

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 82 OF 2016

Fransquinho John Carvalho, Rep. by POA
Vailankanim Mascarenhas

... Appellant

Versus

Jenifer Thomas Goes

... Respondent

Shri Cliff Fernandes, Advocate for the Appellant.

Shri Shirin V. Naik, Advocate for the Respondent.

Coram : C.V. BHADANG, J.

Date : 15th February, 2018

ORAL ORDER:

Heard the learned Counsel for the appellant and the learned Counsel appearing for the respondent. Perused record.

2. The challenge in this Second Appeal, is to the concurrent finding of dismissal, of a petition for divorce, filed by the appellant under Articles 4(4) and 4(5) of the Law of Divorce. The marriage between the parties was solemnized on 26.12.2003 and they have a child, who is now aged eight years. Admittedly, the parties are staying separate from December, 2010. The child is with the respondent-wife.

3. The appellant filed a petition for divorce, under Articles 4(4) and 4(5) of the Law of Divorce, on the ground that (i) the respondent since after solemnization of the marriage, has ill treated the appellant and (ii) the respondent has completely abandoned the conjugal domicile for a period of not less than three years.

4. The respondent contested the petition on the ground that she was being ill-treated by the appellant and was compelled to leave the matrimonial house in the night intervening between 17.12.2010 and 18.12.2010, along with the child and since then, they are staying separate. It was contended that the respondent had filed a complaint of the incident in respect of which, an offence was registered against the appellant. There was a previous complaint filed by the respondent in the year 2004, which was withdrawn by the respondent. The respondent has contended that in fact, it is the appellant, who has ill treated her and as such, she was compelled to leave the matrimonial house, in the night intervening between 17.12.2010 and 18.12.2010.

5. On the basis of the rival pleadings, the learned Trial Court framed the following two issues:-

- 1) Whether the petitioner proves that due to the irrational acts of the respondent, he suffered ill-treatment and injuries to his marital rights ?
- 2) Whether the petitioner proves that respondent from 18.12.2010 deserted the matrimonial house along with the child and other belongings from the matrimonial house at the wee hours between 00:00 hours to 3:00 a.m. and after lodging false complaint before the Verna Police Station started to live at her parental house at the address shown in the cause title ?

6. The appellant examined himself and two other witnesses, including his sister. The respondent did not enter into the witness box. The learned Trial Court answered both the issues in the negative and dismissed the petition for divorce, which has been confirmed by the learned District Judge in appeal.

7. Shri Fernandes, the learned Counsel for the appellant has raised a solitary contention. It is submitted that the respondent, in the written statement, had pleaded that she was driven out of the matrimonial house. It is contended that the respondent has failed to prove the said defence, as she did not enter into the witness box. It is submitted that the learned District Judge was in error in relying on the decision in the case

of **Ravi Kumar Vs. Julmidevi, (2010) 4 SCC 476**, in as much as, in that case, the wife had entered into the witness box and led evidence. It is thus, submitted that the case of **Ravi Kumar** (supra) was clearly distinguishable. It is submitted that once, the respondent had failed to establish that she was driven out of the matrimonial house, the petition for divorce, ought to have been granted.

On behalf of the appellant, reliance is placed on the decision of the Supreme Court in the case of **Vidhyadhar Vs. Manikrao & Another, AIR 1999 SC 1441**, in order to submit that if, a party chooses not to enter the witness box, the Court can draw adverse inference against the party.

8. On the contrary, it is submitted by Shri Naik, the learned Counsel for the respondent that the entire burden in respect of both the issues, was on the appellant. It is thus, submitted that it was for the appellant to establish that the appellant had ill-treated the respondent and that the respondent had deserted and abandoned the conjugal domicile, which he has failed to establish. It is submitted that the learned District Judge in para 37 of the impugned judgment has considered the effect of respondent having not stepped into the witness box and has rightly come to the conclusion that on the basis of the evidence,

it was established that it was the appellant, who was ill treating and harassing the respondent. It is submitted that the appellant has failed to establish the 'animus deserendi', which is *sine qua non*, for the grant of decree of divorce.

9. I have carefully considered the rival circumstances and the submissions made and I do not find that the Second Appeal raises any substantial question/s of law. The dissolution of the marriage was sought by the appellant on two grounds, namely, (i) the respondent has ill-treated the appellant and (ii) the respondent has completely abandoned the conjugal domicile for a period of not less than three years. It is true that the respondent in her written statement claimed that she was thrown or driven out of the matrimonial house. However, the perusal of the two issues which clearly show that the burden to establish that the appellant was ill-treated and there was abandonment of the conjugal domicile by the respondent, lay on the appellant, which both the Courts below, after the appreciation of evidence, have held that the appellant has failed to prove.

10. It would be significant to note that the respondent claimed that in the night on 17.12.2010 at 23:30 hours, the

appellant under the influence of liquor assaulted the respondent with slaps and abused her and thereafter, she along with the child, who was then barely three months old, were confined to the bedroom and she was compelled to run out of the house by jumping from the window. The case made out by the appellant was that the respondent left the matrimonial house on 18.12.2010, between 00:00 to 3:00 hours. It is difficult to accept that the respondent, with a child, barely three months old, would voluntarily leave the matrimonial house during the night and that too, by jumping out from the window of the bedroom, unless, she was compelled under the circumstances to do so. The respondent also lodged a complaint on 18.12.2010, against the appellant and there was an offence registered. It is trite that in a case of the present nature, the burden of proof, would proceed on preponderance of probability. On the basis of the evidence of the appellant, it is difficult to accept that the appellant was ill treated by the respondent or that it is the respondent, who abandoned the conjugal domicile. It has come in the evidence of the appellant that he never made any attempt for resumption of cohabitation between the parties. This is an additional circumstance to show that it is not the respondent, who abandoned the conjugal domicile, but she was compelled under the circumstances to leave the matrimonial house. Once

this aspect is established, the non examination of the respondent, would pale into insignificance.

11. The reliance placed on the judgment in the case of **Vidhyadhar** (supra) to my mind is misplaced. The case clearly turned on it's own facts. Here is the case, where the burden to establish the two issues, lay on the appellant, which he has failed to discharge. In that view of the matter, the District Judge is right in coming to the conclusion that the non examination by the respondent, would be inconsequential. On a careful perusal of the judgment of the Courts below, I do not find that they suffer from any infirmity, so as to require interference. The appeal does not raise any substantial question of law and is accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.

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