
(2009) 03 BOM CK 0037
In the Bombay High Court
Case No : Criminal Appeal No. 293 of 1995

Abhiman Gaikwad

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Evidence Act, 1872 — Section 113A, 113B
Penal Code, 1860 (IPC) — Section 306, 498A

Citation : (2009) 4 BOMLR 1381 : (2009) 2 DMC 757

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : N.N. Shinde, for the Appellant; V.H. Dighe, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to judgment rendered by Additional Sessions Judge, Ambejogai, in Sessions case No. 44/1991 whereby the appellant has been convicted for offence punishable under Sections 498-A and 306 of the I.P.C. and is sentenced to suffer rigorous imprisonment for three (3) years on each count and to pay fine of Rs. 1,000/- (Rupees one thousand), in default to suffer rigorous imprisonment for two (2) months, on each count.

2. Briefly stated, the prosecution case is that deceased Radhabai was a good looking young woman. Her marriage with the appellant was performed on March 10, 1988. The appellant was employed as a postman. He use to reside at village Yusufwadgaon. After about couple of months of the marriage, he started beating, harassing and ill-treating the wife (Radhabai) in the matrimonial home. He was addicted to vice of liquor drinking. He use to regularly return home in drunken condition and beat her. He use to express suspicion about her character. He had demanded amount of Rs. 1,000/- (Rupees one thousand) from her parents. Her mother took the money and went to house of the appellant. However, his father

refused to accept the money. She purchased one nose-ring (Nathani) for her daughter. In her presence, at the time of Rakhi Pournima festival of 1989 i.e. in the month of August, the appellant had beaten up Radhabai in the matrimonial home. Thereupon his father urged her mother to take away Radhabai to her house. So, mother of Radhabai returned to her house at Ambejogai alongwith Radhabai. She resided with her mother uptill 6.11.1990. Even during that period, the appellant use to visit the house of his inlaws and use to ill-treat deceased Radhabai. He use to ask the in laws to send her with him. In a common meeting of the relatives, her parents ultimately decided to send her with the appellant when he agreed to execute an undertaking in writing to give her proper treatment. He executed a written undertaking on stamp paper and assured that he would not beat her or ill-treat her any more. Thereafter, Radhabai was sent with him on the next day. Within about a fortnight, her parents received information that she was admitted in SRTR Medical College Hospital at Ambejogai due to burn injuries. They visited the Hospital and met her. She narrated to them that the appellant did not allow her to speak out the truth. She narrated to them that it was the appellant who had done all the things and, therefore, she had received the burn injuries. She succumbed to the burn injuries on 30.11.1990. Initially a case of accidental death (A.D. No. 28/90) was registered. The Police investigation, however, indicated material to show that deceased Radhabai was subjected to matrimonial cruelty meted out to her. On basis of the material gathered during the investigation, the appellant was charge-sheeted for offences punishable under Sections 498-A and 306 of the I.P.C.

3. The appellant denied truth into the accusations. He adopted defence of simple denial in the context of allegations of the matrimonial cruelty and suicidal death of deceased Radhabai. He asserted that Radhabai met with an accident due to bursting of stove and hence, had received the burn injuries.

4. At the trial, the prosecution examined in all ten (10) witnesses in support of its case. The appellant examined D.W. Chandrakant in support of his defence. Certain documents were also placed on record. On appreciation of the evidence, the learned Sessions Judge came to the conclusion that the deceased was subjected to matrimonial cruelty at hands of the appellant. The learned Sessions Judge further held that she committed suicide, as a result of unbearable cruelty meted out to her by the appellant. In keeping with such findings, the appellant was convicted and sentenced as described hereinabove.

5. Heard learned Counsel Mr. N.N. Shinde, for the appellant and Mr. V.H. Dighe, learned A.P.P. for the State.

6. At the outset, it may be mentioned that out of the ten (10) witnesses examined by the prosecution, none has highlighted the circumstances in which deceased Radhabai received the burn injuries in the relevant evening. The marriage was performed on 10.3.1988. The incident occurred in the evening of 22.11.1990. At the relevant time, deceased Radhabai was in the matrimonial home at village Yusufwadgaon. The injured Radhabai succumbed to the burn

injuries whilst under medical treatment in SRTR Medical College Hospital, Ambejogai on 30.11.1990. The Police registered a case of accidental death after her death (A.D. No. 28/1990) u/s 174 of the Cr.P.C. It was during course of inquiry of the accidental death that the parents and other relatives of deceased Radhabai suspected foul play.

7. The spot panchanama (Exh.17) was drawn on 1.12.1990. The recitals of the spot panchanama (Exh.17) indicate that Radhabai was involved in accidental burns due to sudden bursting of stove while she was cooking in the matrimonial home. The learned Sessions Judge noticed that some pieces of burnt clothes and chittis etc. were recovered from the house in question, yet, no stove was found. It was for such a reason that inference of suicide was drawn. It is pertinent to note that during his cross-examination the I.O. - P.W.10 - PSI Kautik admits, unequivocally, that dying declaration of Radhabai was recorded by the Executive Magistrate and was also received alongwith inquiry papers in connection with case of accidental death (A.D. No. 28/1990). He admits further that during his inquiry and investigation he could not find out any material to indicate suicidal or homicidal death of Radhabai.

8. In the above background, the version of D.W.1 Chandrakant is significant. At the relevant time, he was attached to Tahsil Office, Ambejogai as Naib Tahsildar. His version purports to show that his services were requisitioned by the Police for recording dying declaration of injured Radhabai. He deposed that on 23.11.1990 he received letter from PSO Ambejogai for recording of the dying declaration and, therefore, he approached the Hospital. He recorded the dying declaration of injured Radhabai vide Exh.45. He admits that she was suffering from pains due to burn injuries. He denied that relatives of the appellant had informed him that she received burn injuries while cooking. The dying declaration was recorded on next day of the incident little after mid-day. It is important to notice that parents and other paternal relatives of deceased Radhabai never expressed any suspicion about involvement of the appellant in her death. They did not report to the Police that the appellant had set her on fire. According to the Police version, Radhabai orally informed her parents, when they interrogated her, that the appellant was responsible for what had happened. She had not narrated to her parents the cause of the burn injuries.

9. The version of P.W.1 Dr. Satyanarayan purorts to show that Radhabai had received 55% burns on the head, neck, face, chest and abdomen as well as back side. He states that there were no burns on the lower extremities and perineum. He gave details of such injuries in column No. 17 of the postmortem notes (Exh.13). His version would show that Radhabai died as a result of septicemic shock caused by the 55% burns. He admits that from the nature of burn injuries it could not be stated whether they were accidental, suicidal or homicidal. He admits further that he did not notice smell of kerosene being emitted from the clothes or person of Radhabai. The prosecution did not lead any evidence to show that hair and clothes of deceased Radhabai smelt of kerosene when she

was admitted in the Hospital nor opinion of the Chemical Analyser is placed on record to show that burnt pieces of clothes found in the house at the time of spot panchanama (Exh.17) bore smell of kerosene. Thus, it is manifest that there is no iota of evidence to infer that Radhabai, in fact, poured kerosene on her person and immolated herself in the matrimonial home in the relevant evening. The prosecution did not prove that she committed suicide due to self-immolation. It cannot be inferred that because she died within a period of 2-1/2 years of the marriage, the death could be only of suicidal nature. The learned Sessions Judge observed:

The three prosecution witnesses, P.W.6 - Dharuba, P.W.7 - Kisanbai and P.W.8 - Jalindar Bade had, however, deposed that when they had met Radhabai in the Hospital and asked her about the incident, she had told them that whatever is done to her, is done by her husband. In other words, it appears that Radhabai wanted to tell that whatever had happened to her, her husband was responsible for it. These three witnesses have also deposed that Radhabai had told them that let her recover first and then she will tell the details of the burn injuries.

Thus, Radhabai had not told these witnesses that her husband had poured kerosene on her person and had set her on fire. On the contrary, she appears to have told them that let her recover first and then she will tell them the real details. This evidence of aforesaid three (3) witnesses is highly insufficient to infer that the accused had caused death of Radhabai by setting her on fire. The death of Radhabai does not appear to be homicidal one.

10. The learned Sessions Judge, however, discarded the dying declaration (Exh.45) because D.W. Chandrakant did not consult the Medical Officer before recording of the dying declaration. The learned Sessions Judge appears to have reached the conclusion that Radhabai committed the suicide because if there was accidental fire due to bursting of stove then most of the burns would occur on near the abdomen and not on the head or neck. In the absence of any tangible evidence to support such inference, it will have to be said that the learned Sessions Judge gave such a finding merely on surmises and conjectures. As stated earlier, there is no evidence on record to show that clothes or person of Radhabai gave smell of kerosene nor she narrated to her parents that she had poured kerosene on her person and set herself on fire. What she narrated to them was that the appellant was responsible for what had happened and she may give details thereof if she would live. If this really was her version then, in the ordinary course of human nature, her parents would have lodged a report with the Police. An attempt would have been made to record her further dying declaration. The record shows that the Police Officer also had recorded the statement of injured Radhabai in the Hospital. It was on the basis of her such statement that a case of accidental death was registered. Needless to say, in her second dying declaration to the Police too, Radhabai did not speak of the attempted suicide nor attributed authorship of the burns to the appellant. Under these circumstances, I have no hesitation in holding that prosecution utterly

failed to prove that the death of Radhabai was of suicidal nature.

11. So far as the charge of matrimonial cruelty is concerned, the prosecution relied upon versions of P.W.6 Dharuba, P.W. 7 - Kisanbai and P.W.8 - Jalindar. They are the parents and brother-in-law of the deceased Radhabai. The version of P.W. Dharuba purports to show that Radhabai was a good looking young girl. He states that the appellant had demanded amount of Rs. 1,000/- (Rupees one thousand). He gave such amount to P.W. Kisanbai and the latter had gone to village Bansarola, i.e. native place of the appellant, so as to give it to him. It is worthwhile to note that P.W. Dharuba vaguely states that Radhabai was ill-treated by the appellant on account of the demand for Rs. 1,000/- (Rupees one thousand). He did not give any other reason for the so-called ill-treatment nor he spelt out the manner in which she was ill-treated by the appellant. His version purports to show that after festival of Dipawali, Radhabai had been to his house and told him that she will not go to reside with the appellant. His version further purports to show that the appellant and Baburao (father of the appellant) had visited his house with intent to fetch Radhabai. She was sent with them after obtaining an undertaking on stamp paper (Exh.22). It is pertinent to note that P.W. Dharuba does not say that the appellant was addicted to liquor drinking nor there is any whisper in his evidence that the appellant used to suspect character of Radhabai. He deposed that Radhabai used to ask him money as and when she used to visit his house because the appellant had lost his job. He admits that the appellant did not demand Rs. 1,000/- (Rupees one thousand) from him. His version purports to show that such demand was made after Dipawali festival.

12. As regards demand of Rs. 1,000/- (Rupees one thousand) by the appellant, P.W. Kisanbai gave different version. She states that the appellant used to send Radhabai to her house in order to fetch money. She deposed that at the time of festival of Rakhi Pournima (somewhere in August) the appellant and Radhabai both had visited her house. He had joined the demand for Rs. 1,000/- (Rupees one thousand) made by Radhabai. This part of her version is contradictory to the version of P.W. Dharuba. She deposed that after a couple of months of the marriage, the appellant started beating Radhabai on account of suspicion about her character. As pointed out earlier, P.W. Dharuba does not say anything about conduct of the appellant regarding suspicion about her character. The version of P.W. Kisanbai reveals that after a couple of days, subsequent to Rakhi Pournima festival, she and Radhabai had gone to house of the appellant at village Bansarola with the amount of Rs. 1,000/- (Rupees one thousand). She tendered the amount to father of the appellant but the latter did not accept it. The appellant then told her to purchase a nose ring for Radhabai. She purchased a nose ring from the local market. She deposed that in the said night, the appellant had beaten Radhabai by means of fist blows and kicks. She further narrated that even at her own house, the appellant used to beat Radhabai when nobody used to be there. How come that she gathered such information is rendered in obscurity. Her version reveals that Radhabai was brought to her house due to ill-treatment meted out to her. She narrated that the appellant daily

visited her house and use to demand to send Radhabai with him. According to her, Radhabai was sent with the appellant when he gave undertaking (Exh.25) to behave properly with her. She narrated further that when she met Radhabai in the Hospital then the appellant was present there. He had not allowed her to tell the true facts. She deposed that Radhabai told her that the appellant had burnt her. Had this been a fact then there was no reason for her to suppress it. It need not be reiterated that Radhabai was alive upto 30.11.1990 and during the period of one week, FIR could be lodged by her parents about the ill-treatment caused by the appellant as well as his attempt to cause her death by setting her ablaze. The belated police statements of P.W. Dharuba and P.W.Kisanbai suffer from embellishment. It is probable that due to anguish caused due to death of their daughter, they attempted to search for the reason and gave statements according to their surmises.

13. Similarly, P.W. Jalindar narrated that the appellant use to beat and ill-treat Radhabai. He narrated that on one occasion he had visited house of the appellant because he had received information that the appellant use to beat and ill-treat Radhabai. He had no personal experience about such ill-treatment meted out to Radhabai by the appellant. However, according to him, on next day when he urged the appellant to send Radhabai with him then the latter refused to do so. The appellant then told Radhabai to go after keeping the clothes provided by him at his house. The version of P.W. - Jalindar reveals that he and three more persons thereafter took Radhabai to house of her parents at Ambejogai. He did not give details of the period when such incident had occurred. His version is quite vague in the context of such an incident. According to P.W. Jalindar, the appellant use to demand money from P.W. Kisanbai for the purpose of making his job permanent. This is not the case put forth by the prosecution nor P.W. Kisanbai says that demand for money was on account of need to make the appellant's job permanent.

14. The above three witnesses are closely related to deceased Radhabai being parents and brother-in-law. They did not spell out anything immediately after the incident of her burning. It no doubt appears that the appellant gave an undertaking (Exh.22/Exh.25) on 6.11.1990 to the effect that he would not ill-treat and beat her. The confessional part of the undertaking is inadmissible in evidence. The inconsistent versions of P.W. Dharuba, P.W. Kisanbai and P.W.Jalindar are insufficient to reach conclusion that deceased Radhabai was subjected to matrimonial cruelty on account of her failure to meet any unlawful demand of the appellant. Indeed, the only unlawful demand stated by P.W. Dharuba is in respect of Rs. 1,000/- (Rupees one thousand) but that too was not directly made by the appellant for himself. The amount was not accepted when tendered to his father but it was suggested that a nose ring may be purchased for Radhabai and that was done by P.W. Kisanbai. In this view of the matter, it is difficult to hold that the appellant subjected deceased Radhabai to matrimonial cruelty which was of such degree that she was driven to path to end her life nor it can be gathered that the appellant made unlawful demands and failure of

Radhabai or her parents to fulfill the demand was the cause of her harassment or ill-treatment.

15. The other evidence tendered by the prosecution need not be discussed in detail. The inquest panchanama (Exh.11) is corroborated by P.W.2 Gajendra. The spot panchanama (Exh.17) is corroborated by P.W. 3 Dagdu. He admits, however, that he had not entered the house when the spot panchanama was drawn in the evening of 1.12.1990. The versions of P.W.4 - Shrikishan and P.W.5 Ravan are of no much avail to either side. Both of them were declared hostile. The prosecution examined P.W. Ravan in order to show that there use to be quarrels between the spouses. He did not subscribe to the case of prosecution. The version of P.W.9 Kaluram PHC (B. No. 865) shows that he recorded case of accidental death (A.D. No. 28/1990) u/s 174 of the Cr.P.C. after death of Radhabai. He sent concerned papers to P.S.I. P.W. 10 Kautik Iedhate. His version reveals that he had received statements of Radhabai which was recorded by the Executive Magistrate. The offence was registered on the basis of the F.I.R. lodged by P.W. 10 PSI Kautik on the basis of the investigation.

16. The circumstances in the present case are sufficient to raise strong suspicion. Still, however, it is well settled that suspicion cannot take place of proof. The learned A.P.P. referred to presumption available u/s 113-A and 113-B of the Evidence Act. Before such presumptions are invoked, it is necessary to establish that the deceased bride committed suicide within seven (7) years of marriage, she was subjected to matrimonial cruelty which would come within the ambit of Section 498-A of the I.P.C. and there are "other circumstances of the case" which if considered together would give rise to such presumption. The presumptions are of rebuttal nature. In "Baban Anna Dixit v. The State of Maharashtra" 1991(1) Crimes 439, this Court held that where the appellant bride gave two dying declarations, one to Police constable showing suicide because of cruel treatment of in laws ,and second to the Executive Magistrate showing accidental burns while cooking on stove, the presumptions could not be drawn. Unless there is adequate evidence to infer matrimonial cruelty and that the proximity test is satisfied, after the proof of suicidal nature of the death, there is no scope to consider the request to draw presumptions. In the present case, the prosecution evidence is insufficient to reach conclusion that deceased Radhabai was subjected to matrimonial cruelty on account of her failure to meet unlawful demands of the appellant.

17. Taking a stock of foregoing discussion and circumstances placed on record, I have no hesitation in holding that the prosecution could not establish the charge levelled against the appellant beyond reasonable realm of doubt. It is not proved that deceased Radhabai was subjected to matrimonial cruelty which was of the degree as envisaged in explanation (a) or (b) of Section 498-A of the I.P.C. It is also not proved that she died suicidal death. The impugned judgment is, therefore, unsustainable.

18. In the result, the appeal is allowed. The impugned judgment rendered by the

learned Sessions Judge in Sessions Case No. 44/1991 is set aside. The appellant is acquitted for the offences punishable under Sections 498-A and 306 of the I.P.C. His bail bonds be deemed as cancelled. The fine amount if deposited be refunded to him.