

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

SECOND APPEAL NO.287 OF 2016

Subhash s/o Uttam Avhad
Age 35 years, Occu. Service
R/o at Varpewadi (Pasure),
Taluka Bhor, District Pune

..Appellant
(Original defendant)

Versus

Chaya w/o Subhash Avhad,
Age 30 years, Occu. Service,
R/o Ingle Estate, Malharwadi road,
Rahuri, Taluka Rahuri,
District Ahmednagar

..Respondent
(Original plaintiff)

Mr N.B. Narwade, Advocate for appellant
Mr R.R. Karpe, Advocate for respondent

CORAM : T.V. NALAWADE, J.

DATE : 1st August 2016

PER COURT

1. The appeal is filed against the judgment and decree of Regular Civil Appeal No.106 of 2013, which was pending before the Additional District Judge, Ahmednagar, which was filed by respondent-Smt. Chaya to challenge the decision given on her Hindu Marriage Petition filed under Section 9 of the Hindu Marriage Act by Civil Judge, Senior Division, Ahmednagar and it is allowed. The decree of restitution of conjugal rights is given in favour of respondent. Heard both the sides.

2. It is the case of wife that she was given in marriage to present appellant in the year 2003 and she co-habited with appellant at his place Bhongwali. It is her case that after 5-6 months of the marriage,

ill-treatment was started to her and the appellant started asking her to bring Rs.50,000/-, as he wanted the money for medical expenses of his sister. It is contended that when the demand was not met with, her gold ornaments were snatched away and she was beaten and driven out of matrimonial house on 12th October 2010 and so, the cause of action took place for the proceedings.

3. The present appellant - husband, filed say and denied the aforesaid allegations. He contended that in the year 2007, the wife had filed maintenance proceedings under Section 125 of Code of Criminal Procedure and the maintenance of Rs.600/- per month was granted by the Court. He contended that she had filed one proceeding under the provisions of Protection of Women from Domestic Violence Act and the said proceeding is still pending.

4. It is the case of the husband that the wife is whimsical in nature and she is acting as per the instigation given by her parents. He has also contended that the wife has love affair with a person and due to this extramarital affair, she is not ready to co-habit with the appellant. He contended that he is handicapped and due to that reason she is not ready to return to the matrimonial house.

5. The issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. The trial Court had dismissed the petition by holding that the wife failed to prove that she was driven out of matrimonial house on 12th October 2010. The trial Court had held that

when the maintenance proceedings were filed in 2007 and when the father of the wife gave admission that for a marriage, she had returned to parents house, prior to 2007 and since then she was living in the house of parents, it is not possible that she was driven out of matrimonial house on 12.10.2010. The circumstance like acquittal of the husband and his relatives in criminal case filed under the provisions of Section 498-A of Indian Penal Code was also considered against the wife. The first appellate Court has considered these circumstances against the husband and it is held that when the husband has come with a case that wife has extramarital affair, the other things need to be ignored.

6. The reasoning given by the Court below and the submissions made show that prior to the marriage, the parents of the wife were close relatives of the parents of the husband and the wife is a daughter of maternal uncle of present appellant. This circumstance is sufficient to infer that very body from the house of wife knew that present appellant was handicapped. In spite of that circumstance, the marriage took place. The record also shows that at the time of marriage, present appellant was not employed, but after that he got employment and now he is working as a teacher.

7. It is true that there is admission from the side of wife that the sisters of the present appellant were married but, from that inference is not possible that husband was not demanding money from her parents for medical expenses. Serious allegation is made by husband

i.e. extramarital affair of the wife. This allegation cannot be ignored. Due to this allegation, it cannot be said that husband has desire to co-habit with the wife.

8. Surprisingly, even when there is allegation of aforesaid nature, the trial Court had considered the circumstance that no evidence was given on attempts made through mediators by the wife. On the contrary, in our society, it needs to be presumed that wife has no other alternative than to return to matrimonial house. In such case, it is open to husband to show that he had made attempts to bring the wife to matrimonial house. When he had the suspicion of aforesaid nature, it is clear that he had not made any attempt to bring the wife back to matrimonial house. The circumstance that criminal Court acquitted the husband and his relatives in a case punishable under Section 498-A read with Sec.34 of Indian Penal Code cannot be used against wife as standard of proof in such a case is different. The case like present one needs to be decided on preponderance of probability. So, the circumstance that Police had formed opinion that such offence was committed and charge sheet was filed, can be used in favour of wife. Similarly, the circumstance that the criminal Court has made order of maintenance in favour of wife also can be used in support of the wife. It can be said that there is some mistake in the drafting. When the wife is not disputing that in 2007, she had filed proceeding for maintenance on the ground that she was deserted and neglected, it is clear that she did not want to prove that she was deserted in 2010. That mistake ought to have ignored.

9. Judgment of the first appellate Court shows that all the aforesaid circumstances are discussed by the first appellate Court. The finding is finding of fact. No substantial question of law is involved in the matter. In the result, Second Appeal stands dismissed.

(T.V. NALAWADE, J.)

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