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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELATE JURISDICTION
FAMILY COURT APPEAL NO.71 OF 2008

Tejas Shah ...Appellant
vs.
Ms Aditi Tejas Shah ...Respondent

Ms Edith Dey and Ms Neeta Parikh for the appellant
Mr.Hemant Ingle i/b Mr.Prashant S. Goyal for the
respondent

CORAM : A.S.OKA, &
A.K.MENON, JJ.
DATE : FEBRUARY 12, 2015

ORAL JUDGEMENT: (PER A.S.OKA,J.)

1 Heard the learned counsel for the parties. By this appeal, the appellant-husband has taken an exception to the Judgment and Decree dated 3rd January 2008 passed by the learned Judge of the Family Court at Bandra.

2 The marriage between the parties was solemnised on 27th February 2002 in accordance with Hindu Vedic rites. The present petition for divorce was filed by the appellant-husband on 16th May 2005. A decree for divorce was sought on the ground of cruelty under clause (i-a) of sub-section 1 of section 13 of the Hindu Marriage Act,1955 (for short 'the said Act'). The learned Judge of the Family Court came to the conclusion that the conduct alleged by the appellant-husband against the respondent-wife even

taken as correct will not constitute cruelty. The learned Judge observed that the marital bond between the parties cannot be broken for the small reasons. The learned Judge, however, recorded that both the husband and wife are egoistic and did not have regard for the desire and wishes of other spouse. The petition was dismissed by the impugned Judgment and decree.

3 The learned counsel for the appellant-husband has taken us through the pleadings and notes of evidence. The learned counsel pointed out various instances of cruelty set out in the petition as well as in the affidavit in lieu of examination-in-chief of the appellant-husband. She pointed out that there is hardly any challenge to what is set out in the affidavit in lieu of examination-in-chief. Her submission is that the overall effect of various instances which are narrated by the appellant-husband which have been established on evidence will have to be considered to decide whether the conduct of the respondent constitutes cruelty. Her submission is that the learned Judge of the Family Court has not even adverted to the evidence on record and, therefore, the impugned Judgment is illegal. She invited our attention to the averments made in paragraph 8 of the written statement. She pointed out that very serious allegations affecting the character of the appellant's father and brother have been made by the respondent. She also pointed out the averments made in the written statement and in particular in paragraph 11 alleging that during

the subsistence of the marriage, the appellant was enjoying the company of one Karishma. She also invited our attention to the cross examination of the appellant made by the respondent. She also invited our attention to the evidence of the respondent in which she has reiterated the allegations made against the appellant. She submitted that the said allegations which affect the character of the appellant himself, his father and brother have not been substantiated by the respondent and that the same constitute cruelty to the appellant.

4 The learned counsel for the respondent submitted that the learned Judge has very hurriedly disposed of the matrimonial petition. He pointed out that the evidence of both the appellant and the respondent was recorded on 3rd January 2008. He pointed out that the arguments in the petition were also heard on the same date. He invited our attention to the fact that on 3rd January 2008, both the appellant and the respondent had applied for adjournment. He pointed out that both the applications were rejected. He urged that without granting even a reasonable time, the learned Judge after recording evidence immediately concluded the case on the very day and even the Judgment was pronounced on the very day. He urged that the respondent was forced to cross examine the appellant in person. He pointed out that examination-in-chief of the respondent was recorded without giving an opportunity to her to file an affidavit in lieu of

examination-in-chief. He, would, therefore urge that this is a fit case where an order of remand deserves to be passed. He submitted that in view of Rule 33 of Order XLI of the Code of Civil Procedure, 1908, this Court can pass an appropriate order though the respondent may not have challenged the impugned decree. On instructions, he submitted that the respondent never consented to decide the petition on 3rd January 2008 itself and what is recorded in paragraph 1 of the Judgment is factually incorrect.

5 We have given careful consideration to the submissions. Firstly, we propose to deal with the last submission made by the learned counsel for the respondent regarding the failure of the learned Judge of the Family Court to grant even a reasonable opportunity to the respondent to defend herself. It is true that in a given case by exercising power under Rule 33 of Order XLI of the said Code, appropriate decree can be passed even on the request made by the respondent to the appeal though the respondent may not have challenged the decree subject matter of challenge in the appeal. We have carefully perused the record. Before adverting the record, we must note what is recorded by the learned Judge in the Judgment in its first paragraph which reads thus:

"1 The matter is on Board for hearing today. When the Respondent-wife made a grievance that now she is studying in

Scotland and she is unable to come again and again in Court, I therefore, gave priority to this matter with their consent deciding this finally today...."

6 The learned Judge has thus clearly recorded that it was on the request of the respondent-wife that he gave out of turn priority to the hearing of the petition and with the consent of the parties, he decided the petition on the very day.

7 In the light of what is recorded by the learned Judge, it will be necessary to peruse the record. On 3rd January 2008, the respondent made an application at Exh.11. In the said application she stated that she is studying in Scotland and her course will be completed in December 2008. A prayer made in the said application was that hearing of the petition should be adjourned till January 2009. There is a handwritten order dated 3rd January 2008 passed by the learned Judge of the Family Court on the said application. In the said order, the learned Judge has recorded that after evidence of the appellant was over, the respondent stated that she wants to go abroad and hence, it is agreed that the matter will be decided on that very day. After recording this, the learned Judge rejected the application at Exh.11. It is true that on the same day, an application (Exhibit-12) for adjournment was made by the husband. The said application was rejected on the very day i.e on 3rd January 2008 on the ground that the application for adjournment made

by the respondent was rejected. There is one more interesting aspect which must be noted. On 3rd January 2008, the respondent made an application at Exh.18 for grant of permission for appointing an Advocate. The said application seeking a permission for appointing Advocate was granted on the very day and the Advocate sought to be appointed by the respondent also filed Vakalatnama on the very day.

8 Not only in the order below application at Exh.11, but in the Judgment, the learned Judge has recorded that as the respondent was studying in abroad, she was unable to come again and again to Family Court. As far as the consent of both the parties to dispose of the matter on the very day recorded in the Judgment is concerned, the said consent has been recorded by the learned Judge in the Judgment on the basis of the oral statements made by the parties. What is recorded by the learned Judge in paragraph 1 of the Judgment is what transpired in the Court. If according to the respondent, what is recorded in the Judgment is incorrect, the only remedy available for the respondent was to make an application to the concerned Court for necessary clarification. However, even during the pendency of the Family Court Appeal which is pending almost for 7 years, the respondent has not at all applied to the learned Judge of the Family Court for necessary clarification/modification of the order. Therefore, we will have to proceed on the footing that what is

recorded in the paragraph 1 of the Judgment is correct and that it is on the request of the respondent and by consent of the appellant, the petition was disposed of on the same day on which evidence was recorded. In view of what is recorded in the Judgment and in particular in paragraph 1 of the Judgment, the contention of the respondent that she was not given a proper opportunity to contest the petition cannot be accepted. Merely because the examination-in-chief of the respondent was not taken in the form of an affidavit and that the same was recorded in open Court, no illegality has been committed by the learned Judge of the Family Court. Therefore, the prayer made by the learned counsel for the respondent for remand deserves to be rejected.

9 It will be necessary now to make a reference to the pleadings. In the written statement of the respondent in paragraph 8, she has stated thus:

"8....On the contrary Respondent states that father of the petitioner had evil eye on the respondent. He would never close the door while having bath or going to toilet. Door of the bedroom were never locked. Moreover, father of the petitioner would sleep between petitioner and respondent on pretext of not having A.C in their room. Further, brother of the petitioner Kartik would also follow foot steps of his father and make gestures which cannot be put in screen. The respondent

states that whenever she would bring the said fact to the notice of petitioner, the petitioner would become wild and start assaulting her. Respondent also states that as she could not fall prey to her father-in-law and brother-in-law, she was purposely and constantly targeted by the mother-in-law and she was also made to suffer immensely at the hands of the petitioner."

(underline supplied)

10 Further in paragraph 11, the respondent has stated thus:

"11....Everybody in the family avoided her and neglected her. The petitioner started bringing a girl called Karisma and he was always found in the company of the said girl whenever she would question the petitioner and disclosed her objection, she was abused by saying Bastared, fucking girl etc and abused in most filthy language. The respondent states that on 1st of January 2005 as it was new year Petitioner took her for English Movie where the said Karisma was also present. The respondent states that she was shocked and surprised to see Karisma sitting next to the petitioner. The petitioner was often found holding hands of said Karisma. The petitioner would get physically cozy with her and played with her ears, moved fingers over her hair and make uninvited gestures. The respondent states that whenever she would object she was threatened to kill if she utter a word. She was

constantly kept under pressure by the petitioner."

(underline supplied)

11 It will be necessary to make a reference to the cross examination of the appellant made by the respondent. In the cross examination, at the outset, a suggestion was given that the appellant was found in a compromising position with one Karishma Bajaj in the bedroom of the respondent. The correctness of the said suggestion was denied by the appellant. Thus, an allegation was made against the appellant by the respondent of having objectionable relationship with one Karishma Bajaj. The contention regarding finding the appellant in compromising position with the said Karishma in the bedroom of the respondent is not specifically raised in the written statement. We have quoted the allegations of very serious nature made by the respondent affecting the character of the appellant's father and brother. These allegations have not been proved by the respondent. The examination-in-chief of the respondent was recorded by the learned Judge on 3rd January 2008. It will be necessary to make a reference to the assertions made in the examination-in-chief. In paragraph 2, the respondent stated thus:

"2...The petitioner used to go to pick one lady by name Karishma Bajaj who happened to be wife of his boss. He brought her at our home, and introduced to me as a friend. They

were having very close relations as they used to move together, spend most of time together. The petitioner was buying various gifts for her."

(underline added)

12 Even going by the testimony of the respondent-wife, the allegations affecting the character of the appellant, the appellant's father and brother have not been established. The allegations made are of sweeping nature casting aspersions on the character of the not only the appellant but also on his father and brother. These are the allegations which are defamatory in nature.

13 It will be necessary to make a reference to the recent decision of the Apex Court in the case of K. Srinivas Rao Vs. D.A.Deepa¹. In the said decision, the Apex court referred to its earlier landmark decision in the case of Samar Ghosh Vs. Jaya Ghosh². In the paragraph 14 of the decision in K. Shrinivas Rao, the Apex Court held thus:

"14 Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the

1 AIR 2013 SC 2176

2 (2007) 4 SCC 511

business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

(Underline added)

14 In the case of Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate³, the Apex Court dealt with a case where allegations affecting character of a spouse were made in the written statement. It will be necessary to make a reference to paragraph 7 of the said decision in the case of Vijaykumar Bhate. Paragraph 7 of the said decision reads thus:

"7 The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1) (i-a) of the Act. The position of law in this regard has come to be well settled and declared that levelling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to

3 (2003) 6 SCC 334

the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law has also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High Court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible."

(underline applied)

15 Now coming back to the facts of the case, we have already quoted the allegations made by the respondent against the appellant's father and brother. It is not necessary to elaborate that the

said allegations are of very serious nature affecting the character of the appellant's father and brother. We have already pointed out what is set out in paragraph 11 of the written statement wherein the respondent went to the extent of stating that the appellant started avoiding her and was always found in the company of one Karishma.

16 At this stage, it will be necessary to make a reference to the deposition of the respondent. In the examination-in-chief for the first time she came out with a case that the appellant used to go to pick one lady by name Karishma Bajaj who happened to be wife of his boss which is completely a new case made out by the respondent.

17 In paragraph 6 of her cross examination, the allegations against the appellant's father and brother have been reiterated by the respondent.

18 The allegations made against the appellant's father and brother and the allegations made against the appellant are of very serious nature affecting their reputation and character. The respondent has made no attempt to substantiate the allegations. Such unsubstantiated and reckless allegations must have certainly caused mental agony and cruelty to the appellant-husband. Therefore, a decree of divorce on the ground of cruelty must follow.

19 As we are inclined to pass a decree of divorce on the aforesaid ground, it is not necessary for us

to go into the other allegations made by the appellant in this petition for divorce.

20 We find that there is no material on record to consider the claim of the respondent, if any, for maintenance. But, the respondent is at liberty to apply under section 25 of the said Act for grant of appropriate relief.

21 Hence, for the reasons set out, we pass the following order:

(I) Impugned Judgment and decree dated 3rd January 2008 in Petition No.A-931 of 2005 is hereby quashed and set aside;

(II) The marriage solemnised between the appellant and the respondent on 27th February 2002 is hereby dissolved by a decree of divorce under clause (i-a) of sub-section (1) of section 13 of the Hindu Marriage Act, 1955;

(III) We grant liberty to the respondent to file appropriate proceedings for maintenance and other reliefs. If such application is made, the appropriate Court will decide the same in accordance with law;

(IV) The Appeal is allowed on above terms with no order as to costs.

(A.K.MENON, J.)

(A.S.OKA, J.)