

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

**Family Court Appeal No. 19 of 2017
With
Civil Application No.5955 of 2017**

Karuna @ Vishakha w/o Abhayraj Hanmante,
Age 43 years, Occupation : Household,
R/o C/o R.B. Horshil, Jai Mahalaxmi Nagar,
E-1, Gaikwad Mala,
Behind Regimental Talkies, Nashik Road,
Nashik. **.. Appellant.**

Versus

Abhayraj s/o Shankar Hanmante,
Age 48 years,
Occupation : Legal Practitioner,
R/o 1222, Sai Nagar, N-6 CIDCO,
Aurangabad. **.. Respondent.**

Ms. Pooja V. Langhe, Advocate, for appellant.

Shri. Satish M. Godsay, Advocate, for respondent.

**Coram: T.V. NALAWADE &
A.M. DHAVALÉ, JJ.**

Date: 3 October 2017

JUDGMENT (By T.V. Nalawade, J.)

1) The appeal is admitted. Notice after admission made returnable forthwith. Heard both the sides by consent for final disposal.

2) The appeal is filed by the wife against the judgment and decree of Hindu Marriage Petition No. A-220/2010 which was pending in Family Court Aurangabad. The petition was filed by respondent husband under the provisions of section 13(1)(1a) of the Hindu Marriage Act, 1955 (Hereinafter referred to as "the Act") for dissolution of marriage. The petition was allowed by the trial Court and the marriage is dissolved. Initially by judgment and decree dated 26-9-2011 the petition of the husband was dismissed by the trial Court. The husband challenged the said decision in this Court by filing Family Court Appeal No.29/2011. By decision dated 22-8-2016 this Court had remanded the matter back to the trial Court for fresh trial and hearing on limited point. The matter was to be decided by the trial Court only on the ground or cause of action which had arisen, had become available to the husband after dismissal of Hindu Marriage petition No.210/2006, the previous petition filed by the husband for divorce.

3) Family Court Appeal No.29/2011 was partly allowed by this Court and direction was given with some

observations as follows :

"7. Naturally, if, the subsequent proceedings are based on same cause of action, then the present petition for divorce bearing Petition No.A-220 of 2010 was not maintainable in view of the dismissal of H.M.P. No.210 of 2006 for want of prosecution, more particularly when the said dismissal was U/O IX Rule 8 of the C.P.C. and the fresh proceedings on the same cause of action are barred in view of Order IX Rule 9 of the C.P.C. The marked distinction in the present proceeding bearing Petition No.A-220 of 2010 is that the petitioner is pleading cruelty on the ground that false criminal case was filed by the respondent U/Sec.499 and 500 of the I. P. Code and after trial present appellant has been acquitted in the said case. The said factum will have to be considered by the Family Court. Whether acquittal was on technical ground or any other ground, the effect of the same upon the case of the parties will have to be considered by the family Court while deciding the said petition. As the cause of action was subsequent to the dismissal of H.M.P. No.210 of 2006, certainly it was within the province of the Family Judge to consider the said ground of cruelty qua the cause of action arisen subsequent to the dismissal of the said earlier petition bearing H.M.P. No.210 of 2006. (*emphasis supplied by us*).

10. The impugned judgment and order is quashed and set aside. The parties are relegated before the Judge, Family Court, Aurangabad for deciding Petition No.A-220 of 2010 afresh. It is made clear that, the appellant is not entitled to raise ground of desertion and/or of cruelty, which was subject matter in H.M.P. No.210 of 2006 and only the Petition No.A-220 of 2010 shall be considered in respect of the cause of action arisen subsequent to the dismissal of H.M.P. No.210 of 2006.

11. As the parties have already led their evidence, the parties are not now required to adduce the evidence and the learned Judge of the Family Court shall hear the final arguments of the parties and

decide the same in view of the observations made herein above. The parties or their lawyers shall appear before the Judge, Family Court, Aurangabad on 06th September, 2016. Considering the fact that, the matter is remitted back and the matter is only required to be heard finally and decision given, the Judge, Family Court, Aurangabad shall endeavour to dispose of the petition expeditiously and preferably within a period of three (03) months from the date of appearance of the parties. Record and proceedings be sent back forthwith. The family court appeal partly allowed and disposed of. No costs."

4) Copy of the Hindu Marriage Petition No.210/2006 is on the record and this document shows that the petition was disposed of on 5-4-2008. Thus after the remand of the matter the husband was expected to make out a case on the basis of ground or circumstance which had become available to him after 5-4-2008. It can be said that in Petition No.220/2010 one new ground was added like disposal of private complaint filed by the wife bearing No.1413/2002 on 10-5-2010.

5) Some important dates and events need to be mentioned in view of the aforesaid directions given by this Court in the appeal. They are as follows :

Sr.No.	Date	Events
i	17-12-2000	Date of marriage.
ii	03/12/01	A daughter was born.
iii	29-4-2002	Notice through Advocate by husband demanding divorce.
iv	08/05/02	Reply by the wife to the notice dated 29-4-2002 through Advocate refusing to give divorce and asking the husband to withdraw the allegations made against her in the notice. In this reply she had offered to return to matrimonial house to resume cohabitation.
v	26-6-2002	Private complaint No.1413/2002 filed by wife against husband for offence of defamation punishable under section 500 of Indian Penal Code due to allegations made by the husband against her in the notice dated 8-5-2002.
vi	30-7-2002	Application No.100/2002 filed under section 125 of the Code of Criminal Procedure by the wife for herself and for daughter.
vii	29-6-2005	The decision of maintenance proceeding in favour of the wife and daughter.
viii	09/09/05	Criminal Revision filed by the husband challenging the decision of maintenance proceeding bearing No.100/2002.
ix	17-2-2006	Revision Petition filed by the husband partly allowed and the maintenance granted to the daughter reduced to some extent.
x	06/06/06	Hindu Marriage Petition No.210 of 2006 filed by husband for divorce in Nashik Court.

xi	05/04/08	Dismissal of Petition No.210/2006 by Nashik Court.
xii	10/05/10	Dismissal of private complaint No.1413/2002 filed by wife and acquittal of the husband in the said case.
xiii	12/08/10	Hindu Marriage Petition No. 220 of 2010 filed by the husband in Aurangabad Family Court for divorce, the present proceeding.

6) In view of the rival pleadings and the directions given in the aforesaid Family Court Appeal by this Court, issues were framed after remand of the matter by the trial Court as under :-

- "(1) Whether the petitioner proves that he being acquitted in the criminal case filed under Sec. 499 and 500 of I.P.C. by the respondent, amounts to cruelty ?
- (2) Whether the petitioner is entitled to dissolution of his marriage.
- (3) What order and decree ?"

7) The husband is practicing as Advocate in Aurangabad Courts. It is not disputed that the wife had gone to the house of her parents when she was pregnant. It is also not disputed that there was some complication

and due to that the wife was receiving treatment in Nashik and the husband had even given his consent for small operation performed on the wife in Nashik. On 3-12-2001 a daughter was born when the wife was living in the house of her parents.

8) In the evidence, the husband has admitted that he received anonymous letter on 31-8-2001 and due to the contents of this letter he became prejudiced. Whether the person who had given his name as a well-wisher in the anonymous letter is in existence or not was not confirmed by the husband. Without confirmation of anything from proper person, the husband had mentioned all the allegations which were appearing in the anonymous letter in the notice dated 29-4-2002 in which he had demanded divorce from wife. The allegations were with regard to chastity of the wife and the sender had informed that he had illicit relation with the wife. The sender had informed that even prior to the marriage of the wife, she had become pregnant from him and that pregnancy was terminated. The so called informer in the anonymous letter had expressed that probably the wife had again

conceived from him. In that letter the husband was advised to take divorce. Even when there were allegations of such nature in the so called anonymous letter the husband did not find it necessary even to confront the wife or make inquiry with proper person from the place where the wife was living before marriage. The husband is Advocate and it can be said that he used that portion in the divorce notice as he had intention to use that matter in divorce proceeding. By mentioning these allegations the husband had asked wife to go for divorce by mutual consent. When the letter was received on 31-8-2001 the husband has given evidence that after that letter he had gone to Nashik, the place of the parents of the wife and he had given his consent for operation and he wanted to take wife back to the matrimonial house. In spite of such oral evidence given by the husband, there is nothing on record like notice given by the husband to ask the wife to return to matrimonial house. Immediately after completion of about 4 months from the date of the birth of the daughter, the husband gave notice of divorce to the wife.

9) In the reply given by the wife to the aforesaid notice, wife had denied the allegations and she had expressed that mentioning of those contents in the notice was nothing but attempt on the part of the husband to defame her. The wife had also asked to tender apology and take her back to the matrimonial house. She had given time also for that to the husband. The husband did not respond to the reply given by the wife. It can be said that due to this conduct and approach of the husband, the wife was required to take some steps and those steps were available to her in law.

10) The husband did use the aforesaid anonymous letter for both divorce proceedings filed by him. This circumstance and mentioning of the contents of the anonymous letter in the divorce notice show that right from beginning the husband had intention to use the letter in Court proceedings, he wanted to publish the contents. The publication of these contents definitely amounts to defamation. The husband cannot claim excuse by saying that it was not his allegation but it was allegation made in anonymous letter. For this, the occupation of the husband

as an Advocate needs to be kept in mind.

11) The sequence of the events with dates is already mentioned. Due to the divorce notice given by the husband, the wife filed private complaint for offence of defamation. As the husband wanted to use that matter in divorce proceedings, it can be said that the wife had taken the steps advised by her counsel. The learned Judicial Magistrate First Class issued process in the said proceeding. Issuance of process is a judicial act and the Magistrate is expected to form opinion as to whether offence is made out or not. The case was decided after giving evidence and the Judicial Magistrate, First Class acquitted the husband by holding that mentioning of such imputation in the notice does not amount to publication of defamatory matter as required in section 499 of Indian Penal Code. Thus, acquittal is given by the learned Judicial Magistrate First Class by holding that one of the ingredients of the offence which is necessary for making out the offence is not made out.

12) The aforesaid discussion shows that the husband admits that he had sent notice to the wife in which the allegations which are defamatory were made. Due to this circumstance it cannot be said that the wife had filed false private complaint against the husband. Acquittal in the complaint is only the ground on which the husband is claiming divorce. The trial Court has considered not only the aforesaid private complaint but has considered other proceedings filed by the wife like proceeding filed for maintenance under section 125 of the Cr.P.C. and the proceeding filed under the Protection of Women from Domestic Violence Act, 2005. This approach of the trial Court is surprising. The husband was not ready to take wife to matrimonial house and so the wife had no other alternative than to take steps to enforce her rights. Such steps taken by the wife by no stretch of imagination can be called as willful ill-treatment given to the husband.

13) Learned counsel for the wife, appellant, placed reliance on the observations made by various High Court in some reported cases as follows :-

- (i) *Amit Kausik v. Monika Gaur* (2016(5) ALL MR 1.
- (ii) *Deeplakshmi Sachin Zingade v. Sachin Rameshrao Zingade* (AIR 2010 Bombay 16);
- (iii) *Chiranjeevi vs. Smt. Lavanya @ Sujatha* (AIR 2006 AP 269);
- (iv) *Sandip Gopinath Bhalke v. Aruna Sandip Bhalke* (2009 LawSuit (Bom) 1843);
- (v) *Ranjit Kaur v. Jaswant Singh* (FAO No.250-M of 2008 decided by High Court of Punjab and Haryana on 22-9-2009).

14) In some of the cases the High Court had held that filing of proceedings for maintenance or under the provisions of the Protection of Women from Domestic Violence Act, 2005 cannot give a ground of cruelty to the husband as the right is given to the wife under those provisions to take measures for her protection and maintenance. In one case the High Court has held that when acquittal is given on the ground of benefit of doubt, such acquittal cannot be used by the husband as a ground of cruelty and it cannot be said that false allegations were made by the wife. The present matter is on better footing. It is already observed that it cannot be said that the wife had made false allegations or she had filed false complaint against the husband.

15) Learned counsel for the respondent-husband has placed reliance on the following reported cases :-

- (i) *K. Srinivas Rao v. D.A. Deepa* (AIR 2013 SC 2176);
- (ii) *K. Srinivas v. K. Sunita* (2015(2) ALL MR 435 (SC));
- (iii) *Vinod Kumar v. Saraswathi* (2016(2) Mh.L.J. 1);
- (iv) *Samar Ghosh v. Jaya Ghosh* (2007 CJ (SC) 1025);
- (v) *Mangesh vs. Leena* (2016(2) Mh.L.J. 252);
- (vi) *Manoj vs. Vijaya* (2015(1) Mh.L.J. 900);
- (vii) "S" vs "D" (2014(5) Mh.L.J. 181);
- (viii) *Anil vs. Mangal* (2016(2) Mh.L.J. 166);
- (ix) *X V v. S Y* (2014 CJ (Bom) 781);
- (x) *Manoj v. Urmila* (FCA No.85 of 2015 Nagpur Bench decided on 23-3-2017);
- (xi) *Bhushan v. Vandana* (FCA No.49 of 2015 Nagpur Bench decided on 6 March 2017);
- (xii) *Vaishali v. Rajesh* (FCA No.86 of 2014 Nagpur Bench decided on 1 March 2017);
- (xiii) *Bharti v. Anil* (FCA No.55 of 2016 Nagpur Bench decided on 6 February 2017);
- (xiv) *Tushar v. Ujwala* (FCA No.257 of 2014 Nagpur Bench decided on 1 July 2017);
- (xv) *Sangita v. Mahendra* (FCA No.345 of 2014 Nagpur Bench decided on 4 July 2017);

(xvi) *Roshan v. Poonam (FCA No.89 of 2015 Nagpur Bench decided on 7 February 2017);*

(xvii) *Pradeep Singh v. Nisharani (FCA No.29 of 2014 Nagpur Bench decided on 20 August 2016).*

16) In view of the facts of the cases cited supra the Apex Court and the High Courts held that there were false allegations made by the wife, they were of serious nature and due to conduct and circumstances it was possible to hold that the allegations were false and they were willfully made. Thus, on facts cruelty was made out by the husband in those cases. As already observed, in the present matter, there is no room to say that false private complaint was filed by the wife. On the contrary, the husband had made serious allegations with regard to the character of the wife and it can be said that he used the peculiar modus operandi. The husband admits that he had mentioned those contents in his notice also. He had supplied copy of the aforesaid anonymous letter to the wife. The husband had used this letter in divorce proceeding of the year 2006 which was dismissed prior to the decision of the private complaint.

17) The aforesaid discussion shows that the husband had committed wrong and he got the benefit of his own wrong as the trial Court gave him decree of divorce. This Court has no hesitation to hold that when the case filed by the wife cannot be called as false case, the husband cannot use the decision of the said case like acquittal as the ground of cruelty for getting divorce. Similarly, it is necessary for the Courts to keep in mind that if the things were started by the husband and he was at fault, he cannot be allowed to take benefit of his own wrong. This Court holds that the trial Court has committed grave error in giving decree of divorce in favour of the husband and interference is warranted in the said decision. In the result, following order.

18) The appeal is allowed. The judgment and decree of the Petition No.A-220/2010 which was pending in Family Court Aurangabad is hereby set aside. The petition filed by present respondent-husband for divorce stands dismissed. Civil Application stands disposed of.

Sd/-
(A.M. DHAVAL, J.)
rsl

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