

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 106 OF 2013

Mrs Loretta Olimpia Roberta Lobo e Remedios
Furtado, daughter of Andrew Lobo, aged 58
years, service, residing at '4' Windmere, 1st
Floor, Prof. Almeida Road,
TPS IV, Bandra, Bombay, 400 050

..... Appellant
Original Plaintiff

V e r s u s

Mr. Caetano Xavier Ivo dos Remedios Furtado
son of late Alvaro does Remedios Furtado,
married, aged 70 years, residing at Alvaro
Mansion, Landscape City Alto Porvorim,
Bardez, Goa.

..... Respondents
Original Defendant

Mr. M. B. D'Costa, Senior Advocate with Ms. K. Betquekar, Advocate for the
Appellant/original Plaintiff

Mr. R. G. Ramani and Mr. Praban Kakodkar, Advocates for he Respondent.

Coram :- **F. M. REIS, J**

Date : **24th March, 2017**

ORAL JUDGMENT

Heard Mr. M. B. D'Costa, learned Senior Advocate for the Appellant
and Mr. R. G. Ramani, learned Counsel appearing for the Respondent.

2. The above Appeal came to be admitted by an Order dated 04.09.2013
on the following substantial questions of law :

(I) Whether in a petition for divorce filed under Article 4(4), 4(5) and 4(8) of the Law of Divorce in force in Goa condonation of cruelty is a valid defense and the English Judgment *Hearn vs. Hearn* [1969(3) All Eng Rep.P.417] has any relevance ?

(ii) Whether allegation of unchastity against the wife made in the deposition itself (vide paras. 15 and 16 of the affidavit in evidence of the Defendant and page 14 and 15 of his cross examination), irrespective of the letters Exh. PW 1/C, Exb. PW1/D, by itself constitutes cruelty and is a ground for divorce ?

3. Briefly, the facts of the case as stated by the Appellant are that the Appellant-Original Plaintiff and the Respondent-Original Defendant got married somewhere on 08.05.1966. The Appellant was working for Siemens Ltd., in Mumbai, and had an understanding with the Respondent that she would continue to work at the said establishment. Consequently, after spending sometime in Goa, the Appellant returned to her parents in Mumbai and upon the transfer of the Respondent in the year 1967, they lived at Byculla at Mumbai. Subsequently, the Appellant and the Respondent somewhere in the year 1968, shifted to their flat at Bandra along with their son Loyola who was born on 31.07.1967. It was further contended that in the year 1970, the Respondent started harassing the Appellant whereby he used to go out of the house and return intoxicated and abuse the Appellant. Even at functions attended by them, the Appellant would get drunk and

falsely accuse the Appellant of having affairs with her superior. In the year 1984, according to the Appellant, the Respondent came home drunk late at night and hit her and consequently the Appellant was forced to shift to the flat she had acquired with her provident fund and filed a police complaint. The elder son of the Appellant met with an accident somewhere in the year 1987 and she was not permitted by the Appellant to see her son for five days. The son ultimately died in the hospital and after the death of her son, upon pleadings of the Boss of the son and the Respondent, the Appellant returned to Bandra on the condition that the Respondent would not harass the Appellant. However, the Respondent within fifteen days, started harassing the Appellant and the situation was as before . The Respondent accused the Appellant of having affairs with other men and making money from prostitution. The Respondent thereafter left Mumbai and came to Goa and ultimately on 14.02.2012, the Appellant filed a suit for Divorce on the ground of the ill treatment and cause injury and that the Appellant and the Respondent were de facto separated for over ten years and also on the ground that the Respondent abandoned the conjugal domicile in Mumbai and came to Goa.

4. The Respondent disputed the contentions of the Appellant and pointed out that the allegations by the Appellant are without any foundation and that he had come to Goa at the request of the Appellant as one of the sons had fallen in bad company. It was also alleged that after she returned to the matrimonial home in Bandra, they lived as a couple and, as such, the allegations by the Appellant were without any foundation.

5. The learned Trial Judge by Judgment and Decree dated 07.05.2012 after framing the issues and appreciation of evidence, decreed the Suit filed by the Appellant but, however, the Respondent preferred an Appeal before the Lower Appellate Court which came to be allowed by Judgment dated 20.04.2013 whereby the Decree of Divorce granted by the learned Trial Judge was quashed and set aside. Being aggrieved by the said Judgment, the Appellant has preferred the present Second Appeal which came to be admitted on the aforesaid substantial questions of law.

6. Mr. M. B. D'Costa, learned Senior Advocate appearing for the Appellant, has pointed out that a ground for Divorce was cruelty and ill treatment by the Respondent to the Appellant which was evident from the false accusation and filthy language used by the Respondent in addressing letters which are part of the records. Learned Senior Advocate further pointed out that though letters were addressed way back in the year 1996 or thereabout, even thereafter when she had agreed to live in the Flat though separately for the welfare of her other children, there were more letters addressed on similar lines by the Respondent which disappeared at the instance of the Respondent who had proceeded to Mumbai when the Appellant had come to Goa. Learned Senior Advocate further pointed out that on perusal of the averments in the plaint, it clearly shows that the case of the Appellants is that even after she returned to the Flat at Bandra upon the death of her son, the Respondent continued the ill treatment and cruelty to the Appellant. It is further pointed out that as it would create a stigma in the career of the Appellant who was working as a responsible Officer at a reputed establishment at Siemen in

Mumbai, the Appellant suffered so that it would not have an impact on the career of the Appellant. It is further pointed out that the letters which have been produced on record would disclose cruelty and ill treatment to the Appellant, by making false accusations without any basis against the Appellant which even doubted her chastity. It is further submitted that though the proceedings for Divorce initiated by the Appellant were filed after her retirement, nevertheless, there were justifiable grounds to that effect and, in any event, the accusations by the Respondent continued even whilst filing the written statement wherein the Respondent has reiterated and sought to justify the earlier false accusations. It is further pointed out that the Lower Appellate Court has allowed the Appeal preferred by the Respondent essentially on the ground of condonation as, according to the learned Judge, as the Appellant had returned to the conjugal domicile after the said letters were written, it would clearly suggest that the Appellant had condoned the previous conduct of the Respondent which, according to the learned Senior Advocate, is misconceived and erroneous in law. It is further pointed out that the concept of condonation is not available to the Respondent in cases for Divorce filed in terms of the provisions of the Law of Divorce as prevailing in the State of Goa. It is further pointed out that in any event the learned Trial Judge had rejected the claim of the Appellant that there was de facto separation for a period of ten years as the suit was filed within eight years and, as such, pre-mature to avail of such grounds. It is further pointed out that the Respondent has been living in Goa since the year 1989 and, in any event, considering the admitted date from when the Appellant and the Respondent are de facto separated ten years have already elapsed and, as such, the Appellant is entitled to raise such ground to obtain Divorce from the Civil Court.

Learned Counsel further pointed out that at the time when the Appeal was pending before the Appellate Court, such ground might not have been available to the Appellant but, however, as the period of ten years has admittedly elapsed, the Appellant is entitled to raise such ground to obtain Divorce in terms of the relevant provisions of law. Learned Senior Advocate thereafter has taken me through the evidence on record and the Judgment passed by the learned Trial Judge and the Appellate Court to point out that the Lower Appellate Court was not justified to interfere in the Judgment of the learned Trial Court merely on the ground of condonation which was not available in terms of the Law of Divorce in force in Goa. Learned Senior Advocate has pointed out that the substantial questions of law be answered in favour of the Appellant herein.

7. On the other hand, Shri R. G. Ramani, learned Counsel appearing for the Respondents, has supported the impugner Judgment. Learned Counsel further pointed out that the inordinate delay which has not been explained would itself not justify the filing of Petition in the present case. It is further submitted that the said Appellant has failed to show that after her return to the conjugal domicile in Bandra, cohabitation did not exist. It is further submitted that one of the sons has supported the case of the Appellant whereas the other son has deposed in support of the Respondent and, consequently, the Lower Appellate Court was justified that the Appellant had waived or acquiesced on the ground for Divorce of ill treatment and cruelty. It is further submitted that the Lower Appellate Court has rightly found that there was condonation on the part of the Appellant as she had herself accepted the default and returned to the conjugal domicile. It is further

pointed out that the evidence on record itself shows that the relationship between the Appellant and the Respondent was cordial and, as such, the contention of the Appellant that the Appellant continued to misbehave and cause ill treatment to the Appellant, even thereafter, is totally devoid of any substance. It is further pointed out that the gross delay in filing the Divorce proceedings would itself justify the dismissal of the Suit for Divorce filed by the Appellant. Learned Counsel further pointed out that even assuming that the condonation is not available in terms of the Law of Divorce in force in the State of Goa, but however, the Respondent is entitled to show that the conduct of the Appellant after she returned to the conjugal domicile would itself suggest that she had waived her right to raise such contention before the Court of Law and/or that she had acquiesced to the situation arising from the correspondence addressed by the Appellant earlier. Learned Counsel further pointed out that the Lower Appellate Court as such is justified to rely upon the case of **Hearn v. Hearn**. Learned Counsel as such pointed out that the substantial questions of law be answered in favour of the Respondent and the Appeal be accordingly rejected.

8. Upon hearing the learned Counsel and on perusal of the records, the first aspect to be examined is the contention of Mr. R. G. Ramani, learned Counsel appearing for the Respondent that the proceedings for Divorce are grossly belated and deserves to be rejected on the ground of limitation. Section 29(3) of the Limitation Act, 1963, reads thus :

“29. Savings. -

(1) ...

(2) ...

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law. “

9. On going through the said provisions, it clearly provides that the Limitation Act, 1965 would not be applicable to the proceedings for Divorce. Dealing with such aspect in the Law of Divorce as in force, the learned *Commentator Dr. Cunha Gonsalves in his Treaties on Civil Law at page 55 of Vol. 7* has translated in English reads thus :

“As regards prescription it is disputed whether divorce suits can at all get barred by prescription. Learned writers consider the suit as time barred when the period of thirty years after the facts, which may give rise to divorce, has lapsed. But this opinion is disputed by others and was repelled by the jurisprudence of the French and Italian Courts, which consider divorce as not subject to prescription since it deals with the question of status of a person, which is inalienable. This second opinion appears to be the only one which is sustainable in the light of Article 506 of our Civil Code.”

10. On going through the aforesaid Commentary, it clearly shows that the right to file proceedings for Divorce do not get prescribed. In such circumstances, the contention of Mr. R. G Ramani, learned Counsel, that the proceedings for Divorce itself were prescribed, deserves to be rejected.

11. As far as the next contention of Mr. M. B. D' Costa, learned Senior Advocate appearing for the Appellant, that the concept of condone are not found in the Law of Divorce as applicable in Goa, I find that there is a specific provision of Section 2(3) in the Matrimonial Proceedings (Magistrates' Courts) Act 1960, which governed the decision in the case of **Hearn v. Hearn** which clearly contemplates that condonation can be a ground to refuse a ground for Divorce. The said Section 2(3) of the said Act of 1960, reads thus :

“The Court hearing a complaint under section one f this Act shall not make a matrimonial order containing a provision such as is mentioned in paragraph (a), (b) or (c) of subsection (1) of this section-(a) on the ground that the defendant has committed an act of adultery, unless the court is satisfied that the complainant has not condoned or connived at, or by willful neglect or misconduct conducted to, that act of adultery; or (b) where the complainant is proved to have committed an act of adultery during the subsistence of the marriage, unless the court is satisfied that the defendant has condoned or connived at, or by willful neglect or misconducted conducted to, that act of adultery.”

12. Admittedly, in the Law of Divorce as applicable to the State, no such provisions are found and, as such, the Lower Appellate Court was not justified to rely upon the said Judgment to come to the conclusion that in view of the condonation on the part of the Appellant, such ground of ill treatment and cruelty based on the letter addressed by the Respondent was not available to the Appellant as she had returned to the conjugal domicile after the death of her son.

There is no reason to disbelieve the case of the Appellant that she had to return to the flat at Bandra to look after the welfare of her two sons considering that one son had expired. It was also contented by the Appellant that she was forced to take such step in view of the advise by the Boss of her son as well as that of the Respondent.

13. With regard to the contention of Mr. R. G. Ramani, learned Counsel appearing for the Respondent, that the proceedings have been initiated belatedly, I find that in the present case, it is the case sought to be made out by the Appellant that even after returning to the conjugal domicile upon the death of her son, the Respondent continued his ill treatment and made wild accusations of infidelity against the Appellant and falsely inputting affairs with her Superiors. It is also an admitted position that in the year 1989, the Respondent returned to Goa. Even on perusal of the written statement, as rightly pointed out by Mr. M. B. D'Costa, learned Senior Advocate, such irresponsible allegations and imputations are found therein. But, however, the learned Lower Appellate Court apart from such concept of condonation has not examined such material on record as well as the other evidence adduced by the Appellant to examine whether such ground for Divorce was available to the Appellant. Apart from that, Mr. R. G. Ramani, learned Counsel appearing for the Respondent, has pointed out that the evidence on record also suggests that the Appellant had waived her right to raise such grounds and had acquiesced to the wrong committed by the Respondent. This contention on the face of it, cannot be accepted looking into the written statement filed by the Respondent. Apart from that, merely agreeing with the Respondent to come to

Goa for the welfare of the son cannot by itself be a ground to claim that the ground for Divorce otherwise allegedly available to the Appellant has been waived. Serious allegations have been made by the Respondent in the letters alleging affairs, etc., of the Appellant, which have not been established or justified by the Respondent by producing material on record. Making such accusations, prima facie, can lead to a case for cruelty and ill treatment which is a ground for Divorce in terms of the Law of Divorce. But, considering that the Lower Appellate Court has failed to examine these aspects based on the materials produced by the Appellant but, however, refused the relief to the Appellant on the ground of condonation which is not available to the Respondent, I find that, in the interest of justice, the said finding of the Lower Appellate Court on such ground deserves to be quashed and set aside⁴ and the matter remanded to Lower Appellate Court to decide the Appeal preferred by the Respondent in accordance with law. Whilst deciding the said aspect, the Respondent can raise all contentions including that there was waiver and acquiescence which otherwise has been seriously disputed by the Appellant herein. The Lower Appellate Court as such would have to decide the Appeal of the Respondent being Regular Civil Appeal no. 103 of 2012 afresh after hearing the parties in accordance with law.

14. Mr. M. B. D' Costa, learned Senior Advocate appearing for the Appellant has pointed out that the Appellant is also pressing the ground for Divorce under Article 4(8) of the Law of Divorce as, according to him, there is admittedly de facto separation between the Appellant and the Respondent freely consented which would give rise for entitlement of Divorce on such ground. Considering that the

matter is being remanded to the Lower Appellate Court and the learned Trial Judge had rendered a finding that such ground was premature as ten years had not elapsed, I find that the Appellant should be given an opportunity to raise such ground before the Lower Appellate Court by filing appropriate Cross Objection/Cross Appeal before the Lower Appellate Court.

15. Needless to say, in case the Appellant so desires, liberty to the Appellant to file an application for amendment to give particulars of such ground to which the Respondents would be entitled to file an additional written statement. The Lower Appellate Court would have to examine whether any additional issues are to be framed based on such pleadings and the manner in which the evidence, if any, would have to be adduced by the respective parties. The substantial questions of law are answered accordingly.

16. In view of the above, I pass the following :

ORDER

- (i) The Appeal is partly allowed.
- (ii) The impugned Judgment and Decree passed by the Lower Appellate Court dated 20.04.2013 is quashed and set aside.
- (iii) The Lower Appellate Court is accordingly directed to decide the Appeal preferred by the Respondent afresh after hearing the parties in the light of the observations made herein above in

accordance with law within three months from the receipt of this Judgment.

(iv) The parties are accordingly directed to appear before the Lower Appellate Court on 24.04.2017 at 10.00 a.m.

(v) The Appeal stands disposed of accordingly with no orders as to costs.

F .M. REIS, J.

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