

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FAMILY COURT APPEAL NO.223 OF 2014

Mrs.Arti Jayaprakesh Yadav,
R/o. Mumbai.

Appellant

versus

Jayprakash Yadav, Mumbai.

Respondent

Mr.Prashant Aher for Appellant.

Mr.Aurup Dasgupta with Ms.Sheetal Shah i/by M/s.Mehta &
Girdharlal for Respondent.

CORAM : A.S.OKA AND P.D.NAIK, JJ.

DATE : 21st March 2016

ORAL JUDGMENT - (Per : A.S.Oka, J.) :-

1. The submissions were heard on the last date. Appeal was taken up for final disposal in view of the order dated 28th October 2014 passed by earlier Division Bench.

2. The Appellant is the wife and Respondent is the husband. The Appellant-wife has impugned the judgment and decree dated 18th July 2014 passed by the learned Principal Judge of Family Court, at Mumbai in a petition filed by the Respondent-husband. By the impugned judgment and decree,

the marriage solemnized between the Appellant-wife and the Respondent-husband on 9th May 2004 has been dissolved by a decree of divorce under Clauses i(a) and i(b) of sub-section 1 of Section 13 of Hindu Marriage Act, 1955 (for short "the said Act"). Under the same impugned judgment and decree, the custody of minor sons was ordered to be handed over to the Respondent-husband.

3. We may note here that the Appellant-wife along with her two minor sons filed a petition under section 125 of Code of Criminal Procedure, 1973 ('Code' for short) before the Family Court, at Mumbai. By a separate judgment and decree passed on the same date i.e. on 18th July 2014, the learned Principal Judge of the Family Court allowed the said petition filed by the Appellant-wife and her two minor sons. The learned Principal Judge directed the Respondent-husband to pay maintenance of Rs.1,500/- per month to the Appellant-wife, however, the order regarding maintenance in respect of two minor sons was not passed on the basis of the decree which is impugned in this appeal, by which custody of the minor children was ordered to be handed over to the Respondent-husband.

4. Before we advert to the submissions made across the bar, we must note here that the learned counsel for the Respondent-husband, on instructions of the Respondent-

husband, who is personally present in the Court, has stated that on the basis of the impugned judgment and decree, he has not disturbed the custody of minor children. On instructions, he states that as for all purposes, the custody of the minor children is with the parents of the Appellant-wife. In the event Appellant-wife desires to disturb the said custody, he will take out proceedings in accordance with law. He, however, states that at present, the parents of the Appellant-wife are permitting him to meet the minor children. The same arrangement may be continued. The Respondent-husband has also tendered an affidavit-cum-undertaking affirmed today. The undertaking is that in the event the decree of divorce is confirmed by this Court, he shall continue to pay without any default the maintenance amount payable under the judgment and order dated 18th July 2014 passed in a petition filed by the Appellant-wife under section 125 of the Code.

5. A brief reference to the averments made in the petition for divorce filed by the Respondent-husband will be necessary.

6. As narrated earlier, the marriage between the parties was solemnized on 9th May 2004 in accordance with the Hindu wedding rights. The marriage was solemnized at Azamgarh in Uttar Pradesh. There are various averments made in the petition filed by the Respondent-husband stating that initially

the matrimonial life was normal. In fact, he stated that till the date of birth of the first child on 2nd November 2006, everything went on smoothly. It appears that dispute started thereafter. On 21st June 2008, the Appellant-wife delivered second male child. We must note that in the petition, it is averred that in January-2008, the Respondent-husband lost his grandfather who was residing at the native place. At that time, the parties were residing in their matrimonial home at Mumbai. It is alleged in the petition that though the Respondent-husband requested the Appellant-wife to visit the native place to participate in the ceremony of funeral of his grandfather, the Appellant-wife refused to do so. It is alleged that the Respondent-husband proceeded to his native place along with his parents and the Appellant-wife proceeded to her father's house at Kurla, Mumbai. It is alleged that for a period of six to seven months, the Respondent-husband continued to stay at his native place in Uttar Pradesh and during the said period, he was in regular contact with the Appellant-wife.

7. It is alleged that when the Respondent-husband came back from his native place in July-2008, he went to his in-laws located at Kurla. It appears that according to the case of Respondent-husband, when the Appellant-wife was admitted for delivery of second child, her father has taken a sum of Rs.8,000/- from Respondent-husband's father towards hospital charges. It is stated that when the Respondent-husband's father

went to Kurla to bring back the Appellant-wife, she refused to accompany him on the ground that the new born child was too small. It is alleged that when second child was five to six months old, he suffered burn injuries and therefore, was hospitalized. It was alleged that the Respondent-husband's father paid the hospital charges. It is alleged that there was a demand of Rs.25,000/- by the Appellant-wife to the Respondent-husband's father. It is further alleged that thereafter the Appellant-wife came back to her matrimonial home only with the elder son. She did not bring younger son and kept him at her parents' home. When Appellant-wife was asked as to why she did not bring with her the younger child, her reply was that she will bring the younger son only after payment of Rs.25,000/-.

8. It is alleged that after her return to the matrimonial home, the Appellant-wife started creating nuisance. She took up small issues for quarrel. It is alleged that the Appellant-wife started beating her elder son. When the Respondent-husband intervened, the allegation of the Respondent-husband is that the Appellant-wife assaulted him with bread stick. When she was questioned, she proceeded to Police Station and she called her father to Police Station and it is alleged that the Respondent-husband and his parents were taken into custody by the Police and kept in police lock-up. It is alleged that when they were in police lock-up, at 2 a.m; the Appellant-wife visited the matrimonial home and took away all her belongings.

9. The allegation in the petition is that in February-2009, the Respondent-husband's father made one more effort to bring back the Appellant-wife by visiting her parents residing at Kurla. However, she refused to come back. It is alleged that in fact a meeting was arranged with the Appellant-wife and her parents in the presence of respectable members of the society. However, the Appellant-wife was adamant and was not willing to come back to the matrimonial home. It is alleged that even thereafter repeated efforts were made by the Respondent-husband and his father but the Appellant-wife continued to be adamant and non co-operative.

10. It is alleged that since the beginning, the Appellant-wife has not performed her duty as a faithful wife. It is alleged that for a period of three years or more since the marriage, the marriage could not consummate due to non co-operation on the part of the Appellant-wife.

11. A specific allegation of cruelty in paragraph 16 is made wherein it is alleged that the Appellant-wife was cruel mainly with the Respondent-husband. It is alleged that initially the Appellant-wife deprived the Respondent-husband the pleasures of matrimonial life. The decree of divorce was sought both on the ground of cruelty and desertion.

12. The Appellant-wife filed written statement and contested the petition filed by the Respondent. She relied upon the petition filed by her under section 125 of the Code. The allegations made by the Respondent-husband in the petition have been denied. It is her case that in fact the Respondent-husband treated her with cruelty. Her contention is that in September-2007, she came back to the matrimonial home on her own volition notwithstanding the trauma and ill-treatment which she had undergone. She stated that she took this decision considering the future of her children. She stated that in January-2008, she did not accept the request of the Respondent-husband to visit the native place in Uttar Pradesh as she was already pregnant at that time. The allegations made by the Respondent-husband regarding the amounts paid by his father to the Appellant-wife's father have been disputed in the written statement. All other allegations have been denied by the Appellant-wife. It is alleged that the father of Respondent-husband never visited her parents home in February-2009. In paragraph 19 of the written statement, she reiterated her allegation of the Respondent-husband treating her with cruelty. She contended that though she admitted that she resided away from matrimonial home, the Respondent-husband created a situation which forced her to reside away from her matrimonial home.

13. The Appellant-wife and Respondent-husband examined themselves. No other witness was examined by them. As stated earlier, by the impugned decree, divorce was granted both on the ground of cruelty and desertion.

14. Learned counsel for the Appellant-wife has taken us through the findings recorded in the impugned judgment. He pointed out that even going by the findings recorded by the learned Principal Judge of Family Court, at highest, what is alleged by the Respondent-husband constitute normal wear and tear in the matrimonial life. He submitted that taking the findings of the learned Principal Judge as correct, the decree of divorce on the ground of cruelty cannot be passed. As far as desertion is concerned, she submitted that there is no evidence adduced by the Respondent-husband to show any intention on the part of the Appellant-wife to desert him and that there was desertion for a period of more than two years. He states that if the entire evidence of the Appellant-wife and Respondent-husband is perused, the finding of desertion is totally uncalled for.

15. Learned counsel for the Respondent-husband supported the impugned judgment and decree. He pointed out that there is a clear admission by the Appellant-wife in her cross examination that she does not want to go back to her husband.

16. We have given careful consideration to the submissions. We have perused the documents and evidence on record.

17. As far as plea of desertion is concerned, the allegation made by the Respondent-husband is that when in January-2008 he along with his parents proceeded to his native place in Uttar Pradesh, the Appellant-wife who was pregnant at that time, went to her parents' house at Kurla and thereafter, she never returned. What transpired thereafter has been set out in the petition for divorce as well as in affidavit in lieu of examination-in-chief filed by the Respondent-husband. We must note here that the respective affidavits are substantially in terms of pleadings.

18. It is not disputed by the Appellant-wife that if not from January-2008, but at least from 21st June 2008, she continued to stay with her parents. It is not the case made out by the Appellant-wife that there was any overt act on her part to resume the cohabitation. She did not adduce evidence of her father.

19. We have perused the examination-in-chief of the Respondent-husband. The allegations of cruelty and desertion are in terms of the allegations made in the petition for divorce to which we have already made a reference. In the cross

examination of the Respondent-husband conducted by the advocate for the Appellant-wife, a suggestion was given in paragraph 22 that there was no dispute between the parties till the year 2008. The correctness of the said statement was accepted by the Respondent-husband. In the cross examination not even a suggestion was given to the Respondent-husband by the advocate of the Appellant-wife that any effort was made by the Appellant-wife to resume cohabitation, but the Respondent-husband either refused or was not interested. All this will have to be considered in the context of the affidavit in lieu of examination-in-chief of the Appellant-wife and the cross examination conducted by the advocate for Respondent-husband.

20. It will be necessary to make a reference to material part of the cross examination of the wife in paragraphs 21 and 23 on pages 157 and 158 of the paper book, which read thus :

"21. My husband used to assault me. I had complained about it to my parents and his parents. I am residing separately from my husband since 2009. I did not make any effort to go back.

22. I left my parents' house in November 2012. My father threw me out of his house, as if I reside there, my brother and sister will not be able to find a match. It is not true to say that, I was thrown out, as I was going for job and coming late. My children reside with my parents. They are eight and seven years old respectively. Their maintenance amount, upon receiving, is given to my parents. It is not true to say that, I am employed.

23. I do not want to go back to my husband. *I want my children's custody. It is not true to say that, I had demanded Rs.25,000/- from my husband. It is not true to say that, I have taken all my belonging from his house."*

(Underlines supplied)

Thus, there is a categorical admission in paragraph 21 by Appellant-wife that she was residing separately from Respondent-husband since the year 2009 and that she did not make any effort to go back. Moreover, in paragraph 23, the Appellant-wife accepted that she does not want to go back to her husband. This will have to be appreciated in the context as to what is stated in paragraph 22 by her. She has stated that in November-2012, she was thrown out by her own father from his house on the ground that if she continues to stay with him, the prospects of marriage of her brother and sisters will be adversely affected.

21. Thus, it is an admitted position even going by the evidence of the Appellant-wife that she was residing separately from her husband since 2009. Further she accepted that she never made any effort to go back to her husband and that she does not intend to go back to Respondent-husband. Moreover, her claim is that since the year 2012, she is not even residing with her parents and only her children are with her parents. The statements made in cross examination in paragraphs 21 to 23 are more than sufficient to reach conclusion that it was the

Appellant-wife who deserted the Respondent-husband since 2009 and that she made no efforts to resume the cohabitation as she did not intend to resume cohabitation.

22. In paragraph 17 of the impugned judgment, the learned Principal Judge of the Family Court has recorded precisely the same finding based on the admitted position that the Appellant-wife is residing separately from the year 2009 and she has categorically stated in cross examination that she does not intend to go back and reside with Respondent-husband.

23. The petition for divorce was filed by the Respondent-husband on 17th April 2013. Thus, there was a desertion for a period of more than two years. Therefore, the finding recorded by the learned Principal Judge in the impugned judgment on issue no.2 of desertion calls for no interference and the impugned decree of divorce deserves to be confirmed on the ground of desertion.

24. Now we come to the allegation of cruelty. It will be interesting to note that the finding recorded by the Principal Judge in paragraph 22 of the impugned judgment which reads thus :

"22. From this entire evidence on record, I find that it is word against word. The petitioner's evidence goes to show that the same is ordinary wear and tear of marriage and no.

serious act has been done by the respondent. It is brought on record that there are complaints to the police made by the respondent against the petitioner. That has not been elaborated or pointed out to me."

(Underline supplied)

In paragraph 26, the learned Principal Judge has observed thus :

"26. The fact that the respondent has expressed to the petitioner that she does not like him and she does not want to reside with him has gone unchallenged helps this Court to arrive at a conclusion that the respondent by her act and implication as well as from what she has told the petitioner that their marriage cannot survive, I hold that the petitioner has proved that the respondent has committed cruelty against him. I, therefore, answer Issue no.1 in the affirmative."

(Underlines supplied)

On conjoint writing of the findings recorded in paragraphs 24 and 26, the learned Principal Judge of Family Court after holding that cruelty has not been proved by the Respondent-husband, proceeded to dissolve the marriage presumably on the basis of total break down of the marriage. Law on this aspect is very clear which is laid down by several decisions of the Apex Court. One such decision is in case of **Savitri Pandey Vs. Premchandra Pandey**¹. The law is that unless any of the grounds in sub-section (1) of Section 13 of the said Act are established, a decree of divorce cannot be passed only on the ground of irretrieval break-down of marriage. Therefore, even taking the findings recorded by the learned Principal Judge of

¹ (2002)2-SCC-73

the Family Court as correct, in our view, a decree of divorce could not have been passed on the ground of cruelty and therefore, the findings recorded by learned Principal Judge on issue no.1 of cruelty cannot be said to be legal.

25. As far as the custody of minor children is concerned, apart from the statement made by the advocate for the Respondent-husband which is recorded above, we find that the finding recorded by learned Principal Judge cannot be sustained. The learned Principal Judge in paragraph 29 has observed thus :

"... .. It is astonishing to note that the respondent has been thrown out from the father's house in 2012 as her father thinks that keeping her at his residence would be a deterrent for her younger brother and sister to get married and also because he cannot afford to keep her. It is admitted by her that she is residing separately as her father has thrown her out, since 2012. According to the husband, she is residing with another man, hence her father has thrown her out."

26. In view of this finding, we have again carefully perused the cross examination of the Appellant-wife. Though in paragraph 22 which is quoted above she has accepted that her father threw her out of house, in the cross examination, even a suggestion is not given that her father threw her out of his house on the ground that she is residing with another man. However, we find that the learned Principal Judge was impressed by this allegation made by the Respondent-husband.

In paragraph 30, the learned Principal Judge has stated that there is not even a prayer made for permanent custody by Respondent-husband. The learned Principal Judge went on to the extent of observing that though there is no specific prayer made, she intends to disturb the custody by going "out of way". The learned Principal Judge has recorded a finding that the father of the Appellant-wife is not a fit person to have the custody of the boys. The father of the Appellant-wife was not before the Court. In fact, in paragraph 25 of the impugned judgment, the learned Principal Judge has recorded a finding that the Appellant-wife's father practically kidnapped the elder son when he was six months old. Thus, the findings recorded by the learned Principal Judge against wife's father was unwarranted and could not have made considering the scope of the petition. Moreover, there was no occasion for the learned Principal Judge to pass an order disturbing the custody of the minor children inasmuch as admittedly no such relief was sought by the Respondent-husband in his petition. Therefore, that part of the impugned decree will have to be set aside.

27. We must note here that maintenance to the minor sons is denied by the learned Principal Judge of Family court in petition filed by the Appellant-wife under section 125 of the Code only on the ground that custody of the minor sons was with their grand parents. In view of the findings which we have recorded on the issue of custody, needless to add that it will be

open for the Appellant-wife to take out appropriate proceedings for challenging the judgment and order dated 18th April 2014 passed in Petition No.E513 of 2009 or for modification thereof. The contentions of the Respondent-husband in the proceedings which may be taken by the Appellant-wife are expressly kept open.

28. Hence, we pass following order :

(a) The decree of divorce passed under Clause i(a) of sub-section 1 of Section 13 on the said Act on the ground of cruelty is hereby quashed and set aside. However, the decree of divorce passed under Clause i(b) of sub-section 1 of Section 13 of the said Act is hereby confirmed;

(b) Clause (3) of the operative part of the impugned judgment and decree is set aside with liberty to the Respondent-husband to adopt appropriate proceedings in accordance with law;

(c) The statements made by the Respondent-husband through his learned counsel which are recorded in paragraph 4 above, are accepted. The undertaking tendered today by the Respondent-husband is taken on record and marked "A-2" for identification. The said undertaking is also accepted;

(d) The appeal is accordingly partly allowed in above terms;

(e) Considering the peculiar facts of the case, there shall be no order as to costs.

(PD.NAIK, J.)

(A.S.OKA, J.)

MST