

(1999) 09 BOM CK 0071

In the Bombay High Court

Case No : Family Court Appeal No. 125 of 1996

Vishnu B. Mayekar

APPELLANT

Vs

Smt. Laxmi V. Mayekar

RESPONDENT

Date of Decision : 28-09-1999

Acts Referred:

Constitution of India, 1950 — Article 142
Criminal Procedure Code, 1973 (CrPC) — Section 125
Hindu Adoptions and Maintenance Act, 1956 — Section 18
Hindu Marriage Act, 1955 — Section 25

Citation : (2000) 3 ALLMR 211 : (2000) 2 DMC 727 : (2000) 1 MhLj 713

Hon'ble Judges : R.J. Kochar, J; N.J. Pandya, J

Bench : Division Bench

Advocate : Abhay Oka, for the Appellant; J.V. Karkhanis and K.D. Juvekar, for the Respondent

Judgement

1. The appellant is the husband who had filed M.J. Petition No. 327 of 1996 initially in the City Civil Court at Bombay which later on came to be transferred to the Family Court at Bandra. He had sought divorce on 2 grounds, one was that his consent to the marriage was obtained by fraud and second was that of cruelty. The learned trial Judge by judgment dated 7th December, 1993 had disbelieved the ground of fraud completely and so far as the ground of cruelty is concerned, the decision was against the husband. As a result, the petition came to be dismissed.

2. We have referred to the aforesaid two grounds with a view to emphasis that in the appeal, the ground of fraud is not pressed. The appeal is argued only on the ground of cruelty.

3. We are taken through the position of the petitioner husband at page 48, and the letter of respondent wife at page 55 and her witnesses.

4. The husband has tried to make out a case of cruelty on 3 instances:

- (i) that the wife had taken pills and thus had tried to commit suicide;
- (ii) she was in the habit of consuming liquor; and
- (iii) she has not made any attempts whatsoever to resume cohabitation.

5. As it has come on record, it is quite obvious that in a city like Mumbai, like most of the members of public the said couple was also feeling the pinch of shortage of accommodation. In one room alongwith parents, the petitioner and the respondent were staying at Khar.

6. Some arrangement was worked out with the help of a friendly doctor and for sleeping at night, they were permitted to make use of the dispensary.

7. During the said arrangement once according to husband, he found the respondent wife having become unconscious in the said dispensary and when she came to consciousness, she told that she had taken pills. She also indicated that she does not want to live. This is first said by the husband in the course of his examination-in-chief at page 49.

8. However, when the wife was in the witness box nothing has been asked to her about this incident. On the contrary it is her say that she was beaten by her mother-in-law and as she was not well, the Doctor was called on the next date at 10 a.m. No questions have been put to her in the cross-examination suggesting that she had become unconscious because of taking pills.

9. So far the consumption of liquor is concerned, it appears to be a very wild allegation. In any case nothing is suggested to her during the cross-examination. In this background, if no attempts are allegedly made, the question to be considered is whether it could have been made at all. The entire testimony of the husband as that of the wife clearly indicates that the parents of the husband, more particularly, mother did not like the wife. There were constant argument leading to physical violence also where wife was the victim.

10. After considering all these aspects, when the Trial Court has dismissed his case of cruelty, we do not see any reason to interfere with the same.

11. The learned Advocate for the appellant had cited four different decisions of this Court as also Supreme Court. The decision of the Full Bench of this Court rendered at Nagpur in the matter of Kesharao Krishnaji Londhe Vs. Nisha Londhe, . The learned Judges have categorically stated that the concept of cruelty has undergone change and if conduct of the parties is such as would make it impossible for the petitioner to live with the respondent, the case of cruelty should be accepted.

12. Except for the passage of time starting with the year 1996, when the petition was filed, till date the parties have not resided together. We have nothing before us to suggest that till the filing of the petition or till the recording of evidence, the circumstances were such as would make us to come to a conclusion that the petitioner husband cannot reasonably be expected to live with the respondent.

13. No doubt, no attempts said to have been made in form of a notice or petition by the wife. But, so far as the efforts made either by relatives or during the pendency of the petition are concerned, if no results are forthcoming, that by itself, in our opinion, will not make the case to be such as to attract the decision of the Supreme Court in the case of V. Bhagat v. Mrs. D. Bhagat, II (1993) DMC 568 referring to the peculiar feature of the case before Their Lordships, it has been observed that it is a fit case for cutting across the procedural objections to give a quietus to the matter. The circumstances before Their Lordships clearly indicated that the respondent before them was bent upon treating the petitioner with mental cruelty. This being not the position here, passage of time alone cannot help.

14. In another case, Romesh Chander v. Smt. Savitri, I (1995) DMC 231, there was second round of litigation, culminating in the appeal before the Supreme Court and the appellant husband was not found to be dutiful and conscious of his responsibilities towards his wife and son. At that later stage the appellant husband has expressed divorce and was willing to compensate. Holding that marriage is dead both emotionally and practically it appeared that continuation thereof will amount to prolonging the agony, invoking their power under Article 142 of the Constitution, the decree of divorce was granted. In para 3, after referring to judgments it has been observed that when a marriage is found to be dead and there is no chance of it being retrieved, it better be brought to an end.

15. The powers of the Supreme Court under Article 142 are altogether different. In any case, when the matter of cruelty itself is not there on record and on evidence when we agree with the learned Trial Court Judge, the aforesaid decision of the Supreme Court, in our opinion, will not help the appellant husband.

16. While, dismissing the petition, the Trial Court had awarded maintenance of Rs. 500/-. This also is being objected to by the husband and it is obviously urged that in view of the Supreme Court decision given in Chand Dhawan (Smt.) v. Jawaharlal Dhaivan, 1993 (2) AIHLR 203 (SC) : II (1993) DMC 110 (SC).

17. If the petition for divorce is dismissed, there being remedy either u/s 125 of the Cr.P.C or u/s 18 of Hindu Adoption and Maintenance Act, maintenance u/s 25 of the Hindu Marriage Act cannot be granted. For this purpose, after examining various decisions of different High Courts, Their Lordships have come to conclusion that dismissal of a petition will not amount to decree under Hindu Marriage Act, 1955.

18. In our humble opinion, dismissal of a petition is also a decree as contemplated under the Code of Civil Procedure. The proceedings under the Hindu Marriage Act are governed by the said Code of Civil Procedure. Dismissal of a petition is made appealable. Secondly, reference to the aforesaid alternative remedy, in our humble opinion, again would lead to multiplicity of proceedings. This will be opposed to established public policy judicially recognised.

19. However, being bound to follow the Supreme Court decision, by virtue of Article 141, we accept the said judgment and accordingly allow the plea of setting aside the order passed by the Trial Court with regard to maintenance.

20. The appeal, therefore, succeeds only to that extent. So far as the plea of divorce based on cruelty argued before us, the appeal is dismissed. So far as the order of Trial Court granting maintenance is concerned, it is set aside in view of the Supreme Court judgment. The appeal, therefore, succeeds only to that extent.

21. So far as the order of the Trial Court is concerned, is therefore, set aside only to the extent of grant of maintenance. Rest of the order of the Trial Court is confirmed.

22. Under the circumstances, the parties are left to bear their own costs.

23. All concerned to act on a copy of this order duly authenticated by the Sheristedar of the Court.