

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

FAMILY COURT APPEAL NO. 25 OF 2016

Kulwantsingh s/o. Gurubachansingh Bhatiya.. Appellant

Versus

Rupindarpalkour w/o. Kulwantsingh Bhatiya.. Respondent

Mr.M.V.Ghatge, Advocate for the appellant.

Mr.Sudhir K. Chavan, Advocate for sole respondent.

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

RESERVED ON: 20.02.2018

PRONOUNCED ON: 26.02.2018

ORDER [PER : S.M.GAVHANE, J.] :-

1. The appellant/husband of the respondent/wife whose Hindu Marriage Petition No.A-159 of 2015 for divorce under section 13 (1)(i-a) of the Hindu Marriage Act was dismissed by the judgment and order dated 11.08.2016 by the learned Judge, Family Court, Nanded, has preferred this appeal being aggrieved by the dismissal of the said petition.

2. Facts in short are that, the marriage of the appellant and the respondent was solemnized on 26.10.2013 as per rites and rituals prevailing in their community at Ludhiana (Punjab State). The appellant resides in rented premises along with his old aged parents at Nanded. There is nobody to look after his parents except the appellant. After his marriage, the respondent came to her matrimonial house, resided happily for a period of initial two months and thereafter she started insisting the appellant to reside separately from his parents. The appellant tried to give understanding to the respondent that since there is no one to look after his parents, he is unable to reside separately. His refusal for separate residence was not liked by the respondent and therefore she started quarreling with him and his parents on petty grounds. The respondent started to visit her parents' house at Ludhiana without any reason and with increased frequency. Therefore, the family of the appellant suffered a lot. Thereafter, the respondent was pregnant.

The appellant has taken every care to provide medical aid to the respondent during her pregnancy. On 11.03.2016, the respondent delivered twins. After birth of the said twins, the respondent resided happily for two months and thereafter started her demand for separate residence from the parents of the appellant. She insisted the appellant to shift to Ludhiana and carry on some business at Ludhiana. The appellant refused. Therefore, the respondent started quarreling. She did not perform her domestic obligations properly. She did not look after children and finally she insisted for going at Ludhiana and started quarreling on that count. The parents of the respondents also asked the appellant to send the respondent to Ludhiana and threatened him to file criminal case. Therefore, on 24.07.2015, the appellant sent the respondent at her parents' house along with parents of the appellant.

3. Thereafter, the appellant requested the respondent to come to Nanded for co-habitation. However,

the respondent avoided to come to Nanded without any just and sufficient reason. On 20.08.2015, the respondent called the appellant and asked him to come to Ludhiana for co-habitation and told that she would not come to Nanded. Since the respondent refused to come for co-habitation, the appellant filed petition for restitution of conjugal rights before the Family Court bearing No.A-123 of 2015. After getting knowledge of filing of petition for restitution of conjugal rights, the respondent filed complaint before the Women's Cell at Ludhiana. Therefore, one Head Constable Baldev Singh came to Nanded and asked the appellant to come to Ludhiana. Thereafter, the respondent and her mother abused the appellant in filthy language and thereby harassed the appellant. It is stated that the respondent has mentally and physically harassed the appellant and his parents and she has no intention for co-habitation. Therefore, the appellant withdrawn the petition for restitution of conjugal rights and filed petition for divorce. According to the petitioner on 08.11.2015, the

respondent finally told that she would never cohabit. The above activities caused tremendous physical and mental torture amounting cruelty to the appellant.

4. The petition proceeded ex-parte against the respondent.

5. The appellant produced his affidavit and affidavits of his parents and land-lord in support of his contentions in the petition. Considering the said evidence, the Trial Court held that the petitioner/appellant failed to prove that after solemnization of marriage the respondent treated him with cruelty and ultimately on holding that the petitioner /appellant is not entitled to divorce on the ground of cruelty, dismissed the petition leaving the parties to bear their own costs by the impugned judgment and order.

6. It is the above said judgment and order of dismissal of divorce petition, challenged in this appeal

by the appellant on several grounds mentioned in memo of appeal and mainly on the grounds that the Trial Court has failed to consider the fact that the respondent has not appeared in the matter and that the testimony of the appellant was uncontroverted. The appellant has proved that the respondent-wife has treated him with cruelty. The cruelty in this matter consists of mental cruelty which may be seen from the conduct of the wife i.e. insisting the husband to reside separately from his old aged parents.

7. Learned Advocate appearing for the appellant made submissions in the light of grounds taken in the appeal. He submitted that the Trial Court has not at all considered the evidence of PWs 2 and 3 – parents of the appellant and PW-4 – landlord of the appellant. The Trial Court ought to have considered the evidence of these witnesses and ought to have either accepted or rejected the said evidence. He submitted that considering the fact that the respondent – wife did not appear in the

petition and did not adduce any evidence, the Trial Court should have considered the unchallenged evidence adduced on behalf of the appellant and ought to have allowed the petition for divorce.

8. Learned Advocate appearing for the respondent submitted that the respondent is ready to co-habit with the appellant. Further, it is submitted that the petition was decided ex-parte and the respondent is ready to contest the same and therefore the matter may be remitted back to the Trial Court for fresh hearing.

9. We have considered the submission of the learned advocates appearing for the appellant and the respondent. With their able assistance we have perused the petition, evidence adduced by the appellant in the Trial Court. We have also perused the impugned judgment and order.

10. On perusal of the record and proceeding in Petition No.A-159 of 2015, it appears that in evidence

the appellant has filed his affidavit of examination-in-chief at Exh.17 and filed an affidavits of his father, mother and the land-lord respectively at Exh.20,21 and 22. The appellant as well as his witnesses have not been cross-examined on behalf of the respondent/wife. The petition proceeded ex-parte against her. It appears that ex-parte order was passed against the respondent on 10.06.2016 after receipt of notice of divorce petition by the respondent by RPAD and after public notice was issued in the news paper, namely, "Indian Express" dated 09.04.2016 and on failure of the respondent to appear in the proceeding.

11. On perusal of the petition, it is clear that the appellant has claimed divorce on the ground of cruelty as per section 13(1)(i-a) of the Hindu Marriage Act. In his affidavit Exh.17, the appellant has deposed in accordance with his contentions in the petition and as such this affidavit is replica of his pleadings in the petition. On perusal of the impugned judgment in para 6 to 10, the

Trial Court has referred the evidence of the petitioner/appellant and ultimately held that sole testimony of the appellant on the basis of vague and general allegations leveled by him against the respondent is not reliable to hold that the respondent caused cruelty to him. It is clear that in the judgment the Trial Court has not at all referred the evidence of PWs 2 to 4. In-fact, the Trial Court should have referred the evidence of said witnesses and should have either rejected or accepted their evidence. Thus, there is substance in the argument advanced by the learned Advocate appearing for the appellant that the Trial Court has not at all considered the evidence of PWs 2 to 4.

12. As mentioned earlier, learned advocate for the respondent submits that the respondent is ready to contest the petition. There is no dispute that the petition proceeded ex-parte against the respondent as observed earlier and that she had not filed her reply to the petition. Therefore, instead of considering the

evidence of PWs 2 to 4 while deciding this appeal, in the circumstances present in the case, we feel it appropriate to set aside the ex-parte order passed against the respondent and to give her an opportunity to file reply to the petition and to adduce evidence with a direction to the Trial Court to allow the petitioner to adduce further evidence, if any and to consider the evidence of PWs 2 to 4, and decide the petition afresh by setting aside the impugned judgment and order, by remanding the matter to the Trial Court, by allowing the appeal. Therefore, the following order is passed :-

(i) The appeal is allowed.

(ii) The impugned judgment and order dated 11.08.2016 passed by the Judge, Family Court, Nanded in Petition No. A-159 of 2015 is set aside. The said petition is remanded back to the Trial Court. The ex-parte order dated 10.06.2016 passed in the said petition below Exh.1 against the respondent is set aside. The respondent is directed to appear before the Trial Court on 22.03.2018. The respondent shall

file reply to the petition in the Trial Court till 20.04.2018. Thereafter, the Trial Court shall decide the petition afresh after giving an opportunity to the respondent to adduce evidence and after considering the entire evidence on record in the light of observations in the judgment, by the end of July, 2018.

(iii) No order as to costs.

[S.M.GAVHANE, J.]

[S.S.SHINDE, J.]