

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE,
AT MUMBAI**

FAMILY COURT APPEAL NO.113 of 2006

Mrs. Ashwini Ashok Bhosale,
Age 42 years, Occu.Nil,
C/o- Sudhakar M. Shinde,
B/6/91, Shanti Rakshak
Society, Yerawada, Pune 6 .. Appellant
(Original Respondent)

V/s

Mr. Ashok Narsinghrao Bhosale,
Age : 51 years, Occ: Service,
R/at Amdar Niwas in front of
Akashwani Behind Mantralaya,
Mumbai- 400 032 and
R/o - Ganpatnagar Chwal,
N.A.H. Room No.-4, Ahela,
Ulhasnagar - 4. .. Respondent
(Original Petitioner)

Mr. Dormaan J. Dalal, Advocate i/by Mr. Sugandh B.
Deshmukh, Advocate for the appellant/ applicant.

**CORAM :- A. S. OKA &
C. V. BHADANG, JJ.**

Reserved on : 3rd February, 2016

Pronounced on : 13th July, 2016

JUDGMENT : (Per C. V. Bhadang, J.)

(Signed judgment is pronounced by A. S. Oka, J. as per clause (i) of Rule 1 of Chapter XI of Bombay High Court Appellate Side Rules as C. V. Bhadang, J. is sitting at Panaji.)

By this appeal, the appellant is challenging

the part of the judgment and order dated 23/05/2006 passed by the Family Court at Pune in P.A. No.635/2004 and P.E. No.134/2003, whereby the learned Judge of Family Court has allowed P.A.No.635/2004 filed by the respondent, thereby granting a decree of dissolution of marriage on the ground of adultery and cruelty under Sections 13(1)(i) and (ia) of Hindu Marriage Act, 1955 (the Act, for short).

2. The brief facts necessary for the disposal of the appeal may be stated thus :

That the respondent no.1 herein had filed P.A.No.635/2004 before the Family Court at Pune seeking divorce under Sections 13(1)(i), (ia) and (ib) in which the present appellant was the respondent no.1 while one Ashok Saini was arrayed as respondent no.2. The marriage between the appellant and the respondent herein was solemnized on 17/12/1984 at Pune whereupon the appellant started cohabiting with the respondent, who was then staying in his joint family at Ulhasnagar.

It was contended by the respondent that the appellant was never interested in cohabiting with the respondent and was saying that she wanted to marry an

educated person having Officer's job while the respondent was a Graduate and working as a Class IV employee. It was contended that the appellant used to humiliate the respondent and his family members and used to pick up quarrel with them. The respondent was forced to reside separately from his family members. However, even thereafter, the conduct of the appellant did not improve. She was frequently going to the house of her parents taking away cash of the respondent. In March, 1993, the appellant left the matrimonial house without informing the respondent or his family members. The respondent was required to fetch the appellant back for cohabitation. In a similar incident in December, 1993, the appellant left the matrimonial house, carrying cash. Every time, the respondent was required to fetch the appellant back.

3. It was next contended that in the meanwhile, the appellant developed illicit relationship with one Ashok Saini (respondent no.2 before the Family Court). She used to stay alone with Ashok Saini whenever the respondent was out for work and when children were in the school. The appellant also accompanied and stayed

with Ashok Saini in Sarthak Lodge at Karjat and Murbad Guest House at Kalyan, leaving the house, on the pretext that she was going to the house of her sister at Andheri. The respondent tried to persuade the appellant to desist from such illicit relationship, however, to no avail. Ashok Saini had admitted in writing about the adulterous relation. The members of the Jagruti Mahila Mandal, working in the locality also tried to convince the appellant to mend her ways.

4. On 28/06/2001, the appellant left the matrimonial house along with Ashok Saini and her daughter Aarti and since then, was living with Ashok Saini.

5. The appellant contested the petition denying the allegations made and the charges levelled. It was contended that she was not treated well by the respondent and his family members and, therefore, her father had purchased a separate house in the year 1988 with household articles, whereupon the appellant and the respondent started residing separately. However, the respondent continued to harass her with an intention to

drive her out of the house. In the said attempt, the respondent is making false and baseless allegations, maligning her character. She denied that she was having any illicit relationship with Ashok Saini.

6. Ashok Saini (the original respondent no.2) also resisted the petition, denying the illicit relationship. It was contended that since 14/06/2001, he is residing at Matunga Railway Quarters. In so far as the writing given by him, it was contended that it was obtained from him under threat and coercion.

7. On the basis of rival pleadings, the Family Court raised as many as eight issues.

8. The respondent examined himself and his son Avinash along with Sukanya Karande and Aparna Bhalerao, the workers of the Jagruti Mahila Mandal. The appellant examined herself, her sister Ravati Bhosale and her daughter Aarti.

The original respondent no.2 did not lead any evidence.

9. The learned Judge of the Family Court answered issue nos.1 and 2 in the affirmative, thus holding that after solemnization of the marriage, the appellant had voluntary sexual intercourse with the original respondent no.2 and that after solemnization of marriage, the appellant treated the respondent with cruelty. In that view of the matter, the petition came to be allowed, granting a decree for dissolution of marriage, which is subject matter of challenge in this appeal.

10. We have heard Shri Dalal, the learned Counsel for the appellant. None for the respondent. With the assistance of the learned Counsel for the appellant, we have perused the impugned judgment and have gone through the evidence on record.

11. It is submitted by the learned Counsel for the appellant that there is delay of almost five years in filing the petition for divorce, which is not explained. It is contended that the petition is filed as a counterblast to the order of maintenance passed on 30/01/2003 in favour of the appellant. It is submitted

that the Family Court was in error in coming to the conclusion, that there were illicit relationship between the appellant and Ashok Saini. It is submitted that the reliance placed on the evidence of Avinash is misplaced as it lacks credibility and is tainted as Avinash was staying with the respondent. Neither the receipts from Sarthak Lodge are produced nor the Manager of the said lodge is examined. It is contended that the evidence of Aparna Bhalerao and Sukanya Karande is not convincing and could not have been relied upon. He, therefore, submits that the appeal be allowed.

12. The Family Court has granted the decree for dissolution of marriage on the grounds of adultery and cruelty. Thus, the following points arise for our determination in this appeal, we have recorded our findings against the same, for reasons, which follow :

(i) Whether the respondent proves that after the solemnization of the marriage the appellant had voluntary sexual intercourse with Ashok Saini (the original respondent no.2) ?

(ii) Whether the respondent proves that after the solemnization of marriage, the appellant treated him with cruelty ?

(iii) Whether the impugned judgment is legal and proper ?

(iv) What order ?

13. At the outset, it is necessary to mention that in so far as the ground of cruelty is concerned, the Family Court has come to a conclusion that apart from the act of the appellant of maintaining adulterous relationship with Ashok Saini (which, according to the Family Court, is itself an act of cruelty), the matrimonial relations between the parties were by and large peaceful except normal wear and tear of such relationship. The Family Court has held that it was only when Ashok Saini entered into the relationship that they went sore. Thus, independently, the ground of cruelty has not been accepted. The Family Court has found and to our mind rightly so, that the evidence on record goes to prove that the marital life of the parties was "like any other ordinary marital life having

its own wear and tear". It has been held that only after the original respondent no.2 entered into their marital life "scene changed". It has been held that except for the act of adultery committed by the appellant, there is no evidence as regards the allegations of cruelty committed by the respondent or his family members. Thus, we confine ourselves with point no.1, namely the ground of adultery.

14. The Family Court, in arriving at a finding that the illicit relationship between the appellant and Ashok Saini are proved, has placed heavy reliance on the evidence of Avinash and affidavit sworn by Ashok Saini. The evidence led by the parties indicates that from 1984 to 1988, the parties resided in the joint family of the respondent and from 1988 to 1993, they resided separately from the family of the respondent. The parties have been staying separately from each other from 28/06/2001 and they have contrary versions as to how they separated. According to the respondent, on that day, Ashok Saini in the presence of brother of the respondent, namely Ganesh Bhosale along with Uttam Bhosale and Rajesh Pachare and several ladies, had given

it in writing admitting about illicit relationship between him and the appellant. According to the respondent, after this, the appellant along with their daughter Aarti, left the matrimonial home accompanying Ashok Saini. On the contrary, according to the appellant, she was driven out of the matrimonial home on 28/06/2001. The case made out by the respondent is that the appellant developed illicit relation with Ashok Saini from the year 1999. Ashok Saini used to visit the house of the respondent in his absence and the appellant and Ashok Saini had gone to Sarthak Lodge at Karjat on 21/01/2001 and 14/02/2001 where they had physical relations. Although the respondent claimed that he has documentary proof about the appellant and Ashok Saini having visited and stayed at Sarthak Lodge, no such evidence is produced on record. Thus, we are left with the rival versions given in their evidence. Admittedly, Aarti Bhosale is staying with the appellant while Avinash Bhosale is staying with the respondent. There is also evidence of Sukanya Karande, Aparna Bhalerao, who were the office bearers of Jagruti Mahila Mandal. Admittedly, the appellant was also a member of the said Mahila Mandal.

15. It would be necessary to refer to the evidence of Avinash, on which the Family Court has placed heavy reliance. Avinash has stated that the relation between his father and mother were cordial. He states that when he was aged 15 years and studying in 10th standard, he noticed that his mother used to remain out of the house, most of the time, even during night, along with Ashok Saini. After he used to return home from school, he used to find Ashok Saini in their house along with his mother and his mother used to ask him to play outside. Even when he made a demand for serving food, she was asking him to come after some time. In the event he would not listen, his mother used to tell his father that he was playing outside the house for the whole day and she also used to beat him. He has stated that Ashok Saini used to come to their house and ask him about their mother. He further states that whenever he would say that he does not know, where his mother is, Ashok Saini used to get angry and some times, also used to beat him. Avinash has stated that Ashok Saini used to tell him that his mother was his (Ashok Saini's) wife and the children are begotten to her from him (from

(Ashok Saini). Ashok Saini also used to inform him that on the previous day, his mother was with him for the whole day. He states that children in the locality used to tease him saying that he was Ashok Saini's son. Avinash has gone to the extent of saying that when he told his mother about the children in the locality teasing him, his mother used to ask him to ignore the same "as whatever the children were saying was correct and a fact". He further states that when he tried to convince his mother saying that whatever she was doing was not proper, his mother used to tell as to what she is supposed to do sitting at home in the night. He claims that his mother used to tell him that they will go and reside with Ashok Saini as Ashok Saini will provide all the luxuries of life, which they were not getting from his father (respondent). He claims that once Ashok Saini also told him that he and Aarti can reside along with him.

16. We find this part of the evidence to be not reliable and acceptable. The evidence in such cases has to be tested and appreciated on the touchstone of natural human conduct. It is unlikely that the person,

who has illicit relationship with a lady would tell her minor son that his mother was with him for the entire day and/ or that he is a child begotten to her from him. It is also not acceptable that a lady would tell her son admitting such relationship and asking the son to ignore the comments by the children saying that whatever they are saying is correct. We also find that the evidence about the appellant telling Avinash that they will go and reside with Ashok Saini to be highly improbable. Even when a lady ventures into such adulterous relationship, she would tend to keep this under wrap and would not openly tell her son that all that is being said is correct. It has come on record that Ashok Saini was residing in the same locality and he was married having two children. The Family Court has refused to accept that the evidence of Avinash smacks of tutoring for the reason that he has grown up and can understand things and is no susceptible to tutoring. We find that the evidence of Avinash smacks of exaggeration and has inherent improbabilities when tested on the touchstone of normal human conduct. If this is considered along with the fact that after the parties separated, Avinash was all along staying with his father, the possibility

of the evidence of Avinash being tainted on account of it being tutored, in our considered view, cannot be ruled out. As compared to Avinash, we find the evidence of Aarti to be quite natural and balanced. Although the Family Court has observed that Aarti used to be at school as her school was in the afternoon, it has come on record that her school timings were from 7.30 a.m. to 12.30 p.m. and she used to be back home by 1.30 p.m. She was attending tuition from 3.00p.m. to 5.00 p.m. Thus, had it been the case that the appellant used to spend time in her house with Ashok Saini, Aarti was a natural witness to any such incident. On a careful consideration of the evidence of Avinash and Aarti, we would prefer to rely on the evidence of Aarti than Avinash.

17. This takes us to the evidence of Aparna Bhalerao. She claims that from 1999, Ashok Saini used to visit the house of the respondent where the appellant and Ashok Saini would spend time behind closed doors. She also claims that both of them used to go out together and they were behaving "as husband and wife." She has, thereafter, deposed about the incident dated

28/06/2001, in which Ashok Saini had admitted in writing about illicit relationship between him and the appellant. She also claims that the appellant used to take tiffin for Ashok Saini and when Ashok Saini shifted from VTC ground, the appellant also accompanied him. In the cross-examination, this witness has stated that her house is in front of the house of Ashok Saini. She is not residing in the Chawl where the appellant and the respondent were residing. She has admitted that from her house, the house of the appellant and respondent is not visible. She has not made any complaint to the Mahila Mandal about the atmosphere in their family being spoiled on account of the relation between the appellant and Ashok Saini. She claims that affidavit was executed by Ashok Saini in the house of Ganesh Bhosale, the brother of the respondent. She had gone there "out of curiosity" to see "why Ashok Saini was called". She has stated that Ganesh Bhosale had called some other persons also. It was suggested to this witness that as Ashok Saini was residing with his wife and children, there was no occasion for the appellant to take a tiffin for Ashok Saini, which she denied.

18. The evidence of Sukanya Karande is more or less on the similar lines as that of Aparna Bhalerao. It was suggested to this witness that out of 'jealousy' between office bearers of Mahila Mandal that she is deposing false. The evidence on record clearly shows that Ganesh Bhosale along with Uttam Bhosale and Rajesh Pachare had called Ashok Saini from his residence in the Matunga Railway Quarters (where he had since shifted). It is also the evidence on record that there were several ladies, who had gathered at the place when Ashok Saini had admitted the illicit relationship in writing. We find that considering the circumstances in which the writing is said to be given, the possibility of it being a result of coercion, cannot be ruled out. That apart, we are of the considered view that such admission by a third person namely the alleged adulterer cannot bind or act to the detriment of the appellant. The Family Court has observed that Ashok Saini failed to enter into witness box to state that the writing was obtained under coercion. It is trite that the evidence pertaining to such a writing has to be considered as a whole and if there are sufficient circumstances, which have already come on record to indicate that Ashok Saini was called

from his house and in the presence of the some ladies from locality, who were the members of Mahila Mandal, the writing was said to be given, there is every possibility that it was an outcome of coercion. As noticed earlier, in any case, this cannot be used to the detriment of the appellant, to record a finding about the alleged illicit relationship. We find that no implicit reliance can be placed on the evidence of Aparna Bhalerao and Sukanya Karande.

19. We are conscious of the fact that direct evidence of such an adulterous relationship cannot be expected or insisted upon. The Family Court has relied upon the decision of the Supreme Court in the case of **N. G. Dastane Vs. Mrs. S. Dastane**, 1975(II) S.C. 326 in order to hold that grounds of divorce like desertion, cruelty and adultery need not be proved beyond reasonable doubt and can be proved by balance of probability or preponderance of probability. It has been held that where circumstances are such that they would lead a reasonable man to the conclusion that adultery must have been committed, the adultery can be inferred in such cases even from the "evidence of

opportunity." It is true that more often than not, in such cases, it is a matter of inference from the circumstantial evidence, whether there were any such illicit relationship and this can be proved on a preponderance of probability and even the evidence of opportunity would be sufficient to infer the existence of any such relationship. This presupposes that there is clear and acceptable evidence of such opportunity which alone can then lead to a reasonable inference about existence of such relationship. The analysis of the evidence as above, in our considered view, is not sufficient to establish the existence of such opportunity, so as to draw further inference about the existence of such relationship. We are not unmindful of the fact that adultery is easy to allege and equally difficult to prove. However, for this reason alone, the Court cannot act on the basis of evidence which is found to be unacceptable with inherent improbabilities. It has to be borne in mind that such a finding has serious consequences not only on the status of the marriage, but also of casting serious aspersions on the character and the dignity of an individual and, therefore, such a finding can be returned only where there is clear case

made out and there is circumstantial evidence produced, which would indicate the existence of such an opportunity which can lead to a reasonable inference about existence of such relationship. Such an inference and finding has to be based on evidence, which is natural and acceptable and one, which inspires confidence and not which is either fanciful or has inherent infirmities, which would entail such evidence being discarded.

20. We, therefore, find that the respondent has failed to establish by acceptable evidence that the petitioner, after solemnization of marriage, had voluntary sexual intercourse with Ashok Saini and finding to that effect, recorded by the learned Family Court cannot be sustained. As noticed earlier, the finding of cruelty is solely based on the finding of adultery and, therefore, the finding as to cruelty also cannot be sustained. We, therefore, answer the point nos. (i) to (iii) in negative.

21. In the result, the appeal is allowed. The

impugned judgment and decree is hereby set aside. The petition filed by the respondent is dismissed.

In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

A. S. OKA, J.

SMA