

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 617 OF 2012

Yogesh Baburao Patil)
Age about 37 years, Occupation : Real)
Estate Agent, R/o. Laxmi Prasad Bungalow)
Ganesh Colony, Near Tidke Colony,)
Nashik) **..... Appellant**
(Original Petitioner)

VERSUS

Sou. Rupali Yogesh Patil,)
Age about 35 years, Occupation : Household)
& Service, R/o.C/o. Madhukar Eknath)
Lone, Shivshakti, 6-B, Block No.12,)
Sector No. 17, Vashi, Navi Mumbai) **..... Respondent**
(Orig. Respondent)

Mr.Dilip Bodake for the Appellant.

Ms.Racheeta Dhruvu, i/b. Mr.A.B.Ghodke for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 7th JANUARY, 2016

JUDGMENT

By this second appeal, the appellant has impugned the order and judgment dated 20th January, 2012 passed by the learned District Judge dismissing the Regular Civil Appeal No. 148 of 2007 filed by the appellant (original plaintiff) against the judgment and decree dated 28th March, 2007 passed by the learned Civil Judge, Senior Division in Hindu Marriage Petition No.149 of 2003. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. The appellant and the respondent were married on 9th December, 2001 at Nashik as per rites and rituals prevailing in Hindu religion. It is the case of the

appellant that sometime in the month of February 2002, the respondent went to her parents house for her examination. On 15th April, 2002 the appellant brought the respondent back to her matrimonial home. Out of the said wedlock a male child is born on 31st October, 2003.

3. It was the case of the appellant that the respondent used to quarrel with the appellant and committed various acts amounting to cruelty on her part against the appellant. On 4th August, 2003 the appellant filed Hindu Marriage Petition No.149 of 2003 against the respondent inter alia praying for divorce on the ground of cruelty and desertion under the provisions of Hindu Marriage Act. The said petition was resisted by the respondent wife by filing written statement.

4. On 30th April, 2004, the respondent filed a petition i.e. Marriage Petition No.189 of 2004 inter alia praying for restitution of conjugal rights against the appellant. The said Marriage Petition No.189 of 2004 filed by the respondent under section 9 was opposed by the appellant by filing written statement. There is no dispute that in the said written statement, the appellant had alleged desertion on the part of the respondent. The respondent led oral evidence in the said proceedings. The respondent was cross-examined by the appellant. The said Marriage Petition No.189 of 2004 filed by the respondent wife came to be disposed of on 15th December, 2006. There is no dispute that the learned trial judge in the said proceedings filed by the wife rendered a finding that there was no desertion on the part of the respondent against the appellant. There was also no dispute that the said order and judgment dated 15th December, 2006 passed by the learned trial judge allowing Marriage Petition filed under section 9 of the Hindu Marriage Act has not been impugned by the appellant husband and has attained finality. The said judgment was delivered during the pendency of Marriage

Petition No.149 of 2003 filed by the appellant inter alia praying for divorce on the ground of cruelty and desertion.

5. There is no dispute that the parties brought on record the proceedings filed by the respondent wife under section 9 of the Hindu Marriage Act, during the pendency of the said Hindu Marriage Petition No.149 of 2003 and also the order dated 15th December, 2006 passed therein. The learned trial judge framed following issues :-

1. Does petitioner prove that respondent has caused cruelty to him so as to make it impossible for him to cohabit with respondent?
2. Whether petitioner is entitled to the relief as prayed for ?
3. What order and decree ?

6. Insofar as issue of cruelty framed by the learned trial judge is concerned, the learned trial judge has answered the said issue in the negative and held that the appellant had failed to prove that the respondent wife had committed any cruelty to him so as to make it impossible for him to cohabit with the respondent. The lower appellate court dismissed the appeal filed by the appellant on 20th January, 2012.

7. Learned counsel appearing for the appellant made following submissions for consideration of this court :-

- (a) Though the appellant had filed Marriage Petition for divorce also on the ground of desertion, the learned trial judge did not frame any issue and decided the entire matter only on the ground of cruelty.

(b) The learned trial judge was bound to decide the suit on the basis of all the issues involved in the suit and could not have decided only on the ground of cruelty. Learned counsel for the appellant placed reliance on order 14 rule 3 and rule 5 of the Code of Civil Procedure, 1908.

(c) It is submitted that even though the court in the proceedings filed by the wife under section 9 of Hindu Marriage Act had framed an issue as to whether the wife had deserted the appellant or not, the trial court in the proceedings for divorce filed by the appellant ought to have framed an independent issue on the ground of desertion and ought to have adjudicated upon the said issue under order 14 rule 3 read with rule 5.

(d) It is submitted by the learned counsel that even if the finding was rendered by the court in favour of the respondent wife in the proceedings filed under section 9 of the Hindu Marriage Act that no desertion was committed by the respondent upon the appellant, the said finding rendered in those proceedings would not be binding on the learned trial judge since the said proceedings filed by the appellant for seeking divorce was an independent proceedings.

(e) Learned counsel placed reliance on order 20 rule 5 of the Code of Civil Procedure in support of the submission that in suits in which issues have been framed, the court shall render its finding or decision with the reasons upon each separate issue.

8. Learned counsel for the respondent on the other hand invited my attention to the concurrent findings rendered by the two courts below and would submit that since the findings are not perverse, this court cannot interfere with such concurrent findings under section 100 of the Code of Civil Procedure, 1908.

9. It is submitted by the learned counsel that the learned judge in the Marriage Petition No.189 of 2004 filed by the respondent for restitution of conjugal rights had already framed an issue of desertion based on the allegations made by the appellant in the written statement filed in the said proceedings. She submits that the respondent wife had led oral evidence in the said proceedings in view of the issues framed by the learned trial judge in the said Marriage Petition No.189 of 2004. The respondent was cross examined by the appellant. The learned trial judge in the said proceedings after considering the oral evidence and documentary evidence had rendered a finding that the respondent had not deserted the respondent. She submits that admittedly the said order and judgment dated 15th December, 2006 passed by the learned trial judge has not been impugned by the appellant husband and has attained finality. She submits that the findings rendered by the learned judge in the said proceedings (189 of 2004) thus would be binding on both the parties including the appellant.

10. It is submitted by the learned counsel for the respondent that the lower appellate court has rightly rejected the submissions made by the appellant that no application was made by the appellant for framing any issue on the issue of desertion before the learned trial judge. She submits that the lower appellate court has rightly taken a cognizance of the order passed by the learned judge in the marriage petition (Marriage Petition No.189 of 2004) filed by the respondent and the order passed therein.

11. There is no dispute that the appellant had filed an application for divorce on the ground of cruelty as well as on the ground of desertion. During the pendency of the said petition filed by the appellant, the respondent had filed petition under section 9 of the Hindu Marriage Act for restitution of conjugal rights. The appellant had filed a written statement in the said proceedings opposing the reliefs claimed by the respondent wife on various grounds including ground of desertion alleged to have been committed by the respondent wife. In view of such pleadings filed by both the parties, the learned trial judge while deciding the said marriage petition no.189 of 2004 had framed an issue of desertion. The respondent had led oral evidence including on the issue of desertion. The respondent was cross-examined by the learned advocate representing the appellant. The learned trial judge recorded a finding in favour of the respondent that there was no desertion committed by the respondent against the appellant and accordingly allowed the Marriage Petition No. 189 of 2004 filed under section 9 of the Hindu Marriage Act filed by the respondent and passed an order of restitution of conjugal rights against the appellant. The appellant has not impugned the said order and judgment of the learned judge deciding the petition under section 9 in favour of the respondent.

12. A perusal of the record indicates that the said proceedings filed by the respondent wife and the order passed by the learned judge in Marriage Petition No.189 of 2004 were produced before the learned trial judge by the parties. In paragraphs 19 to 29, the learned trial judge has taken cognizance of the said proceedings and the findings rendered by the learned trial judge in Marriage Petition No.189 of 2004 in favour of the respondent. The learned trial judge has also taken cognizance of section 11 of the Code of Civil Procedure, 1908.

13. Insofar as submission of the learned counsel for the appellant that the learned trial judge ought to have framed issues from all the materials produced before the learned trial court including the ground of desertion is concerned, there is no dispute that when the trial court had framed three issues though did not frame issue of desertion, no objection was raised by the appellant. The appellant also did not make any application for framing additional issues under Order 14 Rule 5 of the Code of Civil Procedure on desertion. Under Order 14 Rule 5 of the Code of Civil Procedure, the court is empowered to frame additional issues before passing a decree, is empowered to amend the issues on such terms as it deems fit and is empowered to render findings on all such amended issues as may be necessary in determining the matters in controversy between the parties. The appellant also did not challenge the findings rendered by the learned trial judge in the Marriage Petition No.189 of 2004 though the same was decided during the pendency of the Marriage Petition No.149 of 2003. The learned trial judge in my view was thus justified in deciding the entire matter only on the issue of cruelty framed by the learned judge on the basis of the evidence produced by both parties. I am not inclined to accept the submission of the learned counsel for the appellant that the learned trial judge has committed any error in not framing issue on the ground of desertion in the facts and circumstances of this case.

14. Insofar as the appellant placing reliance on order 20 rule 5 of the Code of Civil Procedure is concerned, the said provision provides that in suits in which the issues have been framed, the court shall state its finding or decision with the reasons upon each separate issue unless the finding upon anyone or more of the issues is sufficient for the decision of the suit. In my view the reliance thus placed by the learned counsel for the appellant on the said provision is totally misplaced.

Since the learned trial judge has not framed any additional issue for want of any application made by the appellant, there was no question of the learned trial judge deciding the said issue under order 20 Rule 5 of the Code of Civil Procedure.

15. A perusal of the order passed by the lower appellate court clearly indicates that the lower court has considered this issue raised by the appellant at length and has rejected the same by framing points of determination in paragraph (13) of the impugned order and has dealt with the same by recording the reasons in subsequent parts of the impugned judgment.

16. In my view, the finding on the issue of desertion which issue was framed by the learned trial judge in the proceedings filed under section 9 of the restitution of conjugal rights in view of the plea raised by the appellant in the written statement and adjudication thereof after considering the documentary as well as oral evidence and holding that there was no desertion on the part of the respondent wife upon the appellant has attained finality and would continue to be binding on the appellant even when the appellant had raised an issue of desertion in the proceedings filed for divorce on the ground of cruelty and desertion. In my view the learned trial judge even if would have framed additional issue on the issue of desertion could not have taken a different view than the view already taken by the court in the parallel proceedings filed under section 9 of the Hindu Marriage Act between the same parties.

17. In my view the principles of resjudicata under section 11 of the Code of Civil Procedure, 1908 would apply to the facts of this case. The findings on desertion which has attained finality was binding not only on the parties but also on the learned judge in the petition filed for divorce by the appellant.

18. Insofar as finding on the ground of cruelty raised by the appellant before the trial court is concerned, a perusal of the record indicates that the learned judge has considered the evidence and has rendered a finding of fact. The lower appellate court also has independently appreciated the evidence and has confirmed the finding on cruelty recorded by the learned trial judge. In my view since the court below have rendered concurrent findings which findings are not perverse and thus cannot be interfered with under section 100 of the Code of Civil Procedure, 1908.

19. In my view this appeal is devoid of merits. The appeal does not raise any substantial question of law and is accordingly dismissed with cost quantified at Rs.50,000/- which shall be paid by the appellant to the respondent within two weeks from today.

[R.D. DHANUKA, J.]