

(1992) 01 BOM CK 0024
In the Bombay High Court
Case No : First Appeal No. 561 of 1990

A.	Vs	APPELLANT
H.		RESPONDENT

Date of Decision : 31-01-1992

Acts Referred:

Hindu Marriage Act, 1955 — Section 13(1), 20

Citation : AIR 1993 Bom 70 : (1992) 94 BOMLR 154

Hon'ble Judges : S.W. Puranik, J;N.D. Vyas, J

Bench : Division Bench

Advocate : Mrs. Teja Katdare, for the Appellant; N.S. Joshi, for the Respondent

Judgement

N. D. Vyas, J.—This is an appeal preferred by the appellant wife from the judgment and order of the Family Court, Pune, granting divorce to the respondent husband. This appeal raises an important question, viz., whether a petitioner in support of his case can rely on allegations made by a respondent in her written statement, for the first time the same being made after the filing of a petition.

2. The trial Court has granted the respondent husband's petition for divorce on the ground that the appellant had treated respondent with cruelty. Further, the trial court has held that there was no ground for refusing the decree in view of the fact that the marriage was completely broken down. Mrs. Katdare, learned counsel for the appellant, has assailed the impugned decision on the ground that respondent had failed to prove his case and, therefore, the judgment of the trial Court should be set aside. Mr. Joshi, learned counsel for the respondent, has supported the impugned judgment. Before considering the submissions of the counsel, it would be useful to refer to a few relevant facts.

3. The appellant is a Professor in a college and the respondent is a writer. The parties, both Hindus, were married on 18th May, 1966, at Malvan, Pune, according to Hindu vedic rites and thereafter made their matrimonial home at

Pune. They have two daughters; one is married and the other is unmarried. On 7th Sept. 1987, both the parties went to an advocate, Mrs. Supriya Servate, and signed some documents for obtaining divorce by mutual consent. During the night thereafter, the appellant attempted to commit suicide and was hospitalized up to 15th Sept. 1987 when she was discharged from the hospital. On 11th Sept. 1987, a complaint was filed by the appellant's brother, one Vasant Gadgil, u/s 498A of the Code of Criminal Procedure. On 17th Sept. 1987, a joint letter was addressed by the appellant and the respondent to their said advocate conveying their decision not to obtain divorce by mutual consent. On 21st January, 1988, the criminal complaint filed as above was dropped. The present petition was filed by the respondent husband in February, 1989 in the Family Court, Pune.

4. In the petition the respondent has alleged that the relations between the parties were good for the first about ten years after the marriage but the difference of opinion between the respondent and the appellant began to increase gradually from the year 1975, that in the year 1985 the total outcome of the difference of opinion began to turn into quarrels on a large scale, that the appellant began to behave in such a way that severe mental torture would be caused to the respondent, that on two occasions the appellant was intending to go out of the house getting up suddenly at night threatening to cause harm to her own life, that the respondent prevented the appellant from doing so, that one day the appellant said to the respondent that now the time had come "to hit a blow and make two pieces" and that thereafter in Sept. 1986 the respondent got a service in Bombay and the respondent shifted to Bombay. In paragraph 2 of the said petition, with reference to the period after Sept. 1986, the respondent states that whenever the respondent used to come to Pune the appellant and the respondent used to disagree; that the conduct of the appellant remained the same causing mental stress to the respondent and hence the respondent suggested to the appellant to have a divorce and the parties decided to get divorce by mutual consent. The respondent further avers that accordingly the appellant and the respondent approached a lawyer at Pune and prepared a petition for divorce and decided to file the said petition. Thereafter, according to the respondent, when he went to his house the appellant told him that the respondent had no business to stay in the house and asked him to get out; that, however, the respondent was permitted to sleep in the other room at the instance of the daughters, that thereafter the appellant consumed some poison and tried to commit suicide which resulted in the respondent suffering severe mental stress, that the appellant was removed to the hospital and after great effort her life could be saved; that Vasant, the brother of the appellant, registered a false complaint with the police against the respondent and because of that the respondent suffered additional mental torture. It is further averred that in view of the said police complaint news regarding this incident appeared in many newspapers and the respondent was made to suffer extreme humiliation; that the respondent had to obtain anticipatory bail; that the respondent lost a highly prestigious service and suffered extreme mental torture due to police

investigation. It is the respondent's case in the petition that as the respondent is leading a public life as a writer and editor for last several years, number of people began to avoid the contact with the respondent.

Lastly the respondent has averred that in view of the attempt of the appellant to commit suicide, the respondent suffered extreme mental torture and only with an intention to harass the respondent that the appellant maintained her conduct and that after recovering from the attempted suicide the appellant came back home and continue to harass the respondent and, therefore, the respondent was constrained to file the petition for divorce.

5. From the above averments, it is clear that the respondent has made general and vague allegations only against the appellant in respect of period prior to the appellant attempting to commit suicide, namely, Sept. 1987, and the emphasis is only placed by the respondent on the incident relating to the appellant attempting to take her life and what followed thereafter. It may be noted here that no averments of any kind are made in the petition by the respondent to the effect that the appellant was making allegations and nagging the respondent regarding respondent's chastity and was, thus, making the respondent's life unbearable on that count.

6. As far as the written statement is concerned, the appellant has, after denying the allegations made against her which were general in nature, specifically averred that although she was against taking divorce from the respondent mainly in the interest of their two daughters and also to maintain the marriage, the appellant was compelled to agree to a divorce by consent and had in fact accompanied the respondent to their common advocate on the day when later on she attempted to commit suicide. However, the appellant goes further and alleges cruel treatment meted out to her by the respondent by alleging that the respondent had overfriendly relations with several females whose names she has given in her written statement. In respect of one of them the appellant has gone to the extent of saying that a young girl, namely, Lalita, had herself admitted having illicit relations with the respondent.

7. On the basis of the above pleadings, the trial court framed the following issues:

1. Is it proved that respondent treated the petitioner with mental cruelty since 1985?
2. Is it proved that respondent attempted to commit suicide in order to cause mental cruelty to petitioner?
3. Does respondent prove that the petitioner is guilty of cruelty towards her, by his conduct of having relations with other women?
4. Is there any bar to grant decree of divorce?
5. What order and relief?
8. The parties went to trial and the respondent examined himself and two other

witnesses. In his evidence the respondent has again not chosen to make any allegations against the appellant about her doubting his character but all that he says in his examination-in-chief is that his novels and stories had become a matter of controversy and his writings were not approved by the appellant. In his examination-in-chief, he further states that in 1984 the appellant actually spoke to the respondent explicitly suspecting that he was having some illicit connections with other women. Except this bare statement in his examination-in-chief, and that too regarding something said by appellant in 1984, he has neither deposed to any suspicion being expressed against his character nor any allegations made by the appellant against him as to his having any relations outside the marriage nor that these allegations caused mental torture. In his evidence he further says that on 7th Sept. 1987 the parties had agreed to apply for divorce by mutual consent and the draft was also prepared to be filed in Court and then he refers to the appellant attempting to take her life and the subsequent criminal complaint having been filed against him. Nowhere in his evidence the respondent has said a word about his life being made miserable on account of allegations made against his character by the appellant. In his cross-examination, however, he has admitted having known all the ladies whose names were mentioned to him in his cross-examination. However, he has denied having any relations with anyone of them but in respect of Lalita he has himself in his cross-examination admitted that one Madhav Gadkari, editor of Loksatta, had reported to him that copies of letters addressed to him by Lalita were distributed in office. Again he goes further and has admitted that he has seen a xerox copy of one letter sent by Lalita. Lastly he admits that first time in 1974 he started thinking of seeking divorce from the appellant. The two other witnesses whom he has examined in support of his petition do not throw any light on the subject. The appellant herself gave evidence and in her evidence she repeated that she suspected her husband having relations with several ladies whose names she had given in the written statement and again repeated in her evidence. She again said that in Sept. 1987 on the day she attempted to take her life she had, at the instance of respondent, accompanied him to their advocate for taking divorce by mutual consent although she was not willing to do so and after returning she attempted to take her own life. After she returned from hospital a phone call was received from Lalita by her daughter Pallavi and in response to the telephone call the appellant and Pallavi went to meet Lalita at Sarasbaug, Pune, at which meeting Lalita told the appellant and Pallavi that her relations with respondent had developed to such an extent that both of them had promised each other marriage. Again she has deposed that in July or August, 1988 Lalita had met her in her college and had showed her a letter which appeared to be in the handwriting of the respondent. She further deposed that an article from journal "Gaganbhedi" was pointed out to the appellant somewhere before May 1987 which article referred to the respondent and his having ruined lives of three women. She further says that although in Sept. 1987 she had signed the petition for divorce by consent, the same was not filed in court as the appellant was never ready to obtain divorce. In the cross-examination of the appellant no

questions are put to her suggesting that the names deposed to by her were imaginary. The incident about Lalita showing a letter written by the respondent to her and the talk which Lalita had with the appellant and her daughter Pallavi are not even disputed. In fact there is no cross-examination on this point. The appellant also examined her daughter Pallavi who in her evidence corroborated the meeting with Lalita as deposed to by the appellant herself and she has not been also cross-examined on this point. In fact she went to the extent of saying that Lalita told the appellant and her that her relations with the respondent had developed in a different context and whatever was published in "Gaganbhedi" was true. Significantly in her cross-examination she has deposed that Lalita was her childhood friend; that since a year or two prior to Sept. 1987 she had suspected that relations between respondent and Lalita were not of healthy nature and that during that period her friendship with Lalita had thinned. Appellant further examined one Dilip Kulkarni as her witness and he deposed that he knew the parties for about ten years, that since 1985 he had seen Lalita visiting respondent, that Lalita used to meet respondent at Kirloskar Press, that when he asked respondent as to why Lalita was visiting him so often respondent did not react at all, and lastly, to Court, that respondent's character was of doubtful nature. The brother of the respondent was also examined by the appellant as her witness and he corroborated the visit to the respondent's place along with appellant. The appellant also examined Lalita as her witness and when she denied having telephoned Pallavi and meeting with appellant in 1988, permission was sought from the trial Court to declare her as hostile so that Lalita could be cross-examined. Curiously this permission was not granted. From the several letters and documents placed on record reference is necessary to be made to only few of them. One is an article in "Gaganbhedi" scandalizing the respondent, another is an undated letter written by respondent's brother to respondent (with a copy to appellant) in which letter respondent's brother Deodas has, inter alia, stated that although the respondent was living with the appellant, for last three years they had no physical contacts whatsoever which he learnt from the appellant and this was not the first case of the respondent and before this there were one or two cases which had taken place which means that this was his hobby. Further, in the said letter Deodas says that respondent is "following the American culture and is a promoter of free atmosphere". The last letter which requires same reference is a letter dated 21st January, 1987 written by the respondent to the appellant in which, much prior to the attempted suicide incident, several alternatives were suggested by the respondent to the appellant with an ultimate idea of obtaining divorce.

9. On the basis of the above evidence the trial Court came to the conclusion that the appellant had treated the respondent with cruelty and was entitled to a decree of divorce. The conclusion of the trial court is mainly based on the allegations made by the appellant in her written statement and at the time of the trial in respect of the character of the respondent which the trial Court found to be baseless and false and according to the trial Court these allegations

themselves were acts of cruelty against the respondent. The trial Court further held that the marriage had irretrievably broken down and there was no ground for refusing the decree.

10. We fail to understand firstly as to why Issue No. 3 was ever framed. This is neither a husband's petition for divorce on the ground of desertion where wife pleads constructive desertion nor a husband's petition for restitution of conjugal rights where wife pleads justification for withdrawing from husband's society nor this is a wife's petition for divorce on the ground of cruelty, and secondly we cannot understand the reasoning of the trial court as far as the finding in respect of the issues are concerned. The respondent in his petition has made vague and general allegations in respect of period prior to his shifting to Bombay in Sept. 1986. The emphasis in the petition and in respondent's deposition is only on the incident of attempted suicide by the appellant and what followed thereafter. Unfortunately the trial Court has not appreciated the fact that what prompted the appellant to attempt to take her life was the obtaining of her signature by the respondent on the divorce petition which was to be filed for obtaining divorce by mutual consent. That very day the appellant tried to take her life. The appellant had no hand in the filing of the criminal complaint against the respondent inasmuch as she was lying critically ill in the hospital as a result of her having consumed poison. The respondent has not adduced any evidence to show under what circumstances he lost his job. The respondent has also not adduced any evidence to show how he received humiliation or as to how people stopped keeping contact with him. It appears that it was appellant's written statement and evidence which was scrutinized for coming to the conclusion that appellant was guilty of cruelty.

11. This brings us to an important question as to whether the respondent can be allowed to rely on allegations made by appellant in her written statement, for the first time the same being made after the filing of the petition. The learned trial Judge has referred to several authorities cited before him which go to the extent of showing that allegations made in written statement could be taken as grounds of cruelty. We may point out here one decision of this court which was cited by the learned counsel for the respondent, namely, in the case of Smt. Nirmala Manohar Jagesha Vs. Manohar Shivram Jagesha, , in which a learned single Judge of this court has held that husband was entitled to a decree of divorce on the ground of cruelty as a result of wife's having made wild, reckless and baseless allegations in the written statement without caring to either put her case to the husband or to examine herself on the point. The learned single Judge has taken pains to go through several authorities cited at the bar in order to hold this. One of them is Sumanbai Vs. Anandrao Onkar Panpatil, . Even the facts of the said case clearly show that the court was not dealing with the question of grant of relief on the ground of cruelty to the wife, but was only dealing with the question as to whether it was a reasonable excuse for the wife to withdraw from the society of the husband. However, we do not agree with the view taken by the learned single Judge in Smt. Nirmala Manohar Jagesha Vs. Manohar Shivram

Jagesha, . The requirements of Section 13(1)(ia) are as follows :

"13(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i).....

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty;"

In our opinion, it is clear from the above provisions that the petitioner must have been treated with cruelty prior to the filing of the petition. No subsequent acts either by way of allegations in written statement, responsible or not, baseless or not, can be taken help of in order to come to the conclusion that the respondent in a matrimonial petition has treated the petitioner with cruelty. It is settled law that the right of a party is determined by the facts as they existed on the date the action is instituted. In other words, a petitioner approaching Court with a petition for divorce on the ground of cruelty can succeed only if he proves the act of cruelty on which he has based his petition. Even requirements of Section 20 of the Hindu Marriage Act are mandatory which require every petitioner to state in his petition as distinctly as the nature of the case permits the facts on which the claim is founded. Moreover, the aggrieved spouse must show that he had suffered cruelty as a result of the treatment meted out to him. We are supported in our view by an un-reported judgment of a Division Bench of this Court in Krishnakant Salvi v. Sadhna Salvi, in Letters Patent Appeals Nos. 113 and 114 of 1983, where a similar situation had arisen inasmuch as the husband who had approached the Court was confronted by the wife in her written statement with having illicit relations with another woman. The Division Bench in that case, inter alia, held that the petitioner cannot rely on the allegations made by the respondent in the written statement, the same being made after the filing of the petition. Unfortunately this unreported judgment, it appears to us, was obviously not cited before the learned single Judge in the matter of Nirmala Manohar Jagesha (ibid). Otherwise the learned single Judge would have certainly considered the legal position having given due weightage to the said view of the Division Bench in the said unreported decision. In the case before us the respondent approached the Court with certain set of facts basing his claim for divorce almost entirely on the incident of attempted suicide and what followed thereafter and only in the written statement and at the trial when the wife, namely, the appellant, alleged cruelty against her by the respondent that the trial Court ignored completely the stand taken by the respondent in the petition and in his deposition and required the appellant wife to prove her allegations. The trial Court, moreover, came to erroneous conclusion that the appellant's allegations were baseless. Its findings qua Lalita are without any material. There is no evidence to justify the findings that Lalita had denied that she had any relations of the nature alleged against her with the respondent and that the respondent was only like a father to her. The material produced by the appellant

wife before the trial Court is, in our opinion, otherwise also sufficient to come to the conclusion that her suspicions were not unfounded. This is apart from our coming to the conclusion that allegations made in the written statement can never be the basis of divorce on the ground of cruelty. In these circumstances, we accept the submission of Mrs. Katdare on behalf of the appellant that the respondent husband has failed to make out a case for cruelty.

12. It was submitted by Mr. Joshi, the learned counsel for the respondent husband, that in view of the fact that the marriage has irretrievably broken down divorce should be granted. This submission also cannot be acceded to inasmuch as grounds for divorce laid down in the provisions of the Hindu Marriage Act are the only grounds under which divorce could be granted to parties governed by the same and we are not free to create a new ground for divorce. In a recent judgment delivered by this Bench in *Bhaskar Satchidanand Bakre v. Smt. Alka Bhaskar Bakre*, Letters Patent Appeal No. 11 of 1991 decided on January 16 and 17, 1992, we have in clear terms taken the same view. In the circumstances, we reject the submission of Mr. Joshi.

13. Faced with the difficulty of having failed to satisfy us that the respondent has made out a case for cruelty and also faced with a further difficulty of our not having accepted his submission as to consider the fact of the marriage having irretrievably broken down, a feeble attempt was made by Mr. Joshi to salvage the situation by making an application before us to remand the matter back to the trial Court to enable the respondent to make an application for amendment of the petition. This submission is only stated to be rejected. To remand the matter back would be totally improper on our part as our powers to remand are to be exercised sparingly and in certain circumstances only and the present case does not warrant such exercise of power.

14. In the circumstances, the appeal is allowed. The judgment and order dated 9th April, 1990 of the trial Court is set aside.

There will be no order as to costs.

15. Appeal allowed.