

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.123 OF 2008

“A” Appellant

V/s

“B” Respondent

Ms. Kumud A. Bhatia for the Appellant husband.

Mrs. Geeta Mulekar for the Respondent wife.

**CORAM : A.S. OKA &
A.A. SAYED, JJ.**

DATED : 29 JUNE 2016

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

1 By this Appeal the Appellant husband has challenged the decree of dismissal of the Petition for divorce filed by him before the Family Court at Bandra, Mumbai. The decree of divorce was essentially sought on the ground of cruelty.

2 Considering the nature of the rival allegations made, we are directing the masking of the names of the parties in this judgment. Accordingly, in the cause title of this judgment the Appellant-husband will be referred as “A” and the Respondent-wife will be referred as “B”.

3 The marriage between the parties was solemnized on 14 May 1974. The husband was working in the Indian Navy and later on he joined Merchant Navy. There are two sons who have become major long back and who are working in Merchant Navy.

4 We are referring to the factual controversy only in relation to the issue of grant of divorce and, therefore, we are not touching the other disputes between the parties such as the possession of flat in respect of which there is already a decree in favour of the wife. The only issue which is considered in this Appeal is whether a case is made out for passing a decree of divorce on the ground that the wife has made allegations in the pleadings as well as in her evidence affecting the character of the husband and that the said allegations could not be substantiated. Therefore, it is unnecessary to make a reference to all minor factual details set out by the parties in their respective pleadings. It is brought on record that the wife had filed a Petition for restitution of conjugal rights in the Court at District Judge, Ambala which was withdrawn by her on 2 May 1989 by stating before the said Court that the husband has married with another lady and therefore, she wants to take appropriate action in that behalf. The husband also filed a Petition for divorce under section 13 of the Hindu Marriage Act, 1955 (for short "the said Act") in the District Court at Ambala bearing HMA No.191 of 1991

which came to be dismissed. In the Written Statement filed in the said Petition, the wife made allegations that the husband has kept another woman and he had a child from the said relationship.

5 In the Petition filed before the Family Court at Bandra, Mumbai, which is the subject matter of this Appeal, there are further averments made as to what transpired thereafter. There is a reference to a written Complaint made to the Managing Committee of Gurudwara Gurunanak Darbar at Andheri requesting the said Committee to mediate. The Petition refers to the efforts allegedly made to settle the dispute. There is a reference made to the criminal Complaint filed by the wife against the husband alleging commission of offences punishable under sections 494 and 109 of the Indian Penal Code. The specific case made out in the Petition based on events subsequent to the filing of the earlier Petition is about alleged mental torture and agony caused to the husband due to alleged behavior of the wife. A Written Statement was filed by the wife before the Family Court denying all the allegations made in the Petition. She accepted that the Petition for restitution of conjugal rights filed by her in the year 1988 was withdrawn on 2 May 1989. It is pointed out that a woman by the name Joginder Kaur was made a nominee by the husband in relation to his flat by describing her as a friend. It is contended that the husband also claimed that the said Joginder Kaur

was the servant. It is alleged that the husband is continuously living with the said Joginder Kaur. It is alleged that the husband has married to her and therefore, he has come to the Court with unclean hands.

6 The husband adduced evidence by filing his Affidavit in lieu of examination-in-chief. The wife examined herself. No other witnesses were examined by the parties.

7 The learned Counsel appearing for the husband invited our attention to the pleadings as well as the notes of evidence and especially to the Affidavit in lieu of examination-in-chief of the wife. The submission is that consistently the wife made false allegations against the husband regarding maintaining illicit relations with one Joginder Kaur, getting married to the said Joginder Kaur and having a child from the said second marriage. Her submission is that the said allegations have not been substantiated by the wife. Her submission is that after dismissal of earlier private Complaint alleging commission of offence punishable under section 494 of the Indian Penal Code, in the year 2006, the wife has filed one more private Complaint alleging the same offence in the year 2012. She pointed out the specific case made out that such unfounded allegations affecting the character of husband caused him mental torture and cruelty.

8 The learned Counsel appearing for the wife tendered across the bar a compilation. Her submission is that in the Petition filed by the husband, there is no ground made out that mental cruelty has been caused to him due to alleged unfounded allegations affecting his character. She submitted that if such a ground is to be taken for the first time in Appeal, an opportunity will have to be granted to the wife by remanding the matter. She submitted that even the cross-examination of the husband made by the Advocate for the wife will show that admittedly the husband had a special place in his heart for the said Joginder Kaur. She pointed out that a photocopy of the birth certificate of the child of said Joginder Kaur was placed on record but could not be proved. She pointed out that along with the Affidavit tendered today, the documents are produced on record such as a photocopy of the passport of the husband, a photocopy of the Application made for grant of passport, nomination form and birth certificate as well as ration card which will show that the allegations had been substantiated by the wife. She would, therefore, urge that the documents produced along with the Affidavit be treated as additional evidence. She also submitted that apart from the fact that there is no specific pleading, going by the averments made in the Petition for divorce, the said allegations were allegedly made by the wife in response to the Petition for divorce filed by the husband in the year 1991 in the Court at Ambala. She submitted that period of limitation

of 12 years is available for filing a Petition for divorce and therefore, the Petition was barred by the limitation as the same was filed in July 2003.

9 We have carefully considered the submissions. We may make a useful reference to the assertions made in the present Petition for divorce filed by the husband. The Petition refers to 1988 Petition filed by the wife for restitution of conjugal rights. In paragraph 18 of the Petition, it is alleged that the Petition was withdrawn by the wife on the basis of false allegations that the husband has married another woman and therefore, she wants to take appropriate action in accordance with law. In paragraph 18 of the Petition, there is a specific averment that such allegations caused mental torture and agony to the husband. Paragraph 20 of the Petition refers to the defamatory allegations. It also refers to the Written Statement filed by the wife in the Petition of 1991 filed in the Court at Ambala in which the wife had contended that the husband had kept another woman and that he had a child from said relationship. It is further stated that the said earlier Petition was dismissed. In paragraph 27 of the Petition, a specific allegation is made that the wife continued to defame the husband by alleging that he has married to one lady and was staying at Mohali. There is a reference to a Complaint filed by the wife alleging bigamy by stating that the Complaint is a false Complaint. In paragraph 33 of the Petition, it is stated that the conduct of the wife has

caused a great mental torture to him. The same is the allegation in paragraph 34 of the Petition.

10 At this stage, we may make a reference to the impugned judgment of the learned Judge of the Family Court. In paragraph 6 onwards, the learned Judge of the Family Court has narrated various aspects of cruelty alleged by the husband. Paragraph 17 of the judgment refers to cruelty on the ground that false criminal Complaint has been filed by the wife alleging commission of offences punishable under section 494 and 109 of the Indian Penal Code. Even paragraph 29 of the judgment, there is a specific reference to the case of the husband that due to rumour spread by the wife, the reputation of the husband was affected amongst the relatives and in the community. In fact a specific reliance was placed on a well known decision of this Court in the case of **Vijaykumar Ramchandra Bhate vs. Nila Vijaykumar Bhate**¹. Therefore, the ground which is pleaded and agitated in this Appeal was very much pleaded and agitated before the Family Court and therefore, it cannot be said that the wife is taken by the surprise. In fact there is a factual foundation for the said ground in the Petition for divorce and the judgment of the Family Court shows that the said ground was agitated before the said Court.

11 We have perused the examination-in-chief of the husband wherein he has reiterated what he has stated in the Petition for divorce including

¹(2003) 6 SCC 334

the said allegations made by the wife against him. He has also stated in paragraph 29 of the examination-in-chief that the Complaint alleging the offence punishable under section 494 of the Indian Penal Code was not prosecuted and was dismissed. Even in paragraph 39 of the examination-in-chief, he has stated that the wife has made false and baseless allegations and could not give particulars. It will be necessary to make a reference to the cross-examination of the husband. In the cross-examination, the husband was confronted with nomination forms at Exhibits 21 to 24. He accepted the correctness of the nomination forms. We have seen the nomination forms placed on the record. The first nomination form at Exhibit 21 contains the name of his wife as nominee. The second one at Exhibit 22 contains the names of two sons as nominees. The third one at Exhibit 23 contains the name of Joginder Kaur in which her relationship with the husband is described as friend. The fourth one at Exhibit 24 is a nomination form which makes a nomination in favour of Gurudwara Shri Gurunanak Darbar. These documents in no way substantiate the case tried to be made out by the wife. The relevant part of the cross-examination dealing with the relevant questions put to the husband read thus:

"I do not agree with suggestion Joginderkaur is very close to me. According to me, she was my maid-servant. At the time of execution of nomination form (Exh.23) Joginderkaur had served me as a maid-servant for five years. I agree with

suggestion that there was special space in my heart with respect to Joginderkaur. I do not know the present address of Joginderkaur. I am not able to find out her address at present.”

12 It shows that all the allegations have been denied by the husband except by stating that there was a special space in his heart for the said Joginder Kaur. In fact it was brought on record that he does not know the present address of Joginder Kaur. The husband was confronted with the document marked as “Article A” which is a photocopy of alleged birth certificate, his response was that he has no concern with the said document.

13 Now we turn to the Affidavit in lieu of examination-in-chief of the wife and particularly paragraph 2 thereof, which reads thus:

“2. I say that the Petitioner not only inflicted mental and physical cruelty on me but also on the innocent growing children, as he had gone for another woman and has fathered two children Raja and Dolly from his second wife Joginder Kaur whom he claims to be the house maid, but not aware of her whereabouts. I further say that the illicit relations of the Petitioner with the said Joginder Kaur in or around 1985. The cause for abandoning me and the children were because of the Petitioner’s liking for extra marital affairs and not because of any fault of me or the children.”

(underline supplied)

14 A specific allegation has been made against the husband of keeping illicit relationship with the said woman and maintaining extra marital affair with him. Except for the documents which are referred to above, no evidence was attempted to be led by the wife to substantiate the said allegations. In paragraph 18 of the cross-examination, initially she pleaded ignorance about filing of the Complaint alleging commission of offences punishable under section 494 and 498-A of the Indian Penal Code. But later on, she accepted that she had filed a Complaint in the year 2002 and that the said case was dismissed.

15 Thus, there cannot be any dispute that very serious allegations were made against the husband by the wife affecting the character of the husband. There is a specific pleading in the Petition that such allegations caused mental cruelty and torture to the husband. As far as the plea of bar of limitation is concerned, there are specific averments made that even till 1999, the wife continued to make the said allegations. In any case, in the Affidavit in lieu of examination-in-chief filed by the wife on 2 November 2007, the said allegations have been specifically made.

16 The present Appeal is of the year 2008. The record shows that right from August 2008 the wife was represented by an Advocate. The Appeal was on final hearing board for considerably from long time. At no

stage, any Application was made for leading additional evidence by the wife. Today, an Affidavit of the wife is tendered after the Appeal is substantially argued. We have perused the Annexures to the said Affidavit. What is annexed to the Affidavit is a copy of nomination form at Exhibit 23 and a copy of alleged birth certificate and its translation which is already marked as 'Article A'. Apart from that, there is a copy of the passport of the husband, a copy of ration card standing in the name of the husband and a copy of Application for grant of passport. There are three photographs annexed thereto. We have carefully perused the Affidavit. There is not a single reason assigned as to why said documents could not be produced earlier. As stated earlier, two documents were already on record which could not be proved by the wife. We are not on the technical aspect that there is no specific Application made under Rule 27 of Order XLI of Code of Civil Procedure, 1908 for grant of leave to lead additional evidence. Even treating the Affidavit as such Application, there is absolutely no explanation whatsoever as why the documents which were already in existence are being produced in the Appeal of the year 2008 for the first time in June 2016. Therefore, we are not inclined to allow the production of additional evidence.

17 As far as the law on this aspect of a spouse making allegations affecting character of the other spouse is concerned, it is well settled.

The first judgment on the point is in the case of **Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate**. What is relevant is paragraph 7 of the said decision, which reads thus:

“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 leveling 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 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 added)

18 There is one comparatively recent decision in the case of **K Srinivas Rao vs. D.A. Deepa**². The Apex Court has reiterated the law laid down in the case of **Vijaykumar Ramchandra Bhate**. What is material is paragraph 14, which lays down that making unfounded indecent defamatory allegations by a spouse in her pleadings in a given case may amount to causing mental cruelty to the other spouse. In the present case, apart from the making allegations in the evidence and pleadings, in the year 2002 a private Complaint was filed by the wife alleging commission of an offence punishable under section 494 of the Indian Penal Code which was admittedly dismissed in the year 2006 and now a fresh Complaint is filed recently in the year 2012. Therefore, we are of the view that the ground of mental cruelty was established by the husband. We may add here that the only finding which we have recorded is that the allegations of illicit relationship, second marriage etc. could not be substantiated by the wife. We are not making any adjudication on the pending criminal Complaint alleging commission of an offence punishable under section 494 of the Indian Penal Code and all contentions in the said Complaint are kept open.

² AIR 2013 SC 2176

19 The learned Counsel appearing for the wife submits that a decree of permanent alimony may be passed. The evidence of the wife shows that from 1986 onwards, she was employed. The evidence of the husband shows that he has retired. The learned Counsel appearing for the wife categorically stated that there may not be sufficient evidence on record to pass a decree of permanent alimony. However, in view of sub section (1) of section 25 of the Hindu Marriage Act, 1955 even after decree of divorce is passed, on an Application made by the wife, the Family Court is empowered to pass a decree of permanent alimony and maintenance. Therefore, we propose to grant liberty to the wife take out appropriate Application before the Family Court.

20 Hence, we pass following order:

- i) The impugned judgment and decree dated 8 January 2008 passed in M.J. Petition No.A-1229 of 2003 by the Family Court at Bandra, Mumbai is hereby quashed and set aside;
- ii) We are hereby dissolve the marriage solemnized between the Appellant and the Respondent on 14 May 1974 by passing a decree of divorce on the ground incorporated in clause (ia) of sub section (1) of section 13 of the Hindu Marriage Act, 1955. Accordingly, M.J. Petition No.A-1229 of 2003 stands decreed to that extent;

- iii) We grant liberty to the wife to make an Application before the concerned Family Court under sub section (1) of section 25 of the Hindu Marriage Act, 1955 for grant of permanent alimony and maintenance. If such Application is made, the Family Court shall decide the same expeditiously on its own merits;
- iv) There being no orders as to costs.

(A.A. SAYED, J.)

(A.S. OKA, J.)

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