

(1994) 02 BOM CK 0007

In the Bombay High Court

Case No : Family Court Appeal No. 63 of 1992 and Civil Application No. 483 of 1994

V. (Wife)

APPELLANT

Vs

P. (Husband)

RESPONDENT

Date of Decision : 23-02-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125
Hindu Marriage Act, 1955 — Section 13, 23
Penal Code, 1860 (IPC) — Section 498A

Citation : (1994) 02 BOM CK 0007

Hon'ble Judges : M.F. Saldanha, J; H.H. Kantharia, J

Bench : Division Bench

Advocate : Anita A. Agrawal, for the Appellant; A.V. Datar, for the Respondent

Judgement

M.F. Saldanha, J.—This Appeal has focused on two areas of some consequence. Firstly, in what situations would be a matrimonial Court justified in refusing a relief ? Barring the class of cases where the evidence is so hopelessly bad that even on a benevolent view a relief becomes impossible and the situation where the party is totally disqualified for a relief because absolutely no case is made out, a matrimonial forum would be precluded from passing a decree where there is direct evidence of condonation. Matrimonial statutes take cognizance of the fact that lapses, indiscretions and misdemeanors howsoever serious, can always be pardoned if the parties are mature enough and are willing to put these incidents behind them and still keep the relationship alive. Proceeding on the maxim that to err is human and to forgive is divine, this branch of law prescribes that condonation of a matrimonial offence will virtually obliterate those incidents and that the law will consequently disregard them, as though they are wiped out from memory, they cannot therefore be resurrected and used for any purpose in a legal proceeding. It is impermissible at a post condonation stage to seek to revive the old accusations and a Court will have to totally disregard all this material barring anything that has transpired at a post condonation point of time

which alone will qualify for consideration. It is for good reason that section 23 of the Hindu Marriage Act provides, as in the case of similar provisions in other statutes, that once the matrimonial offences howsoever serious have been condoned that there is a legal bar to the use of such material as the basis for a relief before a court of Law. This, therefore, is one of the few situations in which a decree will have to be refused.

2. Next comes the question of multiplicity of proceedings in relation to the award of maintenance. The jurisdiction of a Criminal Court to award maintenance is essentially an emergency provision and orders passed in such proceedings are necessarily subject to maintenance orders passed by a Matrimonial Court. Basically, the pendency of proceedings u/s 125, Criminal Procedure Code can never be treated as a bar to the passing of appropriate orders by a Matrimonial forum and the proceedings before the learned Magistrate would automatically come to an end and even if some interim orders have been passed because those orders will merge with the orders passed by the Matrimonial Court, having regard to the limitation of Rs. 500/- that is incorporated in section 125, Criminal Procedure Code. A Matrimonial Court must, at the earliest available opportunity, review the case and if the circumstances require award appropriate maintenance of a higher amount.

3. The appellant-wife has, through this appeal assailed the correctness of a judgment and decree passed against her by the Family Court at Pune on 29-10-1991. The respondent husband had presented a petition to the Family Court praying for a decree u/s 13 of Hindu Marriage Act. The charge against the wife was that she is alleged to have been responsible for various acts of cruelty and the petitioner had contended that these acts, individually and collectively were sufficient to entitle him to a decree of divorce. The couple were married on 1-5-1977 according to Hindu Vedic rites. They have a son by the name of Pushkaraj born in February 1978 and the second child, a daughter by the name of Ketki born in August, 1987. The couple were residing together along with the husband's parents at Pune till 9-5-1988. Thereafter, they lived together for some time in rented premises away from the parents. Finally, on 16-7-1990 the present petition was filed by the husband wherein he alleged that a situation of total break-down of marriage has emerged and the grounds set out by him in the petition essentially were to the effect that the respondent wife was the sole contributory to that state of affairs. It is material to mention here that the petitioner-husband had highlighted one fact, namely that according to him he had suffered a serious health break-down, that he had been hospitalised and operated on and that his condition had reached quite a precarious situation on more than one occasion and he alleges that in spite of this condition of his, that the respondent-wife did not change her attitude.

4. These allegations have been denied by the respondent-wife who states that on the other hand it was she who was treated with a high degree of cruelty. She maintained that all sorts of demands were made on the ground that she had not

brought adequate dowry with her, that she was harassed, tortured not only by the husband but by her in-laws and she has also quoted certain specific instances whereby even when she was required to go to work, that she was kept locked and confined to a room and had to be rescued by a neighbor. Apart from this, she alleges that taking advantage of her temporary absence, that her husband in collusion with the in-laws hurriedly got the bungalow vacated and that the same was pulled down. It is her case that all these activities were indulged in specifically for purposes of interfering with and defeating her rights as a wife and a mother. She contends that the cruelty that was meted out to her left her with no option except to institute appropriate legal proceedings u/s 498A of the Indian Penal Code. In sum and substance, therefore, we have a situation where the petitioner had alleged cruelty against himself and the respondent-wife had made counter allegations of cruelty at the instance of the petitioner. Apart from trading these charges the respondent wife has also pointed out that after the year 1990, when she has been living separately, that she has been looking after and maintaining the two children and that the husband has not contributed anything towards their maintenance. She was, therefore, required to file an application u/s 125 of the Criminal Procedure Code, before the Family Court at Pune and we are informed at the Bar that the Family Court has passed an interim order awarding maintenance of Rs. 500/- per month for the two children in the month of January 1994.

5. We need to mention, that Mrs. Agarwal, learned Counsel appearing on behalf of the appellant before us, presented an application which is the companion Civil Application to this Appeal wherein she has contended that it is absolutely essential for this Court to grant an ancillary relief to the appellant-wife by way of an order for maintenance as far as the son and daughter are concerned. We shall deal with that application separately because Mr. Datar, learned Counsel appearing on behalf of the respondent-husband has opposed the application on several grounds one of which is a point of law on which it is necessary that this Court pronounces a decision.

6. The learned trial Judge recorded the evidence of the petitioner Prabhakar as also of his father Narsinha. Thereafter the respondent-wife Vidya gave evidence and she also examined a neighbor of hers by the name of Anjali Pisolkar as her witness. After hearing the parties, the trial Court came to the conclusion that the allegations of cruelty levelled by the husband against the wife were substantially established. There was however one other feature of some consequence that emerged in this case namely the fact that it had been demonstrated in evidence that the petitioner and the respondent had been meeting each other even after the year 1990 on various occasions. It was pointed out to the Court that there were two specific instances; the first of them being on the occasion of the wedding anniversary when the parties had been together and secondly even after the filing of the petition in July 1991 when the husband and wife had jointly made a trip to Trimbakeshwar in connection with some religious ceremony and had stayed together for four days between 16th and 20th July, 1991. On the

basis of this material, the learned trial Judge recorded the finding that the marriage has not irretrievably broken down and that given the time and right circumstances, there was an excellent chance of the spouses coming together again. Because of this reasoning, the learned Judge refused to pass a decree "of divorce but only passed a decree for judicial separation on the ground of established cruelty. We shall deal with this aspect of the matter presently.

7. The wife, however, presented the present appeal to the High Court contending that no case had been made out for the passing of any decree against her. In sum and substance, it is her case that she has been the aggrieved party, that she has been at the receiving end all through and that consequently the decree of judicial separation was wholly unwarranted and was liable to be set aside.

8. This appeal was first heard by us on Friday, 20th January, 1994. After hearing learned Counsel on both sides we suggested to Mrs. Agarwal who represents the wife and Mr. Datar who represents the husband, that their respective clients should be asked to remain present as we did consider, particularly in the light of the observations made by the learned trial Judge, and more so in the interest of the two growing children, that final efforts be made in order to patch-up what appear to be the differences in this matter. The matter was heard in chambers a couple of times and the parties as also their learned Counsel made all possible efforts to resolve the stalemate. Unfortunately, since no workable solution was forthcoming the matter was thereafter taken up for hearing and is being disposed of on merits.

9. Appearing in support of the Appeal, Mrs. Agarwal has taken us in some detail through the pleadings which consist of the petition and the written statement and her preliminary submission was that this is virtually a case of word against word. She pointed out to us that undoubtedly several unhappy incidents and disputes have taken place over the years many of which have been referred to in these pleadings. Coming to the evidence of Prabhakar Joshi who is the petitioner, Mrs. Agarwal points out to us that it is his contention that the respondent was quarrelsome and he contends that his ill-health is as a result of the quarrels which were invariably at the instance of the wife. The second head of charge that he has levelled against the wife Vidya is that there were occasions when she used to leave the matrimonial home and go to her parents. According to him, this was an act of intense cruelty because he is a sick man and his parents namely his mother who was paralysed and his old father were heavily dependent on the wife Vidya for looking after the house, assisting them, doing the cooking etc., and that this behaviour on her part which had taken place on numerous occasions gave rise to intense mental anguish to him. According to him the sale of the family bungalow was because of financial difficulties which his father was facing and he contends that the idea of developing the property was an economic proposition, that his wife misunderstood the entire operation and lodged a Police complaint against them and he further contends that as a result of all these actions that not only he but his old parents were seriously humiliated, that they

went through a lot of mental trauma and that he suffered several health problems. He has denied the counter charges levelled against him which are to the effect that he and his parents used to harass and torture the respondent-wife. He has also set out in great detail, his medical history and the various amounts of money that he was required to spend from time to time and he seeks to make out a case that even though he is earning a reasonably good salary and even though his family is quite well off that he is required to expend a lot of money on his health and that he is hardly in a position to pay any maintenance to the respondent-wife.

10. The only supportive evidence to Prabhakar has come from his aged father. A perusal of his deposition indicates that he has confined his charges to alleging that the daughter-in-law was not very co-operative and the principal thrust of his evidence is that she has lodged a false police complaint against them. He also makes a serious grievance about the invocation of the charge u/s 498A of the Indian Penal Code.

11. The appellant-wife has also given evidence and she contends that the petitioner did not treat her with any degree of kindness right from the beginning. She states that the husband and his relations were dissatisfied with whatever ornaments etc., she brought with her at the time of marriage and that this was a constant source of humiliation and torture to her. She has set out specifically an instance relating to the year 1980 which was very shortly after the marriage when she contends that she was inflicted with a problem of some seriousness concerning an abscess on the breast and that her husband did not show any consideration nor did he help her with the requisite finance for her operation. According to her she had done whatever was possible for the husband and the in-laws without any appreciation. She states that the husband and his father used to constantly ill-treat her and that Mrs. Pisolkar who is her witness had personally seen these things happening. She has also pointed out that apart from physical assaults such as banging her head against the wall etc., that on more than one occasion she was locked up in the house and that Mrs. Pisolkar had to come and rescue her. She has also indicated the manner in which the husband used to treat her and has set out one instance when pursuant to a quarrel, the husband left her on the road and went away. According to her the husband, in collusion with his parents had pulled down the family bungalow and that this was fraudulently done in her absence, that thereby she had to lose whatever few belongings she possessed, as a result of which it was essential for her to lodge a police complaint. The rest of her evidence basically proceeds to indicate that after the break-up, she had been working and looking after the two children and that the husband had neglected to maintain them.

12. What is of importance is that the respondent-wife has very specifically averred in the course of her evidence that she and the petitioner husband used to meet each other from time to time even after the break-up and that they did have sexual relations with each other on these occasions. In paragraph 6 of her

cross- examination she has stated that when they had gone to Trimbakeshwar during the pendency of the petition for performing Narayan-Nagabali that they had stayed together as husband and wife. This was in addition to the time when they had been together on 1st May, 1991. The respondent has been substantially corroborated with regard to the allegations of cruelty as also the wrongful confinement in the room etc., by her witness Anjali Pisolkar. Both the respondent and Smt. Pisolkar have been cross-examined at considerable length and nothing has emerged on the basis of which the Court can hold that either of them are exaggerating or fabricating.

13. On the basis of this material, Mrs. Agarwal submitted that even assuming that there is some degree of truth in the deposition of the petitioner that this is a case where there are equally strong charges and counter charges. More importantly, Mrs. Agarwal submitted that the inter relationship alleged between the petitioner's ill-health and the so called ill-treatment from the wife has not been established. She contended that if at all anybody had suffered in the course of this period of time that it was the wife who had been at the receiving end. Essentially, Mrs. Agarwal drew our attention to the position that is well settled in law namely that the various instances viewed at individually and collectively do not make out a case of cruelty which is good enough or strong enough for the passing of a decree. Without prejudice to this contention, Mrs. Agarwal placed strong reliance on the Supreme Court decision in the case of Dr. N. G. Dastane vs. Mrs. S. Dastane, reported in 1975 (2) SCC 344, and particularly paragraphs 54, 56 and 60 of that judgment. On the basis of the law laid down in that case. Mrs. Agarwal submitted that where she can demonstrate that there has been co-habitation between the spouses after the period relating to the charges and particularly during the pendency of the proceedings, and where she can also demonstrate that none of the so called charges are of a period after the point of time when the parties had once again co-habited as husband and wife, that this Court will have to totally disregard in law all the earlier material in support of cruelty, because it has been condoned. Mrs. Agarwal submitted that having regard to this last aspect of the matter that the learned trial Judge was clearly in error in having brushed aside the aspect of condonation. She has relied on the specific provisions of section 23 of the Hindu Marriage Act which prescribes a Bar on a Court hearing the matrimonial proceeding in entertaining any material on a ground of cruelty if there has been condonation thereafter. This is basically an ethical principle which has been substantially engrafted on to the matrimonial statutes by the Legislature for good reason in so far as even the Act prescribes that efforts should be made at all stages to even forgive, overlook and forget whatever grounds might have estranged the parties in the hope of saving the marriage. Viewed at from that angle, the effect of section 23 is that all earlier grounds or instances that may even qualify for the passing of a decree get completely whitewashed or obliterated once an act of condonation is there. It is for good reason that this provision has been engrafted on to the Act, but this Court also needs to take cognizance of the fact that once such condonation has

taken place that it is wholly and totally impermissible to go backwards and to look at any of the material that has proceeded the act of condonation.

14. We do not consider it essential to embark upon any elaborate assessment of the oral evidence that was led in this proceeding principally because the point of law canvassed by Mrs. Agarwal with regard to section 23 of the Act is liable to be upheld. We have, for purposes of satisfying ourselves about the reliability of the respondent-wife's evidence, evaluated it carefully and have come to the conclusion that there is no reason whatsoever why her statement with regard to the fact that the parties were meeting each other and that they had co-habited in the year 1991 in the months of May and July, should be discarded. Once this evidence is accepted it would, act as condonation for whatever is sought to have been alleged by the original petitioner-husband and in that view of the matter, it would provide a total legal bar to a Court as far as the utilisation of the past incidents against the respondent-wife. Quite apart from this aspect of the matter, we need to record that in a case of the present type even if the evidence were to have been carefully scrutinised and evaluated that it would not be either possible or permissible to grant the relief's prayed for in view of the fact that it is virtually word against word with both the parties making more or less identical allegations against the other spouse.

15. There is a companion Civil Application that has been presented by Mrs. Agarwal on behalf of the appellant-wife which we propose to deal with while disposing of this Appeal. The relief asked for is really an off-shoot of the main proceeding and Mrs. Agarwal pointed out that after the year 1990 that the husband has refused or rather neglected to provide for maintenance of the children. Mrs. Agarwal stated that the appellant Vidhya is working and under these circumstances, that she has not made any separate application for maintenance for herself. She points out to us that the children are growing up and that in spite of the mother's best efforts that it is just not possible for her alone to meet all their requirements financially. On the other hand, Mrs. Agarwal has demonstrated to us from the record that the husband is gainfully employed and furthermore that he has other sources of income also. She therefore submits that instead of pushing the parties to another forum and continuation of the litigation that this Court must decide the question of fair maintenance as far as the children are concerned.

16. Mr. Datar who appears on behalf of the respondent-husband has vehemently opposed this application. In the first instance he points out that the matter is sub judice before the Family Court in so far as the proceeding u/s 125 of Criminal Procedure Code, has been filed by the wife in which certain interim orders have been passed. Mr. Datar submits that if the quantum awarded there is insufficient that it is open to the wife to agitate the question before the learned Magistrate and that consequently this Court should decline to entertain the application in so far as another forum is seized of the matter. Quite-apart from this aspect, Mr. Datar also submits that it would be inappropriate for this Court to give any ruling

with regard to the question of maintenance in so far as his client must be given an opportunity of producing all requisite material such as the question of his deductions from salary his various expenses under the head of medical expenses etc. and in the absence of these, that this Court would be precluded from ruling on the issue. Mr. Datar also canvasses the argument that similarly his client is entitled to demonstrate to the Family Court when the maintenance application is heard, that the respondent wife is sufficiently possessed of the economic means to look after herself and the minor children who have stayed with her of their own volition and whom she has kept because of her attachment to the children. Mr. Datar has made a statement at the Bar that his client has much love and affection for both the children and that even as of today he is perfectly willing to allow them to reside with him and to look after their needs and under these circumstances he submits that no orders ought to be passed on the maintenance application.

17. Dealing first with the legal contention, we need to clarify once and for all that an application for maintenance u/s 125, Criminal Procedure Code is only to be regarded as a transitory remedy and not a permanent one. We have taken cognizance of the fact that unfortunately the monetary limits prescribed by section 125, Criminal Procedure Code are wholly inadequate having regard to the present economic conditions. Quite-apart from that aspect of the matter, the remedy available u/s 125, Criminal Procedure Code is really of an emergency or transitory nature whereby an aggrieved wife who is desperately in need of immediate relief can approach the closest Magistrate and secure an order. It is really within the ambit of the Court exercising matrimonial jurisdiction to assess the requirements the needs, the paying capacity etc. and to pass a fair order for maintenance. Such orders must of necessity be practical and realistic having regard to the actual conditions and cannot be governed by any arbitrary restrictions imposing a ceiling of Rs. 500/- . We see considerable force in the submission canvassed by Mrs. Agarwal who points out that her client who is a working lady has neither the energy nor inclination to prosecute any further litigations before the Family Court at Pune, more so when the monetary limit prescribed in these proceedings is Rs. 500/- which would be wholly inadequate in the matter of maintenance when it comes to the two children. Under these circumstances, the correct position in law is virtually that even if section 125 proceedings have been resorted to or if they are pending, that the matrimonial Court must realistically assess the requirements when an application for maintenance is filed and pass a fair and just order. That order would supersede whatever orders might have been passed in the section 125 Criminal Procedure Code proceedings. On the passing of such an order, it only follows that the proceedings u/s 125 Criminal Procedure Code would virtually come to an end and the orders if any passed in those proceedings would merge in the orders passed by the Matrimonial Court.

18. So far as the second aspect of the matter is concerned, Mr. Datar's objection is to this Court assessing the position for purpose of awarding maintenance in

the absence of the elaborate procedure of the two parties leading evidence etc. We have on record in these proceedings the details in relation to the husband's income. We have also on record enough material from which we can assess his station in life, what is his dependency as also what his normal needs would be. We do take note of the fact that the matter was heard some years back and therefore that there would be some scaling up of all those figures. As against this position, we have also taken careful note of the ages of the children. We have spoken to the parties as also to the son who was present. We have found out exactly what their station in life is, the type of education being imparted to the children and having regard to the requirements, in our considered view, it is very essential that the parties should not be subjected to any further protracted litigation and that this Court must pass an order at this point of time deciding the issue. We however make it clear that, as is the position in law, this order is always reviewable in so far as if there is a change of circumstances or if there is any good material, it is open to the parties to approach the Family Court and ask for a variation.

Having regard to the ages of the two children as also to their educational and other requirements, we direct that the respondent-husband shall pay a sum of Rs. 1,000/- (Rupees one thousand) per month as maintenance for the son and an amount of Rs. 500/- per month as maintenance for the daughter with effect from the month of January 1994. The payments, if any, made pursuant to the orders passed by the learned Magistrate shall merge in this order and he shall be given credit therefore.

19. In the light of aforesaid position, the appeal is allowed. The judgment and order of the Family Court, Pune, dated 29-10- 1991, whereby a decree of judicial separation has been granted to the respondent-husband is set aside. In the facts and circumstances of the present case, the appeal is allowed with costs which are quantified at Rs. 1,000/- . Rule is made absolute on the C.A. No costs.

Civil Application is disposed of accordingly.