

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FAMILY COURT APPEAL NO.43 OF 2017

Manohar s/o Ramchandra Jadhav,
Age-45 years, Occu:Service,
R/o-Building No.A-2, Flat No.1/1,
Mayur Park, Harsul Area,
Aurangabad

...APPELLANT

VERSUS

- 1) Sau. Sangita w/o Manohar Jadhav,
Age-35 years, Occu:Household,
R/o-H.No.1-9-919/3, Bhimnagar,
Bhavsingpura, Aurangabad,
- 2) Kailas s/o Dagdu Gaikwad,
Age-38 years, Occu:Business,
R/o-C/o-Payal Tea Centre,
In front of Santosh Traders,
Bhimnagar, Bhavsingpura Road,
Aurangabad.

...RESPONDENTS

...

Mr.B.S. Bhale Advocate for Appellant.
Mr.S.R. Dheple Advocate for Respondent No.1.
None present for Respondent No.2.

...

CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.

DATE OF RESERVING JUDGMENT : 13TH MARCH, 2018.

DATE OF PRONOUNCING JUDGMENT: 21ST MARCH, 2018.

JUDGMENT [PER S.S. SHINDE, J.] :

1. By this Family Court Appeal, the Appellant - husband challenges the Judgment and order dated 18th September, 2014 passed by the Principal Judge, Family Court, Aurangabad in Petition No.A-351 of 2008 thereby dismissing the Petition filed by the Appellant for dissolution of marriage and decree of divorce on the ground of cruelty and adultery.

2. The case of the Appellant as disclosed in the petition filed by him for a decree of divorce, in brief, can be stated as under:

A) The Appellant is a professor. The marriage between Appellant-husband and Respondent No.1-wife was solemnized on 4th June, 1990 as per

"Boudha" rites, at Aurangabad. She some how cohabited with husband for about 4 to 5 years. They are having two daughters, namely, Aishwarya aged 17 years and Mansi aged about 7 years. Both the daughters are taking education and are presently residing with Respondent No.1-wife. Previously all were residing in the joint family of the Appellant.

B) Appellant-husband is the only earning hand in the family, so his parents, three brothers and a sister were also depending upon him. Respondent No.1-wife did not like to cohabit in the joint family. She was insisting the Appellant to reside separately from joint family and on that count she was raising quarrels with Appellant i.e. husband. She stopped cooking food, and started giving trouble to his parents and brothers. Parents of Respondent No.1-wife were also quarreling with Appellant-husband, on her tutoring. Respondent No.1-wife used to give abuses in loud voice to the

Appellant and his parents and on some occasions even by standing in the lane, outside the house.

C) The Appellant had made known to the parents and other relatives of Respondent No.1-wife about her misbehaviour. However, instead of telling Respondent No.1 not to misbehave, they extended threat to Appellant that, they will initiate proceedings against him for ill-treatment on account of dowry before an appropriate forum.

D) Since August, 2000, they have no physical contacts with each other. Many times Appellant had tried to have physical contacts with Respondent No.1, but she avoided saying that, doctor has advised her to abstain from sexual relations. On insistence, she used to say that, she will commit suicide by pouring kerosene on her person or attempt to break her head. Once she had caused injury to herself by a razor blade.

E) The second daughter Mansi is born on 23rd February, 2001. As a matter of fact, Appellant and Respondent No.1 had no physical contacts and sexual relations for seven months. However, Mansi was born after said seven months. On 19th November, 2008 Appellant had learnt from Respondent No.1-wife that Mansi is not born to her from him, but from some one else. Therefore, it is alleged that second daughter Mansi is born to Respondent No.1-wife from her extra marital relationship.

F) On 5th March, 2003 Respondent No.1-wife raised quarrels with the Appellant and went with her mother thereby leaving the house of the Appellant. When the Appellant tried to bring her back for cohabitation, she had flatly refused to come back. Ultimately, the Appellant had filed a Petition for restitution of conjugal rights in the Family Court bearing Petition No.A-170 of 2003.

After an efforts made by the Appellant and through process of conciliation, Respondent No.1 came back for cohabitation, and accordingly the said matter/proceedings were closed.

G) Respondent No.1 again started misbehaving with the Appellant. After reunion when Appellant tried to have sexual contact with her, she asked him to wait for 3-4 months, as her mental condition was not good. Whenever the Appellant tried to have sexual contact with her, every time there were quarrels between the couple.

. Respondent No.1-wife started talking to some one in low voice on mobile phone by hiding herself in W.C., bathroom, at odd time during night hours. After the marriage, Respondent No.1-wife insisted and compelled the Appellant to transfer the residential house in her name. Now she was saying that, the house belongs to her, and at any time, she will drive the Appellant out of

the said house.

H) Respondent No.1-wife has tendency to purchase unwanted and costly items required in the house. She always used to ask, for money from the Appellant. She used to demand amount from Appellant, on different counts, and used to give said amount to her parents. With an intention that, her extra marital relations should not be disclosed, Respondent No.1-wife had made false allegations of extra marital relationship of the Appellant.

I) On 20th June, 2008, at about 10.00 p.m. Respondent No.1-wife insisted for going to Goa, and Appellant immediately became ready for it. Next day when they went up to Nipani, it was 12.00 in the midnight. However, there was puncture to tyre and till the tyre was replaced, it was 1.30 a.m., still Respondent No.1-wife insisted that they should continue to travel in the night

itself. Appellant has alleged that during the journey from Aurangabad to Goa, the behaviour of Respondent No.1-wife was suspicious, and she was all the while talking with some one else on her mobile phone in low tone. So, suspecting some foul-play, the Appellant immediately returned back to Aurangabad. On 19th November, 2008 Respondent No.1-wife started quarreling, giving abuses to brother of Appellant, and said that her Goa trip became unsuccessful otherwise the Appellant would not have seen the day of life, and that her plan did not materialize. She also stated that, she does not like the Appellant, and she like some one else, from whom she had begotten the daughter i.e. Mansi.

J) On 30th October, 2008 Respondent No.1-wife insisted for purchasing a gold chain and on that count there was quarrel between the couple. Thereafter also she again quarreled with him and asked him to go away from his house. So, the

Appellant left his own house and went to reside at the house of his brother and till now he resides with his brother.

K) Blood group of Appellant and Respondent No.1-wife is "A" positive. On the other hand, the blood group of his daughter Mansi is "A" negative. Scientifically this is not possible. It is the allegation of Appellant that Mansi must not be his daughter and she must have been born to Respondent No.1 from some one else than him.

L) By way of amendment to the Petition, the Appellant has contended that Respondent No.1 had performed second illegal marriage with Respondent No.2. Respondent No.1 is living in adultery with Respondent No.2 and they are having illicit relations with each other. It is alleged by the Appellant that he had received photographs of Respondent Nos.1 and 2 in marital posture, as husband and wife. Appellant believes that second

daughter Mansi is born to Respondent Nos. 1 and 2 from their illicit relationship. So on all these grounds, Appellant has claimed divorce from Respondent No.1.

3. Respondent No.1-wife has filed written statement in the Petition and denied all the allegations levelled by the Appellant-husband against her. She has denied the allegations of ill-treatment and cruelty. The submissions of Respondent No.1-wife can be stated, briefly, as under:

I) It is contended that still Respondent No.1-wife resides with the Appellant, but he himself has left her company and residing separately without any cause. It is contended that when she was residing in the joint family, she used to do all household work, but the Appellant and his relatives were not treating her well because they wanted to marry him with his maternal uncle's

daughter. They all were unhappy because she had given birth to a girl child.

II) Respondent No.1-wife contended that she never insisted for separate residence. She never called her parents and brothers and raised quarrels with the in-laws. Respondent No.1 is Graduate. As she was feeling that there will be improvement in the behaviour of in-laws, therefore even whens they had abused her, she did not give them replies and also did not tell about it to her relatives. It is submitted that parents of Respondent No.1 had given respectable treatment to the Appellant he being their son in law.

III) Respondent No.1 denied that since August, 2000 she had deprived the Appellant from sexual relations with her. It is submitted that Appellant himself is womanizer. He gets handsome income of Rs.50,000/- per month. Being womanizer, he has no interest in keeping sexual relations with her.

Many times Respondent No.1 had requested him for sexual relations, but he had flatly refused for that. It is the information of Respondent No.1 that the Appellant is having love affair with one lady Professor in his college, and therefore he is neglecting Respondent No.1. As Appellant wanted to marry with said Professor lady, he has filed this Petition for divorce by making false allegations against her.

IV) It is submitted that daughter Mansi has completed 8 years of age on 23rd February, 2008. All along this period, Appellant has treated her well and celebrated all her birthdays. But since 19th November, 2008, as he wanted to marry with another lady, Appellant has made such wild allegations against her. Appellant had filed a petition for restitution of conjugal rights on 19th May, 2003 wherein he had specifically mentioned that, he has two daughters from Respondent No.1. That time he did not suspect

about the paternity of Mansi. It is denied that Respondent No.1 herself had said to the Appellant that Mansi is not born to her from Appellant. No Hindu lady will tell to her husband that a child born to her is born from some one else than her own husband.

V) On 15th November, 2002, the Appellant and his relatives had assaulted Respondent No.1 and her parental relatives and threatened to kill her and therefore, to save her life she went to her parental house. Thereafter her parents had convinced the Appellant and sent back her for cohabitation on 27th January, 2003. But thereafter also there was no change in the behaviour of the Appellant. On 5th May, 2003 also the Appellant and his relatives had abused and assaulted Respondent No.1 and her mother and had driven her out from the house and therefore she went with her mother. She never refused to cohabit with the Appellant but he had made false allegations about her

character.

VI) It is admitted that on 18th June, 2003 a compromise was arrived at between the couple in the Petition for restitution of conjugal rights, and she went for cohabitation. But the relatives of the Appellant had assaulted her and on the say of relatives, Appellant ill-treated her. It is denied that the parents of Respondent No.1 were interfering in the marital life of the couple. It is submitted that Appellant had left no interest in Respondent No.1, and he enjoys sexual life outside the marital tie. It is the case of Respondent No.1 that the house wherein they were residing, was constructed by her father by purchasing a plot, and said house has been given to her, she being the only daughter to him.

VII) It is submitted that, the Appellant was spending much amount of his earning on said Professor lady, with whom he was having love

affair, and therefore there was paucity of funds for daily household needs. So she was often required to ask her father to pay money for household expenses. Many times, her parents had supplied the household grocery and grains even. Regarding the Goa trip, it is submitted that Appellant himself had planned the said trip. All the allegations about the Goa trip are denied. It is contended that she never said that her Goa trip was unsuccessful.

VIII) It is contended that, the allegations that Mansi is not the daughter of Appellant are false. Appellant has made false allegations of adultery against Respondent No.1 after nine years of marriage, as he wants to marry with said Professor lady. Only because blood group of Mansi is different from the blood group of Appellant and Respondent No.1, it cannot be said that she is not their daughter. The photographs filed on record are not the photographs of Respondent Nos.1 and 2.

The said photographs are manipulated one. Respondent No.1 even does not know who is Respondent No.2. Appellant concocted fabricated false evidence to get divorce from her as he wants to marry with that Professor lady with whom he is having love affair. Hence it is prayed that the Petition be dismissed with costs.

4. Respondent No.2 has also filed written statement and denied all the allegations made in the Petition. He showed his ignorance about the relations between Appellant and Respondent No.1. He even does not know how many issues are to them. He denied the photographs also as his photographs. He denied that he has any relations whatsoever or any illicit relations with Respondent No.1, as alleged.

5. After considering the afore-said pleadings of the parties, and considering the oral and documentary evidence brought on record, the

Family Court dismissed the Petition for divorce.

6. Learned counsel appearing for the Appellant invites our attention to the evidence of the Appellant as well as the evidence of his brother, namely Vijay Jadhav, Dr. Awchat and Vijaykumar Urgunde- the photographer and submits that Appellant has proved that after the marriage Respondent No.1 was not behaving properly and she had illicit relations with Respondent No.2, and therefore on the ground of cruelty and adultery he is entitled for decree of divorce. Referring to the grounds taken in the Appeal, learned counsel submitted that the Family Court has failed to appreciate the oral and documentary evidence in its proper perspective. Therefore, he prayed that the Appeal may be allowed.

7. Learned counsel appearing for Respondent No.1-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 extremely vague, the Family Court has rightly rejected the Petition filed by the husband for a decree of divorce. It is submitted that the Family Court has properly appreciated the evidence of the parties, and dismissed the Petition filed by the husband. Learned counsel sought for the dismissal of the Family Court Appeal.

8. We have perused the original record and proceedings. On the basis of rival contentions and reliefs claimed, the issues were framed by the Family Court. The Appellant-husband was expected to prove the case of desertion, cruelty and adultery.

9. We have carefully perused the evidence led by the Appellant. The examination-in-chief is as per the pleadings in the Petition. The evidence of the husband shows that on previous occasion

also there was dispute between the couple and as per the allegations of the Appellant, Respondent No.1-wife was not coming for cohabitation therefore Appellant had filed a Petition for restitution of conjugal rights bearing Petition No.A-269 of 2009, but compromise took place and she agreed to cohabit with the Appellant, the dispute was settled and wife had resumed for cohabitation. After resumption of the cohabitation, there was again dispute between the couple and Respondent No.1-wife used to raise quarrels with the Appellant. Appellant further deposed that, whenever he tried to have sexual contact with her, every time there were quarrels between the couple. Her behaviour was suspicious and she used to talk with some one on mobile phone in low tone by going in W.C., bathroom at odd time at night hours. He further deposed that on 19th November, 2008 Respondent No.1-wife came in front of house of brother of Appellant and gave abuses and also stated that she dislikes Appellant and

she likes some one else from whom she had begotten daughter Mansi. He further deposed that he cannot be a biological father of Mansi. Blood group of Appellant and Respondent No.1 is A+, on the other hand blood group of Mansi is A-, scientifically the same is not possible.

10. We have perused the cross-examination of the Appellant. The Appellant has specifically admitted that he has not done any research in Biology, he has knowledge about blood groups, as it is part of his subject. He has further admitted that financial position of parents of Respondent No.1 is sound. He admitted that residential premises at Bhavsingpura are in the name of Respondent No.1. He stated that he did not remember the exact date in August 2000 since which there are no physical relations between him and his wife.

11. The Appellant has examined Dr. Kamlesh

Anant Avachat. In his examination-in-chief, he deposed that he is M.D. (Pathology). He has pathology Laboratory by name Avchat Pathology Laboratory, at Aurangabad since last 20 years. This witness was shown blood examination reports dated 6th January 2010 and 15th January, 2010 filed by the Appellant. He deposed that those reports bear his stamp and signature. The said reports are correct. He further deposed that the blood group of the parent and the child is different, then usually D.N.A. Test is advised.

. During the course of cross-examination, Dr. Kamlesh Avachat stated that the blood sample is taken either by him or by technicians, depending upon the availability. Vidya Thorat and Avinash Dane are the two technicians in his Lab. About 15 to 20 people come to Lab on an average per day. Record of such people is maintained. He has not brought the record with him. Mansi was brought to Lab by his father Manohar. He did not

ask Manohar as to why the blood sample of Mansi was given nor Manohar informed him anything. He admits that patients for blood sample come to him as referred by different doctors. He did not ask for identification of Mansi. He carried the test as informed by Manohar that the child brought was Mansi. I cannot say for certain whether the child brought was having the name Mansi. The witness was shown report of Mansi. He stated that the Rh confirmation is advised in the said report because the Rh Factor determined in the Lab has 99.99% accuracy. In his Lab the facility is available for 100% confirmation of the Rh factor. It is not done for Mansi as it was not asked.

12. Thus, it is clear from the cross-examination of Dr. Awachat that he was not able to say whether child brought to him was Mansi. He further stated that the Rh confirmation is advised in the report of Mansi because Rh Factor determined in the Lab has 99.99% accuracy. He

further admitted that said facility for 100% confirmation of Rh Factor was available in his Lab, but said test was not done for Mansi as it was not asked.

13. The Appellant has also examined his brother, namely Vijay Ramchandra Jadhav. The examination-in-chief is as per the pleadings in the Petition. During his cross-examination, Vijay stated that his educational qualification is M.Sc. M.Lib. He further stated about his service career. He further stated that he resided in joint family since beginning. His brother became separate since filing of litigation by his brother. The brothers were joint but separate in mess even prior to 3rd December, 2008. They were residing in Begampura for 4 to 5 years. They shifted to Laxmi Colony and resided there for 5 to 7 years in tenanted room of Suresh Dhote on monthly rent of Rs.800/- to 900/-. Thereafter before 10 to 12 years his brothers started residing at Bhoiwada. He further stated

about her married sister Ranjana. He further stated that he did not remember the date and year of instance of alleged insult as stated in Para 6 of his affidavit by way of examination-in-chief. He further stated that 2-3 years after marriage, Manohar and his wife started residing separately in Laxmi colony. He further stated that Manohar's wife did not lodge complaint under Section 498-A of I.P.C. against him, his parents and brother. He further stated that instance quoted in Para 22 of his examination-in-chief was heard by him from the mouth of wife of his brother. He lodged complaint to the police but copy of such complaint is not filed on record.

14. Thus it is clear from the evidence of witness Vijay that he was residing separately from the couple and he had no personal knowledge, exactly on what issues there was dispute between the couple. Though he has stated in his examination-in-chief that Respondent No.1 used to

insult her husband without any reason, during the cross-examination he was unable to state the date and year of such alleged incidents. He has further stated that regarding some of the instances, he has no personal knowledge and he heard about the same from other family members.

15. The Appellant has also examined one Vijaykumar Kashinathappa Urgunde, a photographer. In his examination-in-chief he deposed that since last 15 years he is doing the business in photography. He has his photo studio, namely "V.K. Arts", at Cidco, Aurangabad. He was shown some photographs and negatives. He further deposed that said photographs are developed from the negatives shown to him.

. During the course of cross-examination, Vijaykumar stated that he has completed a diploma in Fine Arts in Government College of Arts, Aurangabad. He has not brought the certificate of

the same, but if ordered he would produce the same. He stated that out of three photographs shown to him, two are taken out from the distance of 10 to 12 ft. and third photograph is taken out from the additional distance of 3 ft. He was unable to state, from which camera the said photographs were taken out. He stated that the said photographs might have been taken out prior to 2 to 4 months. He was unable to state timing of taking out said photographs. He further stated that previously it was possible to make negatives from the photograph but now a days it is not possible. He was unable to state how old those negatives were.

16. Thus, from careful perusal of the evidence of this Photographer Vijaykumar, it is clear that through this witness the Appellant was unable to prove that said photographs were really of Respondent Nos.1 and 2. Through the evidence of this photographer, nothing has been brought on

record to support the case of the Appellant.

17. Respondent No.1 has examined herself at Exhibit-49. In her examination-in-chief she deposed that she is well educated, she never insisted the Appellant to reside separately from her parents, she never quarreled with the Appellant and never called her parents. She further deposed that the Appellant is a womanizer. He earns handsome income of Rs.40,000/- to 50,000/- per month. Appellant has no interest in keeping sexual relations with her. She further deposed that on several occasions she had requested him for sexual relations, but Appellant had flatly refused for that. She further deposed that Appellant is having love affair with one lady Professor in his College. She further deposed that as Appellant wanted to marry with said Professor lady, he has filed Petition for divorce by making false allegations against her.

. During the course of her cross-examination, Respondent No.1 admitted that she is educated up-to M.A. Before marriage she studied up-to 10th standard and after marriage she has completed her further education. She denied that she was avoiding to have physical relations with her husband. She denied that she was having extra marital relations with Respondent No.2. She has further denied that she has performed illegal marriage with Respondent No.2.

18. We have already narrated the pleadings of the parties and the evidence tendered by them. The allegations levelled by the Appellant-husband against Respondent No.1-wife are too vague and general in nature. The Appellant has not given specific instances regarding the allegations of cruelty, levelled by him against his wife. Appellant has pleaded that the wife used to misbehave and quarrel with the husband and his parents, but the said statement is not

substantiated by the Appellant by giving specific instances. The Appellant has alleged that there were illicit relations between Respondent Nos.1 and 2, however to substantiate those allegations the Appellant has not examined any independent witness. The Appellant has further alleged that Respondent No.1 used to avoid to keep physical relations with him. But so far as these allegations of the Appellant are concerned the same are denied by Respondent No.1 and it is her allegation that the Appellant himself had love affair with one Professor lady serving in the college, and as he wanted to marry with said Professor lady, he has filed the Petition for divorce by making false allegations against her. Though the Appellant has produced on record some photographs stating that Respondent No.1 has performed marriage with Respondent No.2, Respondent No.1 has come with the specific case that said photographs are manipulated and fabricated. To prove those photographs though

Appellant has examined one Photographer, namely Vijaykumar Urgunde, and as observed earlier, if his evidence is carefully perused, he has not stated that alleged photographs were taken out by him or that those were not manipulated or fabricated one.

19. It is the allegation of the Appellant that he is not the biological father of Mansi. Blood group of Mansi is different from the blood group of Appellant-husband and Respondent No.1-wife, and scientifically the same is not possible. However, we find no substance in such baseless allegations, because Mansi has been born when the couple was residing together and when the marriage between the couple was in subsistence and Mansi is born to the couple through valid wed-lock. The Appellant had filed a petition for restitution of conjugal rights on 19th May, 2003, wherein he had specifically mentioned that, he has two daughters from Respondent No.1 and that time he did not

suspect about the paternity of Mansi.

20. Though the Appellant has relied upon earlier Petition filed by him for restitution of conjugal rights, in the Family Court, bearing Petition No.A-170 of 2003, it is pertinent to note that in the said Petition, compromise was arrived at between the Appellant and Respondent No.1, and the couple had started residing together. Therefore the Appellant cannot take any benefit of the contents of the previous Petition filed by him.

21. From the perusal of entire evidence placed on record, we are of the considered view that the allegations made by the Appellant against Respondent No.1 regarding cruelty are too vague and general. A decree of divorce on the ground of cruelty cannot be granted on the basis of general allegations levelled by the husband against the wife, without clearly mentioning the manner in

which the wife has ill-treated the husband. General allegations that the wife used to avoid the husband and his family members and that she used to often visit her parental house and was not preparing food for the husband, she used to quarrel with husband and his parents, cannot constitute cruelty. So far as the allegations that there were illicit relations between Respondent Nos.1 and 2, the Appellant has utterly failed to prove such allegations. As rightly observed by the Family Court, to prove such allegations, the Appellant has not examined any independent witness.

22. 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 which would entitle the husband to a decree of divorce under Section 13(1)(i-a) of the Hindu Marriage Act. The Family Court has rightly come to the conclusion that the

conduct of the wife was not such that she had shown total disregard to the husband. On appreciation of the entire evidence on record, we find that, the husband has not established that the wife had treated him with cruelty. The Family Court has rightly observed that, after considering all the instances of cruelty as alleged by the Appellant, there is no independent evidence adduced by the Appellant to prove that Respondent No.1 wife had subjected him to any cruelty and that cruelty was of such a serious nature which entitles him in law to get divorce from his wife. After considering the entire evidence on record, we are of the opinion that the Family Court has rightly came to the conclusion that, the Appellant miserably failed to prove the ground of 'adultery' against Respondent No.1-wife. As the Appellant was suspecting the character of Respondent No.1-wife and the paternity of their child Mansi, he had applied for D.N.A. Test of Mansi, before the Family Court. The Family Court has rightly

rejected the said application by observing that, there is no necessity to allow the said application because law does not permit to do so as she is having born within their valid wedlock. As observed earlier, the Appellant had filed a petition for restitution of conjugal rights in the year 2003, wherein he had specifically mentioned that, he has two daughters from Respondent No.1, and that time he did not suspect about the paternity of Mansi. Thus, the Family Court has not committed any error in refusing the relief of divorce.

23. For the reasons afore-stated the Family Court Appeal stands dismissed, with no order as to the costs.

[S.M. GAVHANE, J.]

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[S.S. SHINDE, J.]