

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

FAMILY COURT APPEAL NO. 05 OF 2015

Jivan S/o Madhukar Nagapurkar
Age : 46 years, Occ : Service,
R/o Plot No.7, Samarthnagar,
Aurangabad.

..APPELLANT

VERSUS

Sow. Shaila W/o. Jivan Nagapurkar
Age : 45 years, Occ : Household,
R/o. Sahyog Nagar, Aurangabad.

..RESPONDENT

...

Mr. H.A. Joshi, Advocate for the Appellant
Mr. R.F. Totala, Advocate for the Respondent.

...

**CORAM: S.S.SHINDE &
S.M.GAVHANE, JJ.**

Reserved on : 09.04.2018
Pronounced on : 23.04.2018

JUDGMENT(Per S.S.Shinde, J.):

By this Family Court Appeal, the appellant – husband challenges the judgment and decree dated 12th July, 2010 passed by the Family Court, Aurangabad, dismissing the Petition No.A-266 of 2009 filed by the appellant under section 13(1)(ia) and (ib) of

the Hindu Marriage Act, 1955, thereby refusing to grant decree of divorce in favour of the appellant i.e. original petitioner.

2. The case of the appellant seeking decree of divorce, in brief, can be stated as under :

The marriage between appellant-husband and respondent-wife was solemnized on 21st May, 1995 as per the Hindu Rites. After marriage, the respondent repeatedly used to visit and stay at her parental house. The appellant tried to bring respondent back on several times, but she did not come. Grand-mother of the appellant is aged about 90 to 91 years and his mother is aged about 70 years and both are bed ridden. Therefore, there is no possibility to have any ill-treatment to the respondent at their hands. In spite of this, the respondent is not ready

to cohabit with appellant. The respondent treated him with mental cruelty, for a long period of 13 years and with a malafide intention to get maintenance allowance, the respondent is refusing to cohabit with him. Since the year 1998, the respondent is residing separately from the appellant. Therefore, on these grounds, the appellant filed Petition for divorce before the Family Court, Aurangabad bearing Petition No.A-266/2009 on 24th July, 2009 and prayed for grant of a decree of divorce against the respondent.

3. The respondent-wife filed written statement in the Petition and admitted her marriage with the appellant. The respondent has specifically denied that, she is residing separate from the appellant, with malafide intention to grant maintenance allowance. Respondent pleaded that, after marriage, she

went to reside at the house of the appellant. At that time, the elder brother and mother of the appellant were suffering from mental illness. The grand-mother of the appellant is residing with the appellant and on an instigation of his grand-mother, the appellant used to abuse and assault her. The grand-mother of appellant also used to abuse and ill-treat her. Therefore, according to the respondent, she started residing separate from the appellant.

4. After considering the afore-said pleadings of the parties, and considering the oral as well as documentary evidence brought on record, the Family Court dismissed the Petition for divorce. Hence this Family Court Appeal.

5. Learned counsel appearing for the appellant invites our attention to the

evidence on record, and submits that, the Family Court at Aurangabad answered the issue as regards cruelty in negative, by relying only on observation of the Family Court, while considering the request of the present respondent, for grant of maintenance under section 18 of the Hindu Adoption and Maintenance Act, to the effect that, the appellant treated respondent – wife with cruelty, and therefore, she has justifiable ground to reside separate from the appellant. According to appellant, the said finding should not have been relied upon on the grounds that, (i) the order granting maintenance under section 18 was an ex-parte, (ii) the degree of proof required under section 18 of Hindu Adoption and Maintenance Act and one required under section 13 of the Hindu Marriage Act, are completely different, (iii) assuming without admitting, it was permissible for Family Court to borrow the

findings recorded in earlier proceedings between the parties, an opportunity to rebut any inference arising from its existence by leading other evidence or to explain the facts and circumstances under which such a finding came to be recorded, ought to have been given before relying upon the same. (iv) the Family Court ought to have apply its mind to the fact that, said finding had been recorded way back in the year 2002 and proceedings for divorce are filed in the year 2009.

6. It is submitted that, the respondent-wife did not examine any witness in support of her contention that, the father of appellant and his sister subjected her to ill-treatment. In absence of any evidence in support of her plea of alleged ill-treatment by the relatives of appellant, the Family Court should not have assumed that respondent

had a reason to live separate from the appellant.

7. It is submitted that, the Family Court discarded the appellant's plea of cruelty by observing that, the pleadings of appellant are vague, as the appellant specifically stated in the petition that, on one or the other pretext the respondent used to reside at her parental home, and she refused to stay with appellant in spite of repeated requests being made to her. Thus, the necessary inference capable of being drawn from this is that, respondent-wife withdrew herself from performing marital obligations towards appellant-husband and as such, she subjected husband to mental cruelty.

8. It is submitted that, the wife had admitted in her cross examination that, she

was residing separate from husband since 6 to 7 years. Though she tried to add that whenever husband used to call her during aforesaid period, she went there to help him. First of all, she had not brought any independent evidence in support of it, and secondly, she deposed exactly opposite, contrary and inconsistent with her own pleading. She categorically stated in her written statement that, the relatives of husband used to visit her at her mother's house. Thus, her version in her deposition is not trustworthy and full of contradictions. Thus according to appellant, he proved the factum of separation.

9. It is submitted that, there is no evidence on record that during the period of separation, she had expressed her desire to cohabit with husband in the light of possible change in circumstances as exist, when she

left the husband. On the contrary she had filed two applications in the year 2005 and in the year 2009, for seeking enhancement of maintenance amount without expressing her desire to join the company of husband. It is submitted that, the husband shown willingness to cohabit with respondent while replying her application seeking enhancement in amount of maintenance. Thus there was clear intention on her part to bring cohabitation completely to an end.

10. It is further submitted that, it is not necessary that intention to bring cohabitation completely to an end and separation shall co-exist. The intention to bring cohabitation completely to an end can be formed subsequently, and the facts involved in present case in hand clearly shows that, her intention to bring cohabitation completely to an end has been

formed subsequently. Without prejudice to the contentions raised hereinabove, it is necessary to look present case also from the point of view that, the parties are residing separately since more than 15 years and making allegations against each other. There is no child also, which would act as an catalyst. Attempts at reconciliation proved futile and marriage is otherwise dead emotionally and practically also. In view of this, it would be just and proper to order decree of divorce. Learned counsel appearing for the appellant has placed reliance on the reported judgments in the cases of Adhyatma Bhattar Alwar V/s Adhyatma Bhattar, Sri Devi¹, Lachman Utamchand Kirpalani V/s Meena alias Mota² and Satish Sitole V/s Ganga³, and submits that, the Appeal may be allowed.

11. Learned counsel appearing for the

1 AIR 2002 SC 88

2 AIR 1964 SC 40

3 AIR 2008 SC 3093

respondent- wife relied upon the findings recorded in the impugned judgment of the Family Court. It is submitted that, since the allegations levelled by the husband are vague and general in nature, the Family Court has rightly rejected the Petition filed by the husband for decree of divorce. It is submitted that, the Family Court has properly appreciated the evidence of the parties and dismissed the Petition. Learned counsel, therefore submits that, the Family Court Appeal may be dismissed.

12. We have given careful consideration to the submissions advanced by learned counsel appearing for the parties. With their able assistance, we have perused the original record and proceedings and also the grounds taken in the Appeal.

13. We have carefully perused the

evidence led by the appellant. The examination in chief is as per the pleading in the Petition. The evidence of the husband shows that, after marriage, the respondent-wife repeatedly used to visit and stay at her parental house. The appellant tried to bring respondent back several times, but she did not come. The appellant further deposed that, his grand-mother is aged about 90 to 91 years and his mother is aged about 70 years and both are bed ridden. Therefore, there is no possibility to have any ill-treatment to the respondent at their hands. In spite of this, the respondent is not ready to cohabit with appellant. The respondent treated him with mental cruelty, for a long period of 13 years and with a malafide intention to get separate maintenance allowance, the respondent is refusing to cohabit with him. Since the year 1998, the respondent is residing separately from the appellant.

14. We have perused the cross-examination of the appellant, the appellant has specifically admitted that, his grand father was serving as Assistant Deputy Commissioner and his grand mother is receiving pension of Rs.4500/- per month. He further admitted that, his mother is also receiving pension of Rs.4000/- per month. He further admitted that, he along with respondent stayed at Kannad for about six months. The appellant has further admitted that, he is ready and willing to maintain the respondent.

15. The Respondent has examined herself at Exhibit-26. In her examination in chief she deposed that, she never visited frequently to her parental house. She deposed that, her father-in-law and sister-in-law used to abuse and assault her. Grand-mother

of the appellant also used to assault her. She used to tell these facts to the relatives of the appellant, but they used to give understanding to her. She further deposed that, elder brother and mother of appellant are suffering from mental illness. She further deposed that, she never ill-treated the family members of the appellant. She further deposed that, due to ill-treatment given by the family members of the appellant, she is now residing separately.

During the course of cross-examination, respondent deposed that, since last 6 to 7 years, she is residing separately from the appellant. When a specific question was put to her by the appellant, whether she is ready to cohabit with him, respondent stated that, she is not ready to cohabit with him because on the say of his grand-mother and sister, he used to ask her to leave the

house even at odd hours, he used to assault her on the instigation of her younger sister Manjushri Purkar.

16. We have already narrated the pleadings of the parties and the evidence tendered by them. The appellant has prayed for divorce mainly relying on two grounds viz:- after marriage, respondent – wife has treated him with cruelty, and further she has deserted the appellant. Upon careful perusal of the entire evidence placed on record, we are of the considered view that, the allegations made by the appellant regarding cruelty are too vague and general in nature. A decree of divorce on the ground of cruelty cannot be granted on the basis of general allegations, without mentioning the manner in which the wife has ill-treated the husband. General allegations that, the wife used to often visit her parental house, she used to

harass the appellant mentally, cannot constitute the cruelty. So far as the allegation that, respondent – wife deserted the appellant without any valid reason is concerned, the appellant has not produced on record any cogent and reliable evidence to that effect. It is the matter of record that, the respondent – wife has filed C.Petition No.44/2001 against the appellant before the Family Court, Aurangabad under section 18 of the Hindu Adoption and Maintenance Act. In the said Petition, the appellant was directed to pay the maintenance allowance at the rate of Rs.1500/- per month to the respondent. In the said Petition, the Family Court has specifically held that, the appellant treated the respondent-wife with cruelty and therefore, she has justifiable ground to reside separate from the appellant. Thus, it is clear that, there is no substance in the allegation of the appellant that, the

respondent has deserted him without any valid reason.

17. The Family Court has properly considered the evidence on record to hold that the allegations levelled by the husband against the wife do not constitute cruelty. The Family Court has rightly held that, the appellant has vaguely contended that, his grand-mother is aged about 90 to 91 years old and is bed ridden, however, the appellant has not produced any medical evidence on record to prove the said fact. The Family Court has further observed that, the appellant has vaguely contended that, respondent treated him with cruelty, however, he has not given any details as to how the respondent treated him with cruelty. After considering the entire evidence produced on record, the Family Court has rightly come to the conclusion that, the appellant has failed to

prove that, after solemnization of the marriage, the respondent has treated him with cruelty and deserted him without any lawful excuse.

18. Learned counsel appearing for the appellant in support of his submissions placed reliance upon the exposition of law in the case of Satish Sitole (supra), wherein the Supreme Court has directed the marriage of the appellant and the respondent therein shall stand dissolved, subject to the appellant paying to the respondent a sum of Rupees Two Lakhs by way of permanent alimony, in addition to the costs of the appeal amounting to Rs.25,000/-. However, the facts of the aforesaid case are altogether different from the facts of the present case. In case cited supra, the wife has given consent for dissolution of marriage with adequate provision by way of permanent

alimony for the respondent-wife. However, in the present case, the appellant has failed to bring on record any cogent evidence to show that, the respondent – wife has given consent for dissolution of marriage.

19. On appreciation of the entire evidence on record, we find that, the appellant has not established that the respondent – wife has treated him with cruelty and that, she had deserted him without any reasonable excuse.

20. In the light of discussions hereinbefore, we are of the considered opinion that, there is no substance in the appeal. Hence the Appeal stands dismissed.

[S . M . GAVHANE]
JUDGE

[S . S . SHINDE]
JUDGE