

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

**Family Court Appeal No.7 of 2013
With
Civil Application No.3167 of 2015
And
Family Court Appeal No.8 of 2013
With
Civil Application No.7159 of 2013**

Gajendra s/o Namdeo Mohite,
Age 33 years, Occu: Private Service,
R/o Flat No.R-304, Gate No.4,
"Roseland Residency",
Near Kunal Icon, Pimple Soudagar,
Pune, Taluka and District Pune.

.. Appellant.

Versus

Asmita w/o Gajendra Mohite,
Age 30 years, Occu: Not known,
R/o. At present C/o Prabhakar Wagh,
"Shivneri", Satyam Nagar, N-5,
CIDCO, Aurangabad,
Taluka and District Aurangabad.

.. Respondent.

Shri. R.S. Deshmukh, Advocate, for appellant.

Shri. R.V. Gore, Advocate, for respondent.

**Coram: T.V. NALAWADE &
S.M. GAVHANE, JJ.**

Date : 8 SEPTEMBER 2017

JUDGMENT (Per T.V. Nalawade, J.):

1) Both the appeals are filed by the husband. Family Court Appeal No.7/2013 is filed against the decision given by the Family Court Judge, Aurangabad in Petition bearing No. A-233/2011 which was filed by the husband for dissolution of the marriage under the provision of section 13(1)(iii) of the Hindu Marriage Act, 1955. The petition is dismissed by the trial Court. Family Court Appeal No.8/2013 is filed against the decision given in Petition bearing No. A-449/2011 by the same learned Judge in favour of the wife by which a decree of restitution of conjugal right is given under section 9 of the Hindu Marriage Act, 1955. The trial Court has decided both the petitions by common judgment. Both the sides are heard.

2) The marriage between the parties took place on 25-6-2007. They have one son who was born on 12-7-2009. The petition for divorce was filed by the husband on 18-7-2011 and the wife filed the proceeding under section 9 of the Act on 30-12-2011.

3) The husband is employed in a software company from Pune and he is B.E., M.B.A. The wife is B.Sc. (Computer) and M.C.A. It was arranged marriage. At the time of marriage the wife was also working in one software company from Aurangabad. She started cohabiting with the husband in Aurangabad in a house where the husband and his mother were living. The husband used to come to Aurangabad on Saturday and Sunday. It appears that for some time before filing of the proceedings they had cohabited at Pune.

4) For making out the ground of mental disorder, the husband had made following contentions:

(i) The wife was not doing any household work and her conduct was showing inconsistency;

(ii) she preferred to have lonely life and she was not mixing up with relatives and others. They had tried to convince her to keep social contacts but she avoided to do it;

(iii) she had developed forgetfulness and on one occasion in October 2008 when she went to beauty parlour due to insistence of mother-in-law, she left two gold rings in the beauty parlour and

after returning home the mother-in-law guessed that probably she had left the rings in the beauty parlour and the rings were found there. In similar manner she used to bring bag of flour belonging to others from the flour mill in stead of bringing own bag. Similarly she was not able to remember the roads from Aurangabad to Pune and she was not able to quote or remember songs of movie which was seen by her in theatre;

(iv) in the night time she used to talk with herself and many times she used to talk with presumption that son Anish was sitting by her side when he actually was not by her side;

(v) in March 2008 when a sister of the wife namely Vaishali had come to the house of the husband for staying there for few days with her 2 year old son, the wife had not opened the door even when the door bell was kept ringing by the sister for some time. When door was opened by the mother-in-law and she questioned the wife as to why she had not opened the door, she started quarreling with the mother-in-law and even rushed at her. When Vaishali tried to intervene she was also insulted by the wife. On the next day when husband of Vaishali learnt about the incident and asked the wife, the respondent to say sorry she refused to say sorry;

(vi) she used to pick up quarrels with Kavita, the wife of her brother-in-law and she used to unnecessarily say that Kavita was not pregnant but she was pretending to be pregnant;

(vii) on 9-4-2011 when the mental condition of the wife was found to be much disturbed the father of the wife and the husband decided to take her to psychiatrist Dr. Kale, she picked up quarrels by saying that she was not insane and near the dispensary of Dr. Kale she started shouting and saying that she was ready to go to Dr. Vaidya. After returning from there she took the key of the four wheeler by saying that she wanted to have outing and when the husband tried to prevent he she started running here and there;

(viii) on 11-4-2011 when husband came to Aurangabad by taking leave of 8 days and when he expressed that he was returning Pune she insisted that he should not return to Pune and she would not allow him to go to Pune. When the husband left home and when he was in the bus proceeding to Pune and when he contacted her by saying that he was proceeding to Pune she did not believe it and she made search for the husband in the house and the courtyard;

(ix) in June 2011 she tried to tutor her son not to keep contact with her mother-in-law;

(x) she did not like to leave home and go for outing. To avoid public contact she refused to participate in *Bhishi* which was planned by some ladies at Pune.

5) It is the case of the husband that due to aforesaid conduct of the wife he had taken the wife to Dr. Kaile, Dr. Vaidya and Vishwa Multispeciality Clinic and the experts have given opinion that she is suffering from mental disorder and she is not able to perform matrimonial obligations. It is his case that she is not able to take care of her own issue also and there is danger to the issue, the husband and other members of the family of the husband from her. It is the case of the husband that due to mental condition of the wife he cannot be expected to live with her and so he is entitled to get divorce.

6) The wife has denied the aforesaid allegations made against her. She has contended that only to get divorce the husband has made false allegations. She has

denied that she was taken to Dr. Kale, Dr. Vaidya and the aforesaid Vishwa Multispeciality Clinic for treatment and she has received treatment from those psychiatrists.

7) It is the case of the wife that the mother of the husband is aged about 70 years and she has undergone bypass operation of heart and she is not in a position to do any household work. It is the contention of wife that she was doing all the household work in the matrimonial house and she was taking care of her issue. It is her case that even when she was required to take care of the son and she was required to do household work, on many occasions her mother-in-law and sister-in-law picked up quarrels and they used to make false allegations against her. It is her contention that she is highly educated lady and for some time she was in service also but only to take care of the household work and the family she left the job. It is her contention that she is ready to resume cohabitation and only for getting divorce the husband has made false allegations. By making such contentions she had prayed for relief of decree of restitution of conjugal rights.

8) Before the Family Court both the cases were heard together and common evidence was given. The issue of mental disorder was framed in divorce proceeding and the issue of refusal to cohabit; neglect and withdrawal from the society was framed in the proceeding filed for restitution. Both the issues are answered against the husband by the trial Court. The entire evidence given by the husband is considered by the trial Court. The wife examined herself to give evidence in rebuttal in divorce proceeding and the manner in which she faced the cross examination is considered by the learned trial Court Judge. The evidence of two doctors examined by the husband is not believed by the trial Court.

9) The divorce is claimed by the husband on the ground given in section 13(1)(iii) of the Hindu Marriage Act, 1955. The section runs as under :

13. Divorce- (1) Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion ; or

(iii) has been incurably of unsound mind, or has suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation- In this clause-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or

10) The aforesaid provision shows that there are two separate grounds in the provision viz. (a) incurable unsound mind; and, (b) respondent spouse has been

suffering continuously or intermittently from mental disorder and the disorder is of such kind and of such extent that the petitioner cannot reasonably be expected to live with the respondent.

11) From the wording of the aforesaid provision it can be said that the mental condition like incurable unsound mind mentioned in the first part or the mental disorder mentioned in the second part needs to be proved by expert evidence and that evidence needs to satisfy the Court that such mental condition exists. From the wording of the provision it can be said that the second part of the provision has wide scope. For this part, it is not necessary that mental disorder is incurable. However, the mental disorder must be of such kind and extent that the Court needs to be satisfied that it is not advisable to ask the petitioner to live with the respondent. The scope shows that there is no limit to the kind of mental disorder as no specific kind is mentioned. However, the term "has been suffering" shows that the period of illness must not be too short or the petition should not be based on one or two instances showing such mental disorder. The term

"intermittently" cannot be misread in this provision to infer that the mental illness returns after the treatment within few days. The term "extent" is also important and on that also the Court needs to be satisfied to come to the conclusion that the petitioner cannot be reasonably expected to live with the husband. Thus the relief is discretionary and while using discretion, the Court is expected to keep in mind the aforesaid things.

12) The burden to prove mental disorder mentioned as second part of the aforesaid provision or the burden to prove incurable unsound mind lies on the party who seeks to use the ground. As expert like psychiatrist is available, the Court is expected to consider the opinion given by the said expert on the mental condition.

13) Psychiatrist is an expert but in view of provision of section 45 of the Evidence Act, it is up to the Court to either rely on the opinion or to refuse to do so. Further, he being a witness, his credibility can be impeached like the credibility of any other witnesses and his veracity can be tested as provided in section 146 and other provisions of

Evidence Act. As psychiatrist is expected to give evidence on the basis of the examination of the patient done by him, the symptoms noted by him, the treatment and the follow up treatment given by him and the record created by him needs to be considered both for corroboration and contradiction purpose. In such a case the evidence of other witnesses or the circumstances which relates to the behaviour of the respondent can be considered by the Court as that can help strengthening the opinion or create probability that the opinion has no justification and it is weak.

14) The aforesaid principles with regard to the provision need to be kept in mind while appreciating the evidence given by the two doctors and other witnesses in the present matter. It also needs to be kept in mind that the trial Court is in a better position to appreciate the oral evidence of the witness. It is already observed that both the husband and the wife are highly educated persons and after marriage they got one issue within one and half years of the marriage and the issue is living with the wife. This circumstance also needs to be kept in mind.

15) The manner in which the mental disorder needs to be proved requires the consideration of the expert evidence first. Dr. Kale is a psychiatrist from Aurangabad. He has deposed that the respondent was brought to him for treatment on 31-3-2011 first time by her husband. He has mentioned the complaints in respect of behaviour like (i) being withdrawn, (ii) at times getting irritated and hostile; and (iii) showing abnormal behaviour in the form of suspiciousness about family members and not taking care of the child. Dr. Kale (PW 4) has deposed that when he started making inquiry, the wife became angry and she refused to cooperate and answer the questions. He has deposed that she had staring looks, she also avoided eye to eye contact and on that basis he had made diagnosis of psychosis and had prescribed medicines. He has deposed that he reexamined her on 7-4-2012 and noticed that there was marginal improvement but there were symptoms of psychosis. He has deposed that he re-examined her on 16-4-2012 and 19-4-2012 also and he advised to increase the duration of the prescribed treatment. According to him, she needs regular treatment. In his evidence only one document is proved at Exhibit 56.

16) It is already mentioned that the respondent-wife has denied that she had taken treatment of Dr. Kale. The document at Exhibit 56 is dated 31-3-2011 and some subsequent dates are mentioned of follow up treatment like 7-4-2012, 16-4-2012 and 19-4-2012. It is already observed that since 18-6-2011 the wife has been living with her parents and this fact is admitted. It is also admitted by the husband that after 18-6-2011 there was no occasion for him to take the wife to any doctor. In spite of that Exhibit 56 shows that in the year 2012 on three occasions it is shown that the wife was taken to this doctor. The evidence of the husband was recorded in the Family Court before examination of the doctor and it can be said that during cross-examination when it was suggested to the doctor that in the year 2012 the wife had never come to him, he admitted it and he tried to give excuse that entries of 2012 were wrongly made by him.

17) Dr. Kale (PW 4) gave oral evidence mainly on Exhibit 56 which is described as OPD paper. Medical Practitioner is expected to maintain OPD register but such register was not brought by him. In the cross examination

Dr. Kale admitted that on 19-4-2011 the husband had come to him and on the basis of the information supplied by the husband he had prepared Exhibit 56. On this paper even address of the wife is not mentioned but mobile number of the husband is mentioned. Thus when the case paper ought to have been prepared on the first visit i.e. in March 2011 the doctor says that it was prepared on 19-4-2011 (in the examination-in-chief it is stated as 19-4-2012) and that was prepared for the husband and it was handed over to the husband. These circumstances have created serious doubt about the evidence given by Dr. Kale and these circumstances are considered by the trial Court against the witness.

18) Dr. Amit Tak (PW 5) is examined by the husband as another psychiatrist. He has given evidence on the basis of few prescriptions, the receipts of the payment made to Vishwa Multispeciality Clinic Pune. The prescriptions are proved at Exhibit 60 dated 8-6-2011, at Exhibit 61 dated 30-5-2011 and one certificate is proved in his evidence at Exhibit 62. Two receipts of payment are also exhibited showing that on 28-6-2011 payment of

Rs.400 was made and on 4-7-2011 payment of Rs.500 was made. Here only it needs to be mentioned that the husband has admitted that since 18-6-2011 the wife is living separate from him. But Exhibit 64 shows that the receipt was issued on 4-7-2011. There is no paper of diagnosis like prescription dated 4-7-2011. Similarly the receipt at Exhibit 63 is dated 28-6-2011 when the wife was living with her parents and the husband admits that he had no occasion to take the wife to any doctor after 18-6-2011.

19) The certificate at Exhibit 62 is shown to be issued on 4-6-2011. But there is no record like case paper showing that on 4-6-2011 the wife was taken to the aforesaid clinic. No case paper at all is produced with regard to the prescriptions which are given exhibits in the evidence of the doctor. The doctor has tried to say that he had examined the wife and then he had prescribed the medicines. Like in the case of Dr. Kale, in the present matter also there is clear probability that it is the husband at whose instance the doctor created this record and probably behind the back of the wife. This doctor had also

not brought the original record from any hospital or the aforesaid institution. The evidence of this doctor shows that the certificate at Exhibit 62 relating to mental condition was issued by him on the request made by the husband and the husband had not given any reason for obtaining said certificate. Though some prescriptions are produced, there is no record to show that said medicines were purchased by using the prescriptions. These circumstances have created serious doubt about the evidence of Dr. Amit Tak. By discussing these circumstances, the trial Court has refused to place reliance on the evidence of this doctor and the aforesaid record.

20) The evidence of the aforesaid two doctors does not show that they had formed opinion that the unsoundness of the mind is incurable. Due to absence of original record and anything showing that the wife had really visited the clinic or the hospital of the aforesaid two doctors it is not possible to believe that the wife had taken the treatment from these two doctors. There is clear probability that it is the husband at whose instance the

record is created. It was created within 3 to 4 months starting from March 2011. The evidence of Dr. Tak does not show that it was informed to him that the patient was already under the treatment of Dr. Kale. This circumstance also shows that the husband created said record for its use in the proceeding like divorce. The Family Court has considered one more circumstance in this regard. In paragraph 8 of the petition the husband has mentioned that when he had taken the wife to the dispensary of Dr. Kale, the wife had refused to get examined from Dr. Kale and she had insisted that she should be taken to Dr. Vaidya and accordingly she was taken to Dr. Vaidya. In the pleadings it is not specifically mentioned that Dr. Kale had examined the wife and he had given treatment to the wife. This circumstance also cannot be ignored. Dr. Vaidya is not examined when it is mentioned in the pleadings that the treatment of Dr. Vaidya was given. Dr. Kale is examined when there is no pleading that Dr. Kale had given treatment. There is a mention of Vishwa Multispeciality Clinic in the pleadings but the name of Dr. Tak (PW-5) is not mentioned in the pleadings. This circumstance also cannot be ignored in

view of the nature of evidence given by these two doctors. This Court has no hesitation to hold that the trial Court has not committed any error in refusing to place reliance on the evidence given by these two doctors.

21) When there is no expert evidence for proving incurable unsoundness of mind or mental disorder as described in the aforesaid provision, the other evidence cannot help the husband in any way to get divorce on the ground mentioned in the aforesaid provision.

22) Even if the evidence given by the husband and his witnesses is considered separately, that evidence has not created any probability of incurable unsoundness of mind and also mental disorder of the nature described in the section. It can be said that the husband was living for most of the time in Mumbai and Pune and occasionally he visited Aurangabad when he used to stay with the wife. They got one issue out of this wedlock and it can be said that most of the allegations in respect of the behaviour of the wife are on the basis of the incidents allegedly disclosed to the husband by his relatives like mother. The

allegation that she was preferring to live alone, she had forgotten few articles, she did not remember the songs of the movie which she had seen or some instances of quarrels cannot create probability that they were treated as symptoms of mental disorder and the husband had taken them seriously. The main witness who could have given evidence on the behaviour of the wife was the mother of the husband but she is not examined by the husband. Only the mother was having the company of the wife for most of the time. Some witnesses like Shankar Gavhane, husband of sister of the appellant, Kalpana Patil, sister of the appellant are examined to prove the contentions. Their names were not mentioned in the pleadings but they are examined. Even in the affidavit filed as examination-in-chief, exaggeration is done by Shankar by saying that the wife was suffering from such illness from her childhood. There was no possibility for him to have personal knowledge about any incident and his evidence shows that it is very vague and only one incident in which the wife kept herself away from the company is mentioned. Kalpana has given evidence on one or two instances but they were of May 2010 and they

were of the nature of usual grievances of ladies against each other.

23) The trial Court has observed on the basis of the oral evidence given by the wife that, there is nothing on the basis of which even suspicion can be created about mental fitness or the mental condition of the wife. It is already observed that due to absence of convincing expert evidence the divorce could not have been given by the trial Court and so the other evidence need not be discussed in detail.

24) When the husband has made the allegation or the contention of the aforesaid nature against the wife, it can be inferred that he has no intention to resume cohabitation. It can be said that the husband has withdrawn from the company of the wife and there is no justifiable reason for the same. In view of these circumstances, there was no other alternative before the trial Court than to give decree of restitution of conjugal right in favour of the wife. This Court sees no reason to interfere in the decision given by the Family Court. In the

result, both the appeals needs to be dismissed.

25) Civil application is filed by the wife for granting interim maintenance in her favour. In the trial Court after considering the financial condition and status of parties interim maintenance at the rate of Rs.10,000/- per month was granted which was not challenged by husband. So, the interim maintenance at the same rate needs to be granted. In the result, following order :-

- (i) Both the appeals stand dismissed.
- (ii) Civil Application No.3167 of 2015 filed in Family Court Appeal No.7 of 2013 is allowed. The husband is directed to pay interim maintenance of Rs.10,000/- (Rupees Ten Thousand) per month to the wife. The maintenance amount of Rs.10,000/- per month is to be given to the wife from the date of filing of the application till final disposal of the appeal. Civil Application No.7159 of 2013 in Family Court Appeal No.8 of 2013 is rejected.

Sd/-
(S.M. GAVHANE, J.)

Sd/-
(T.V. NALAWADE, J.)

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