial law in the light of the decided cases, namely, *Russell v. Russell* [1897] A.C. 395 , and in *Dr. N.G. Dastane Vs. Mrs. S. Dastane*, and observed as follows in the course of the judgment:

As has been held above, a finding of cruelty cannot be given on isolated incidents of marital life and such a finding has to be given from a total picture emerging from the evidence before the Court. There is evidence in this case of certain looseness of tongue on the part of the husband. But unfortunately it has not been clearly established that the allegations were thoroughly reckless and irresponsible or that they were considered as seriously made or that they had any effect whatsoever on the petitioner. It may be like the Earl of Russell that the

petitioner was of such strong constitution that she was able to swallow the insulting language or to ignore it without the same having any effect whatsoever on her. In the absence of any evidence on the record as to the effect of the language used by the husband in the quarrels between them, this must be presumed and once this conclusion is reached, the petitioner must share the same fate as had befallen the Earl of Russell in the leading case of *Russell v. Russell* decided by the House of Lords in 1897.

33. After 1897, the map of the British Empire and the nature and contents of British matrimonial laws were completely changed. Today, we have to judge Indian women by referring to the Indian conditions and standards and not to standards of male British aristocracy of the 19th Century. All that Section 10(1)(b) required the wife to prove against her husband, is that he treated her with "such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.

34. In the present case, we find that the wife, who is an advocate, had specifically averred in the plaint "that her life with the respondent is no more safe and it is harmful and injurious for her to live with the respondent" because of the particular allegation made by the respondent that she had developed extra-marital relationships with her professional colleagues and others. The allegation of extra-marital relations was, as already stated above, admitted in the written-statement as well as in the evidence given by the respondent.

35. It is very difficult to expect a young Indian lady advocate to have in her Indian bosom the stout heart of an Earl Russell of 19th Century England. We cannot believe that the 20th Century Indian woman will become indifferent to such allegations. Apart from this the mere fact that there are such allegations admittedly made by the husband must be held to be cruelty by itself inflicted by the husband on the petitioner. These allegations have to be considered in the light of the requirements of Section 10(1)(b). We have to see whether the apprehensions of the wife are reasonable having regard to the atmosphere in which she lives, the profession which she carries on and the conditions in which she is placed.

36. It is difficult for us to understand what other and better evidence than the admissions of the husband, would be necessary for the proof of the allegations and to establish cruelty within the meaning of that section. Cruelty within the meaning of Section 10(1)(b) of the Hindu Marriage Act, 1955, is established when there is a reasonable apprehension in the mind of the wife, after the alleged incident of August 7, 1973, that it would be harmful and injurious if she lived with the husband any longer. Therefore, the allegations must be considered to find out whether she began to have such a reasonable apprehension. The matter should be approached essentially as a question of fact in the light of the evidence before the Court and not Russell's stout heart or constitution from the point of view of common experience and common sense and not on the basis of standards applicable to the British aristocracy of 19th Century. The Court cannot

transplant Earl Russell's heart and head into the petitioner's body.

37. We have no doubt that any Hindu woman and particularly, a Hindu woman who wants to be economically independent and, therefore, wants to carry on a profession like the legal profession would be deeply hurt and can be reasonably expected to have an apprehension that it would be dangerous to live with a husband who was taunting her for being independent and was telling her every now and then that she was having extra-marital relations with her professional colleagues and others. There cannot be a worse insult and cruelty to an educated Indian wife.

38. The admission made by the husband in this case necessarily led to that inference. No other evidence was called for. We find it, therefore, impossible to agree with the learned single Judge in holding that merely because she has not led further sophisticated evidence such as perhaps psychologists' expert opinion or some such evidence to show how deep were the mental injuries on account of the ill treatment of the husband, she was not entitled to succeed.

39. In the result we set aside the judgment and decree passed by the learned single Judge on October 21, 1975, and the judgment and decree passed by the trial Court on February 6, 1975.

40. The petition filed by the wife is allowed, in terms of petition prayer (a) and (c); and accordingly a decree for judicial separation is passed against the husband and in favour of the wife.

41. It is urged by Mr. Gill that an injunction as prayed for in Clause (c) of the petition cannot be granted by this Court as such an injunction cannot be ordered in matrimonial proceedings.

42. u/s 25(1) of the Hindu Marriage Act, 1955.

Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose of either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support...

43. u/s 27 of that Act-

In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

44. The word "maintenance" is not defined in the Hindu Marriage Act. It is, however, defined in the Hindu Adoptions and Maintenance Act. u/s 3(b) "maintenance" includes in all cases, provision for food, clothing, residence, education and medical attendance and treatment.

45. Whether the tenancy premises which are, as stated above, the only surviving bone of contention between husband and the wife is exclusively of the husband as claimed by the husband or of the wife in whose name it stands or joint, while passing a decree for a judicial separation, therefore, the Court has power to grant an injunction restraining the husband from entering the matrimonial home as such a matrimonial home is "maintenance" as defined in Hindu Adoptions and Maintenance Act even if not joint property within the meaning of Section 27 of the Hindu Marriage Act.

46. In any event, when we grant a decree of judicial separation to the petitioner whose husband drinks and abuses his wife who is an advocate and who finds that when she returns home, the husband abuses her of having extra-marital relationships with her professional colleagues and others, we have power to grant the injunction under Sections 18(1) and (2) and (2)(b) of the Hindu Adoptions and Maintenance Act.

47. In the result, a decree in terms of the Clause (c) of the prayer in the petition, restraining the respondent and his servants or agents by a permanent injunction from entering flat No. 4 situate at Ganga Bhavan, 24th Road, Bandra, Bombay 400050 is also granted.

48. The Letters Patent Appeal is allowed. The judgments and decrees passed by the learned single Judge and the trial Judge are set aside and the decree is passed as directed above in terms of prayers (a) and (c) in the petition. We are told that the husband has been adjudged as an insolvent. Hence, we pass no order as to costs of this appeal.