
(1982) 03 BOM CK 0048
In the Bombay High Court
Case No : Second Appeal No. 289 of 1980

Bhaskar Pandurang Mahatme	Vs	APPELLANT
Meerabai Bhaskar Mahatme		RESPONDENT

Date of Decision : 01-03-1982

Acts Referred:

Bombay Civil Courts Act, 1869 — Section 16
Divorce Act, 1869 — Section 15, 4, 6, 7, 8
Hindu Marriage Act, 1955 — Section 13(1), 13(I), 13(I)(iii), 19, 21

Citation : (1983) MhLj 115

Hon'ble Judges : V. Mohta, J

Bench : Single Bench

Advocate : V.M. Kulkarni, for the Appellant; V.A. Naik, for the Respondent

Final Decision : Dismissed

Judgement

V. Mohta, J.—In which Court does first appeal u/s 28 of the Hindu Marriage Act ("The Act of 1955" for short) against the original decree passed by Assistant Judge lie, is a principal point of law to be determined in this Second Appeal at the behest of the husband (the original petitioner) who has filed a petition for divorce u/s 13 (1) (ia), (ib) and (in) of the Act of 1955. The petitioner succeeded in the trial Court and a decree for divorce was granted but only u/s 13(I)(ia) and (iii). However, the first appeal by the wife before the District Judge succeeded resulting into the dismissal of the petition.

2. The substance of the petition is as under: The marriage between the parties took place on 30-5-1974. It was consummated. The petitioner is a resident of village Wathoda Shukleshwar about 20 miles away from Amravati. The parties have a male child born on 15-10-1977. The wife suffers from mental disorder and gets fits after sexual intercourse, as a result she becomes unconscious and remains in that condition for 2-3 days without taking any food or water. After the medical treatment she recovers but the disorder is repeated after the intercourse. The petitioner is in the prime of his youth. Marriage without sex is

an anathema. He is unable to have sex with his wife and is leading a miserable and unhappy married life. The petitioner cannot live with the wife under the circumstances. The wife's brother and maternal uncle frequently came to the village. They were informed about this unfortunate state of affairs. As a result, they took her to village Shendurjana Khurd, where her parents live. The wife also treated the petitioner with cruelty, abused him and behaved in a most indifferent manner. She never cared for the husband. Since last two years she was living with her parents and had deserted the husband.

3. The defence is as under: The allegations about mental disorder, cruelty and desertion are all false. The petitioner always insisted that she should sign a divorce-deed but the respondent refused and therefore she was beaten and constantly ill-treated. Ultimately, she was sent to her parents' place. Because of the beating and ill treatment, she got a shock and the fits that she got some times was the result of the ill-treatment. The respondent was willing to stay with the petitioner.

4. At the trial, the parties entered into witness box and examined certain witnesses. The petitioner examined two doctors (1) Dr. Omprakash Rathi (A. W. 1) and (2) Dr. Mrs. Bakula R. Shah (A. W. 3). The trial Court believed the evidence of those two doctors when they stated that the respondent was examined by them and they found her suffering from ailment of fits. Finding on desertion was recorded against the husband and on cruelty in his favour. Thus a decree of divorce under sections 13(1), (ia) and 13(1)(iii) was granted. Aggrieved by this decision by the Extra Assistant Judge, appeal was preferred in the Court of District Judge by the wife. The appellate Court was not at all impressed by the evidence of the husband as well as medical evidence and consequently dismissed the petition. It was also pleased to reject the preliminary objection regarding maintainability of appeal.

5. Shri Kulkarni, the learned counsel for the appellant, has reiterated the preliminary point that as the original case was decided by the Extra Assistant Judge, appeal cannot lie to the District Judge but lies to the High Court. In order to appreciate this point it is necessary to state the factual background relevant in this connection. Originally, the petition valued at Rs. 300 was filed before the Court of Civil Judge, Senior Division, Amravati, Even the issues were framed by that Court. Subsequently, at the stage of evidence the case was transferred by the District Judge to the Third Extra Assistant Judge. Obviously, this was done in terms of the powers vested in the District Judge by section 16 of the Bombay Civil Courts Act, 1869 ("The Act of 1869" for short) which reads as under:

"16. The District Judge may refer to any Assistant Judge subordinate to him original suits of which the subject-matter does not amount upto forty thousand rupees in amount or value, applications or references under Special Acts and miscellaneous application.

The Assistant Judge shall have jurisdiction to try such suits and to dispose of

such application or references.

Where the Assistant Judge's decrees and orders in such cases are appealable, the appeal shall lie to the District Judge or to the High Court according as the amount or value of the subject-matter does not exceed or exceeds twenty five thousand rupees.

Now, u/s 19 of the Act of 1955 every petition has to be presented to the District Court within the local limits of whose original jurisdiction certain events contemplated u/s 19(i) to (iv) have taken place. The term "District Court" has been defined u/s 3(b) of the Act of 1955.

The definition reads as under :

(b) "District Court" means in any area for which there is a City Civil Court, that Court, and in any other area the principal civil Court of original jurisdiction, and includes any other civil Court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act.

In Official Gazette dated 1-9-1955, a notification bearing No. HMA-1055/52067 has been issued by the State specifying the Court of Civil Judge, Senior Division as the District Court within the meaning of section 3(b). It is a common ground that if the Court of Civil Judge, Senior Division decides the petition, the first appeal lies before the District Judge. At this stage, provisions of appeal contained in section 28 of the Act of 1955 may be noticed:

28 (1) All decrees made by the Court in any proceedings under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the Court made in the exercise of its original civil jurisdiction and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction.

Section 21 of the Act of 1955 makes the CPC applicable to the proceedings under this Act "subject to the other provisions" and "as far as may be". Thus it is clear that first as well as second appeal lies against decree passed under this Act.

6. Perusal of section 16 of the Act of 1869 indicates that suits where subject matter does not exceed Rs. 40,000, applications and references under Special Acts etc. can be referred by the District Judge to any Assistant Judge and that appeal against original judgment and decree passed by the Assistant Judge lies to the District Judge or to the High Court depending upon the valuation of suits and/or the nature of proceedings. There can be no manner of doubt that proceedings under the Act of 1955 can be said to be application under the Special Act as contemplated u/s 16 and therefore, can be referred to the Assistant Judge by the District Judge.

7. My attention was invited to the decision given in *Thomas G. G. French v. Julia French* A I R 1914 Bom. 267 in which it is held that suit under the Indian Divorce

Act, 1869 is not an application under the Special Act. It is Observed:

.....for though section 16 empowers the District Judge to refer to the Assistant Judge suits, where the subject matter does not exceed a certain amount or value, and applications or references under Special Acts, it does not, in our opinion, authorize him to refer suits for dissolution of marriage, for we think that such suits cannot be appropriately described as applications under a Special Act. They are suits: see sections 4, 6, 7, 8 and 15, Divorce Act, but not suits the subject matter of which is capable of valuation.

The ratio is clearly inapplicable. It deals with a different enactment under which proceedings are specifically termed as suits. It looks obvious that if they are suits, they could not be applications. Reliance was also placed on certain observations in the case of *Ambi Pundalik and Another Vs. Pundalik Shankar*, but as rightly pointed out by Smt. Naik, the learned counsel for the respondent, this decision is given in altogether different setting and scheme of C. P. and Berar Courts Act, 1917 which is quite different from the Act of 1869. The letter and spirit of last portion of section 16 of Act of 1869 is that against decision of all matters specified in the first part including suits of valuation upto Rs. 25,000 appeal lies to the District Judge and appeal against decision in suits of more valuation referred to Assistant Judge by the District Judge, lies to the High Court. I see no other way to reconcile last part of the provision not only with the first part but also with the whole purpose and scheme of the Act. Thus in the present matter which is not a suit much less of value exceeding Rs. 25,000 appeal was rightly entertained by the District Judge, though for slightly incorrect reasons. The fact that in certain matters the Assistant Judge as well as District Judge has co-ordinate jurisdiction will have no bearing on the question in view of specific provisions of section 16. There is also nothing novel about the concept of empowering one Court with appellate powers against the decision of another Court operating upon some area with equal authority.

8. Now, about the merits of the matter. On the point of desertion both Courts have held against the husband and very rightly. The allegations supporting the grounds of cruelty are contained in para 3 of the petition. The petitioner who has come up with a specific case that the wife frequently abused him. In the evidence there is not even a whisper about it. It seems to me that ex facie no case of cruelty exists de hors of the ground u/s 13(I)(iii) of the Act of 1955. It is, therefore, necessary to concentrate on this ground, namely, of wife suffering from "mental disorder" of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. The expression "mental disorder" has been explained in the clause itself. The learned District Judge has discarded the medical evidence on two grounds. Firstly, both the doctors were not experts, not being psychiatrist or specialists in the disease. Secondly, their testimony did not inspire confidence. Dr. Rathi, who is D. C. H. practising in village, has in plain terms admitted that the respondent is otherwise healthy-physically and mentally and that her ailment can be cured. From his

evidence, it is clear that wife was examined by him only few times and the reason behind the fits was told to him by the husband and never by the wife. Dr. Mrs. Shah is a gynaecologist. She changed her opinion and version in evidence. She had not brought any papers with her and indeed the certificate alleged to have been signed by her was not even put to her. Her evidence was only on the basis of her recollections of an event three years prior to the deposition. She has given a version that the respondent told her about the convulsions during the sexual intercourse, but the husband has altogether a different version to give in evidence. According to him, he had accompanied the wife to the dispensary and at that time the wife was lying in unconscious state and the entire history and the state of affairs was narrated to doctor by the husband. It is in her cross-examination that she was suffering from hysteria for which long term treatment is necessary. This implies that it is a curable disease. In the later part of her cross-examination she admitted that the wife was capable of having a sexual intercourse. This witness also admitted that hysterical fits are psychotic and that the patient was not psychotic. If under these circumstances they as well as the husband are disbelieved, I do not think any case for interference with these pure findings of fact exists.

9. In the result, the appeal is dismissed but under the circumstances without any order as to costs.