
(1995) 12 BOM CK 0035
In the Bombay High Court
Case No : First Appeal No. 901 of 1990

Smt. Aruna Shantilal Ajmera	Vs	APPELLANT
Shantilal Vadilal Ajmera		RESPONDENT

Date of Decision : 19-12-1995

Acts Referred:

Hindu Marriage Act, 1955 — Section 13(1), 25

Citation : (1997) 1 DMC 553

Hon'ble Judges : V.H. Bhairavia, J;A.C. Agarwal, J

Bench : Division Bench

Advocate : Uma K. Shah and K.D. Shah, for the Appellant; Mukesh Talsaniai Advocate by Bhagwati Counselling, for the Respondent

Final Decision : Allowed

Judgement

V.H. Bhairavia, J.—This appeal is preferred by the appellant-original petitioner, wife against the judgment and order of the Family Court dated 6.9.1990, passed in M.J. Petition No. 109 of 1986, dismissing the petition of the appellant-wife.

2. The short facts of the case are that the petitioner married to the Respondent on 4.6.1972 at Bombay. After marriage, the appellant-petitioner went with the respondent to reside at the matrimonial home at Kandivali, Bombay. It is the case of the appellant-petitioner that in the beginning, the behaviour of the respondent-husband was very cordial but after sometime, respondent started behaving in a peculiar manner. It is further the case of the appellant that the respondent was found in the company of one girl. He was found in squandering the money. On requesting the respondent to refrain from the company of a girl and squandering the money, he did not pay any attention and he continued to move in the company of other girls also in the same manner. Thereafter, he started picking up quarrels with the appellant-wife. He started insulting her and became very arrogant and behaved in an arrogant manner with the petitioner-wife. He started using insulting language and also assaulting her. It is also alleged that the respondent-husband became so rude in his behaviour that sense

of terror has been created in the mind and heart of the appellant-wife. The respondent-husband also gave threats to the appellant-wife that one day he would take life of the appellant-wife. It is the case of the appellant that on 2.11.1972, the respondent assaulted the appellant that she fell down and became unconscious. The appellant's parents were immediately summoned by the neighbours and she was removed to the hospital for treatment. It is the case of the appellant-wife that from the hospital, she was taken by her parents to their house at Borivli, Bombay. As soon as she regained consciousness, she told her parents that she should not be sent back to her matrimonial home, otherwise worst would happen. Since then i.e. from 2.11.72, the appellant-petitioner is staying at her parents' house at Borivli. It reveals that some of the relations of the respondent including the respondent had tried to persuade the appellant-wife for coming to the matrimonial home. As their efforts failed, a letter was written through Advocate alleging that the appellant-wife had left the house of the respondent on her own accord. According to the appellant, a duly reply was also given on 11.2.81. Thereafter, a petition was filed u/s 13 of the Hindu Marriage Act on the ground of physical and mental cruelty administered by the husband. The respondent-husband has filed his written statement denying the averments in the petition and stated that appellant-wife from the beginning wanted to stay separately from the respondent and to get divorce and also to grab the whole ornaments which were alleged to have been taken by her sister and some of the ornaments alleged to have been kept at the house of the appellant's parents at Borivli.

3. After recording the evidence of the parties, the learned Judge of the Family Court held that the petitioner-wife failed to prove the cruelty and she was not entitled for divorce on the ground of cruelty u/s 13 of the Hindu Marriage Act. Thus, the petition came to be dismissed by his judgment and order dated 6.9.90. Hence this appeal.

4. Heard the learned Counsel for the parties. It has been submitted by the learned Counsel Mrs. Shah appearing on behalf of the appellant that since November, 1972, the appellant is staying at her parents' house and she has never gone to the Matrimonial home and that there is constructive desertion by the respondent and that ground is also valid ground for passing the decree of divorce. The learned Counsel for the appellant vehemently submitted that the evidence speaks volumes regarding the cruelty and there is no reason for not believing the oral evidence of the appellant. The appellant-wife is a Hindu wife. It is submitted that the fear of insecurity was often attributed at the matrimonial home and the sacred relations between the wife and husband would not be re-established. It has been submitted that within the period of 7 months after marriage, the behaviour of the respondent-husband was changed and he started assaulting and insulting the appellant but the appellant tolerated and she did not complain even to her parents regarding the rude behaviour of the respondent-husband with her, but the respondent then tried to physically assault the appellant and when she became unconscious because of beating and was taken

to the hospital. The alleged incident took place on 2nd November, 1972 and this incident has been narrated by the appellant in her oral evidence before the Family Court. The learned Judge has discarded the evidence of the appellant on flimsy ground that there is no corroborative evidence to the incident of 2nd November, 1972. It reveals that the respondent has also filed petition being No. (Sic.-ed)/82 for restitution of conjugal right against the appellant and that was withdrawn on 20.12.1982.

5. As against this, the learned Counsel Mr. Mukesh Talsania appearing for the respondent has submitted that the appeal deserves to be dismissed as there is no legal evidence on record to prove the allegations of cruelty administered by respondent husband and the learned Judge has rightly held so. The learned Counsel for the respondent further submitted that the intention of the appellant-wife in filing the petition for divorce was not only to seek divorce but also to usurp the gold jewellerys belonging to the respondent. The learned Counsel submitted that there were some gold ornaments which were handed over to the appellant-wife by the respondent-husband for keeping at the safer place at her parents' house. Further, it has been submitted that some of the ornaments which were kept in the cupboard in the respondent's house had been taken away by the sister of the appellant while the appellant left for her parents' house on 2nd November, 1972 by opening the cupboard by the duplicate key. The learned Counsel submitted that the cheque was also issued for the payment of the said amount but unfortunately, the amount of cheque has not been disclosed. The learned Counsel has also submitted that the incident of 2nd November, 1972, is a concocted incident and it is not supported by any other evidence. The appellant has failed to examine the neighbourers or the doctor regarding the treatment she received at the hospital. The learned Counsel submitted that as the appellant had intention to stay separately and to take a divorce from the beginning and was waiting for some accusation, the father of the appellant has tried to create that atmosphere and impression by writing a letter dated 31.10.72 to the brother of the respondent-husband which was addressed to Shri Wadilal Mohanlal Ajmera at Rangpur, Saurashtra. The learned Counsel has relied on the letter and submitted that this letter was pretended to be written by him before 2nd November, 1972. The learned Counsel submitted that in this letter also, he does not disclose anything regarding the ill-treatment and rude behaviour of the respondent-husband towards the appellant-wife. The learned Counsel submitted that the legal evidence regarding intention of cruelty has to be proved u/s 13 of the Hindu Marriage Act and as the same has not been proved, the appeal is required to be dismissed.

6. Having gone through the record and proceedings of the Family Court, in our opinion, the impugned judgment and order is unsustainable. It is an admitted fact that the appellant-wife is staying at her parents' house since November, 1972 till today. There is not a single day that the appellant had gone to the house of the respondent and co-habited. It is also an admitted fact that the respondent-husband had filed a petition for restitution of conjugal rights and

subsequently, it was withdrawn. It is also on record that the respondent-husband had written a letter to the appellant-wife and tried to persuade her and express his sorrow for the conduct, which she did not approve. It is also an admitted fact that the appellant-wife had left the house of the respondent-husband on 2nd November, 1972 and the medical treatment was given to her by a doctor. It is also an admitted fact that the father and the sister of the appellant had gone to the house of the respondent on 2nd November, 1972 at the evening time. The respondent himself has admitted that on 2nd November, 1972, the sister of the appellant by applying duplicate key of the cupboard under the guise of taking out some clothes of the appellant, taken away some gold ornaments. This fact is a sufficient proof of the incident of 2nd November, 1972. Further, the respondent-husband has admitted that she was given medical treatment on that day. However, he does not admit that she has become unconscious and any person from her parents' house had come. This falsifies his say in his oral evidence as well as the written statement. In our opinion, the incident of 2nd November, 1972 did occur and the respondent-husband and physically assaulted the appellant and because of that she fallen down and became unconscious.

Except the word of the appellant regarding taking her to the Hospital and giving her treatment there, we have no other evidence. But the fact remains that she was physically assaulted and medical treatment was given to her and since then she had left the house of the respondent-husband and thereafter she never returned to her matrimonial home. This is sufficient evidence for proving the cruelty. The single incident of physical assault would not amount to cruelty under the Hindu Marriage Act as there is a matrimonial right between husband and wife. But, in the instant case, the appellant was so stressed by the rude behaviour of the respondent-husband and the limit of her tolerance came to an end when the respondent-husband started to use physical assault. As he had created sense of fear in her mind, the appellant decided not to come back to the matrimonial home and the repeated efforts of the respondent for pursuing the appellant-wife for joining the respondent failed. Not a single letter has been written by the appellant to the respondent for expressing her willingness to join him. It shows that she is not mentally ready to live with the respondent-husband. Previous 23 years have been passed and she is prepared to stay separately from the husband. It shows that there is no possibility of living together and it would be proper to pass any decree even for conjugal rights dismissing her petition for divorce would not bring any fruitful result. On the contrary, it could not create any harmony on this spouse.

7. In the case of Ramesh Chander v. Smt. Savitri, reported in 1995 IAD SC (C) 235: I (1995) DMC 231 , it has been held that:

"Should the marriage which is otherwise dead emotionally and practically be continued for name-sake is the issue for consideration in this appeal.

25 years have elapsed since the appellant, a sanitary inspector, and the respondent, his wife-a teacher, have enjoyed the company of each other as

husband and wife. Within these 25 years this is the second round of litigation which routing through the Trial Court and the High Court has reached this Court. The earlier one founded on desertion was decided by this Court against the husband on 23rd April, 1980, this appeal is based on cruelty. Both the Courts below have found that even though the wife has cast serious aspersions on the character of the appellant in the written statement filed by her earlier and alleged that he was in the habit of mixing with undesirable girls in the presence of respondent yet since neither any evidence was led nor it was proved consequently it could not be made basis for claiming divorce on cruelty.

In V. Bhagat Vs. Mrs. D. Bhagat, , this Court has explained the concept of cruelty both mental and physical which could entitle an applicant to claim divorce u/s 13(l)(i-a) of the Hindu Marriage Act, 1955. In Chanderkala Trivedi (Smt.) v. Dr. S.P. Trivedi (1995) 4 SCC 232 it was held that if a marriage was dead and there was no chance of its being retrieved it was better to bring it to an end. In this case the marriage is dead both emotionally and practically. Continuance of marital alliance for name-sake is prolonging the agony and affliction."

Further, this Court has also taken view in Atulkumar Natwarlal Kadakia v. Jyoti Atulkumar Kadakia, 1994(4) BCR 219. The head note (B) reads thus :

"Cruelty-Divorce on ground of-Allegations that wife was sex maniac, ill treated earlier marriage son, scantily dressed, threatened to commit suicide-Premarital love affair for two years admitted-Held, the grounds were exaggerated and fabricated."

In the instant case, relation between the husband and wife is broken and there is no any possibility of bringing them together. As observed above by the Supreme Court, the emotional and mental tie is broken. Therefore, in our opinion, the appellant-wife has proved the cruelty. The appellant is entitled for divorce on the ground of cruelty and the interpretation of cruelty u/s 13(1)(ia)(a) of the Indian Marriage Act. In the case of Shobha Rani Vs. Madhukar Reddi, , it has been observed thus :

"The word "cruelty" has not been defined and could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

8. It is to be noted here that at one stage, the learned Counsel appearing for the respondent has submitted that the respondent-husband is ready to give consent for divorce to the appellant provided, she i.e. the appellant if returns the golden ornaments which belonged to the respondent-husband occupied by the appellant-

wife with her. Though divorce u/s 13 of the Hindu Marriage Act is being granted, it is always open for the wife to file separate application u/s 25 of the Hindu Marriage Act for maintenance. Accordingly, the appellant, if she so desires, may file application for maintenance.

In the result, appeal is allowed. The marriage between the appellant-wife and respondent-husband on 4.5.1972 is hereby dissolved.