

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

SECOND APPEAL NO.290 OF 1995

...

MALAN BHAUSAHEB SALVE
age 56 years, Occ. Nil,
R/o. Nimgaon Gangarde,
Taluka Karjat,
District Ahmednagar.

...Appellant..
(orig. defendant)

VERSUS

BHAUSAHEB BABURAO SALVE,
adult, Occ. Agri.,
R/o. Ralegaon (Mhasoba),
Taluka Nagar,
District Ahmednagar.

..Respondent..
(orig. plaintiff)

...

Advocate for Appellant: Mr M P Shinde
Advocate for Respondent : Mr R S Deshmukh

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CORAM : V.K. JADHAV, J.

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Reserved on : February 04, 2019
Pronounced on : June 03, 2019.

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JUDGMENT :-

1. Being aggrieved by the judgment and decree passed in Regular Civil Suit no.339 of 1985 dated 28.1.1988 passed by the Joint Civil Judge Jr. Division, Ahmednagar and the judgment and order dated 20.2.1995 passed by the 3rd Additional District Judge,

Ahmednagar in Regular Civil Appeal No.316 of 1989 confirming thereby the judgment and decree passed in Regular Civil Suit No. 339 of 1985, the original defendant has preferred this second appeal.

2. Brief facts, giving rise to the present second appeal are as follows :-

a] The appellant and respondent are of the same community and religion. According to the respondent/original plaintiff, in the year 1950 when he was studying in seventh standard at village Mandavgan, Tq. Shrigonda, District Ahmednagar at that time, the appellant/original defendant Malan was residing with her maternal aunt's house in the same village and the respondent/original plaintiff was taking meals in the house of the said maternal aunt by paying the charges and providing the grains etc. According to the respondent/original plaintiff, the appellant and the respondent got acquainted with each other and they had developed the intimacy also. Even, on attaining the majority, they fell in love with each other. It is further contention of the respondent/original plaintiff that their

love affair remained continued till the year 1958. There was a tradition in the family of the respondent/original plaintiff to perform the marriage with the consent of the parents and it was for the parents to select the bride. Accordingly, the parents of the respondent/original plaintiff had performed his marriage with one Venubai, daughter of Balaji Dhuraji Vanjare of village Limbi Tq. Shrigonda as per the Hindu Rites and Customs. According to the respondent/original plaintiff Bhausahab and said Venubai are the husband and wife and Venubai has given birth to two sons and two daughters out of their marital wedlock. Even their elder daughter Sumanbai also given in marriage in the year 1974 to one Premanand Ujgare of Burudgaon. Respondent Bhausahab and Venubai were happily cohabiting as husband and wife. However, at the instigation of some persons and in order to defame the respondent/original plaintiff, the appellant-original defendant pretended to be the wife of the respondent and on 20.12.1982 had issued one legal notice through the Advocate to the respondent/original plaintiff demanding the maintenance from him. Though,

respondent/original plaintiff had replied the said notice on 27.12.1982 through his advocate, still then, the defendant had filed a Criminal Misc. Application No.6 of 1983 for maintenance in the Court of Judicial Magistrate First Class, Karjat. The respondent/original plaintiff has strongly resisted the said application by filing reply, however, the Judicial Magistrate First Class, Karjat allowed the said application and awarded the maintenance to the appellant/original defendant from respondent/original plaintiff. The respondent has thus instituted the present suit bearing No.339 of 1985 on 20.6.1985 for declaration that the appellant/original defendant is not his wife with the pleadings as detailed above. Though, the appellant-wife has appeared and sought time to file a written statement, failed to file the written statement. Consequently, on 23.7.1987 the Trial Court has passed the order directing the suit to proceed without 'written statement' against her and further directed the respondent/original plaintiff to file the affidavit. Thus, the respondent/original plaintiff has submitted his affidavit on 1.9.1987 exh.18. The learned Civil Judge J.D. Ahmednagar by ex-parte judgment and

decree dated 28.1.1988 decreed the suit of the respondent/plaintiff with costs and thereby declared that the appellant/original defendant is not legally wedded wife of the respondent/plaintiff. Being aggrieved by the same, the appellant/original defendant has preferred Regular Civil Appeal No.316 of 1989 and the learned 3rd Additional District Judge, Ahmednagar by judgment and order dated 20.2.1995 dismissed the appeal. Hence, this Second appeal.

3. Learned counsel for the appellant/original defendant submits that the appellant/wife had no opportunity to contest the suit on merits. The appellant/wife could not submit her written statement within time due to some difficulties and, as such, injustice has been caused to her. The suit has been decreed ex-parte holding that she is not legally wedded wife of the respondent. Learned counsel submits that, both the Courts below have considered the aspect of not filing the written statement before the trial court within time. However, the Courts below have not considered the legal aspect involved in the suit. Learned counsel

submits that both the Courts below have ignored that the appellant/original defendant had filed Misc. Criminal Application No.6 of 1983 before the Judicial Magistrate First Class, Karjat to claim the maintenance against the respondent/original plaintiff. Even though, respondent/original plaintiff has contested the said proceedings by filing his reply, the learned Judicial Magistrate First Class, Karjat, District Ahmednagar by judgment and order dated 30.4.1985 awarded the maintenance to the appellant from the respondent at the rate of Rs.200/- p.m. The learned 2nd Additional Sessions Judge, Ahmednagar by judgment and order dated 3.8.1989 dismissed the Criminal Revision Petition No.182 of 1985 preferred by the respondent against the said order of maintenance. This Court (Coram : R.M.S. Khandeparkar, J.) by order dated 21.12.2000 dismissed the Criminal Writ Petition no.225 of 1989 preferred by the present respondent against the said order of maintenance passed by the trial court and confirmed by the Sessions Court, as detailed above. Learned counsel submits that in terms of section 114 of the Evidence Act, continuous cohabitation of a man and a woman as

husband and wife and their treatment as such for a number of years may raise presumption of marriage. Said presumption of law is the strongest of legal presumptions and is not lightly to be repelled by a mere balance of probabilities. Learned counsel submits that in the said proceedings of maintenance, the appellant had approached the Court with a specific pleading/contention that her marriage with the respondent herein had taken place in a temple in presence of the priest and marriage ceremony including the wearing of Mangalsutra, seven rounds, Hom (sacred fire), exchange of gifts, presence of invitios, however, their relationship did not yield issues. Therefore, respondent/husband chooses to have a second marriage with Venubai in the year 1958. The appellant has also contended in the said proceedings that the appellant had been residing with the respondent as well as with second wife Venubai in the same house. There are concurrent findings of the fact in those maintenance proceedings that the appellant and respondent herein had stayed together for a considerable time as husband and wife. Since there was no issue borne out of the

wedlock between them, the respondent had performed/contracted second marriage with Venubai and after some time started giving ill-treatment to the appellant, which compelled her to stay separately. Learned counsel submits that second appeal deserves to be allowed on this substantial question of law or in the alternate, matter can be remanded to the Trial Court by setting aside the ex-parte judgment and decree.

4. Learned counsel for the appellant, in order to substantiate his contentions placed reliance on following judgments :-

1. Rangnath Parmeshwar Panditrao Mali Vs. Eknath Gajanan Kulkarni reported in 1996 AIR (SC) 1290.
2. Seth Ramdayal Jat Versus Laxmi Prasad reported in 2009 AIR (SC) 2463.
3. Ashok Kumar Vs. Usha Kumari reported in Lex (DLH) 1984 5 4
4. Chanmuniya Vs. Virendra Kumar Singh Kushwaha and another reported in 2010 (SC) (Supp) 29.
5. Sundararajan Vs. Ashok Kumar reported in Lex (MAD) 1991 8 110.
6. Gokal Chand Vs. Parvin Kumari reported in AIR 1952 Supreme Court 231.

7. Raghuvir Kumar (Minor) by next friend and mother Smt. D. P Kamalakumari and another Vs. Smt. Shanmughavadivu and others reported in AIR 1971 Madras 330.
8. Badri Prasad Vs. Dy. Director of Consolidation and others reported in AIR 1978 Supreme Court 1557.
9. Smt. Parmeshwari Bai Vs. Muthojirao Scindia reported in AIR 1981 Karnataka 40.
10. Razia Begum Vs. Sahebzadi Anwar Begum and others reported in AIR 1958 Andhra Pradesh 195.

5. Learned counsel for respondent submits that the trial court had given sufficient opportunity to the appellant to contest the suit on merits. Even though, the Trial Court had passed 'No WS' order, the appellant has not bothered to file an application for setting aside the 'No WS' order passed against her. Both the Courts below have rightly considered the said aspect and decreed the suit of the respondent/plaintiff in terms of its prayer clause. The learned counsel submits that section 40 to 43 of the Evidence Act provide which judgment of the Court of the justice is relevant and to what extent. Learned counsel submits that in the facts of the present case, the judgment and decree passed by the Civil Court would be relevant. Learned counsel

submits that, if the criminal case and the civil proceedings are for the same cause, judgment of the Civil Court would be relevant. Learned counsel submits that, in light of the judgment and decree passed by the Civil Court deciding the status of the parties inter se, the judgments and orders rendered by the Criminal Court are non est. Learned counsel submits that there is no substance in this second appeal and the second appeal is thus liable to be dismissed.

6. By order dated 10.4.1996 this Court had admitted the present second appeal on ground no.14 which refers the substantial question of law. It is as follows :-

“Ground no.14 :-

Whether in view of the various judicial pronouncements regarding the relationship between the persons that there is a presumption as husband and wife appeal has wrongly been dismissed.”

7. In a case **Smt. Parmeshwari Bai Vs. Muthojirao Scindia (supra)** reported in 1981 Karnataka page 40 in paragraph no.11, 13 and 18 of the judgment, the Karnataka High Court has made

following observations. The Karnataka High Court has placed reliance in a case **Badri Prasad Vs. Deputy Director of Consolidation** reported in AIR 1978 SC 1557.

- “11. The presumption of law is a strong legal presumption and is not likely to be repelled by mere balance of probabilities. The evidence repelling that presumption must be strong, distinct and satisfactory. However, intendment is made in favour of marriage de facto and the presumption drawn is based upon cohabitation and repute. The Weight of the presumption gets strengthened when it is proved that the party whose marriage is in question distinctly intending to marry and went through a form of marriage with that intention and also subsequently lived together as husband and wife and were estimated and reputed - as such by those who knew them. Even when there is no positive evidence of any marriage having taken place, the presumption is not only with regard to factum of marriage,'but also with regard to the parties and the requisite ceremony to constitute a valid marriage.
13. Thus, these authorities would make it clear that a man and a woman tied together by wedlock. form the least unit of our complex society and when ever a man and woman lived. as hug band and wife for a fairly long time and were so reputed, law presumes that they are living as husband and wife and not in a state of concubinage. Presumption is both with regard to factum of marriage and legality of it. It is a strong presumption as it goes to the root of the structure of society and the persons who challenge it will have to rebut it by clear, cogent and satisfactory evidence. This burden is heavy on them.
18. We have already observed above that the presumption arising on the fact of the case is a very strong presumption, and that unless the respondent adduce clear, cogent and reliable evidence, the presumption is not rebutted. The point therefore, that arises for our consideration is Whether suggestions made, the stray sentence elicited in the course of cross-examination of the lady and the questions put on interrogation cannot be sufficient to rebut the presumption arising from the facts of the case discussed above.”

8. In a case Rangnath Parmeshwar Panditrao Mali Vs. Eknath Gajanan Kulkarni (supra) relied upon by the learned counsel for the appellant the Supreme court has reiterated the aforesaid view.

9. In the instant case, the appellant way back in the year 1983 had initiated the maintenance proceedings under section 125 of the Criminal Procedure Code before the Judicial Magistrate First Class, Karjat, wherein a specific contention has been raised about valid marriage performed by the respondent with the appellant herein. There are concurrent findings about marital relations between the parties of the learned Magistrate as well as the Sessions Court while exercising revisional jurisdiction. Even, this Court (Coram : R.M.S Khandeparkar, J.) while disposing off the writ petition preferred by the respondent herein has confirmed the said finding recorded by the Trial Court so also the revision court and dismissed the writ petition. It has been specifically contended in the said proceeding that respondent had performed the marriage

with the appellant as per the Hindu rites and religion and since the appellant could not conceive the child, respondent had performed the second marriage with Venubai. In those proceedings, it has also been specifically contended by the appellant herein that she had even cohabited with the respondent after his second marriage with Venubai for long period, however, she got separated due to the ill-treatment extended to her at the instance of said second wife Venubai.

10. Learned counsel for respondent has further raised an interesting question whether the judgment and decree passed by the Civil Court would be relevant and binding on the criminal court. In a case **K.G. Premshanker Vs. Inspector of Police and another** reported in 2002 AIR (SC) 3372, relied upon by the learned counsel for respondent, in paragraph no.30, 31 and 32, the Supreme Court has made following observations :-

- “30. What emerges from the aforesaid discussion is (1) the previous judgment which is final can be relied upon as provided under [Sections 40 to 43](#) of the Evidence Act; (2) in civil suits between the same parties, principle of res-judicata may apply; (3) in a criminal case, [Section 300](#) Cr.P.C. makes provision that once a person is convicted or acquitted, he may not be tried again for

the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil Court would be relevant if conditions of any of the [Sections 40](#) to [43](#) are satisfied, but it cannot be said that the same would be conclusive except as provided in [Section 41](#). [Section 41](#) provides which judgment would be conclusive proof of what is stated therein.

31. Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under [Sections 40](#) and [42](#) or other provisions of the [Evidence Act](#) then in each case, Court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by 'A' on 'B's property, 'B' filed a suit for declaration of its title and to recover possession from 'A' and suit is decreed. Thereafter, in a criminal prosecution by 'B' against 'A' for trespass, judgment passed between the parties in civil proceedings would be relevant and Court may hold that it conclusively establishes the title as well as possession of 'B' over the property. In such case, 'A' may be convicted for trespass. The illustration to [Section 42](#) which is quoted above makes the position clear. Hence, in each and every case, first question which would require consideration is whether judgment, order or decree is relevant?, if relevant its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon facts of each case.
32. In the present case, the decision rendered by the Constitution Bench in M.S. Sheriff's case (supra) would be binding, wherein it has been specifically held that no hard and fast rule can be laid down and that possibility of conflicting decision in civil and criminal Courts is not a relevant consideration. The law envisages "such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for limited purpose such as sentence or damages."

11. It is thus thus clear that no hard-and-fast rule can be laid down and the possibility of conflicting decision in Civil and Criminal Courts is not a relevant consideration. Such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for limited

purpose such as sentence or damages.”

12. In my considered opinion, the appellant had no reasonable opportunity to contest the suit on merits. Furthermore, both the Courts below have not considered the substantial question of law involved in the matter. Thus, said ex-parte judgment and decree passed by the trial court in the aforesaid Regular Civil Suit No.339 of 1985 and confirmed by the First Appellate Court in Regular Civil Appeal No.316 of 1989 are thus liable to be quashed and set aside. However, in the peculiar facts of the present case, it would be just and appropriate to give opportunity to both the parties to lead oral and documentary evidence to substantiate their rival pleadings. This Court thus left with no other alternative but to remand the matter. It is for the Trial Court to consider each and every aspect including the legal issues involved in the suit, on its own merits without getting prejudiced with the observations made herein above. Suffice it to say that the Courts below have simply decided the suit on consideration of non-filing of the written statement within time without

adhering to the legal issues in the matter. It further appears that suit is old one and the parties are also at the fag end of their life. It would be just to issue certain directions for timely disposal of the suit. Hence, following order.

O R D E R

- I] Second appeal is hereby partly allowed.
- II] The judgment and decree passed by the learned Jt. Civil Judge J.D. Ahmednagar dated 28.1.1988 in Regular Civil Suit No.339 of 1985 and confirmed by the learned 3rd Additional District Judge, Ahmednagar by judgment and order dated 20.2.1995 in Regular Civil Appeal No.316 of 1989 are hereby quashed and set aside.
- III] Regular Civil Suit No.339 of 1985 is hereby remanded to the trial Court for retrial with the following directions :-
 - a] Re-admit the suit under its original number in the register of the Civil Suit and proceed to determine the suit.
 - b] The appellant/original defendant Malan Bhausahab Salve shall be permitted to file

her written statement on the date of appearance or subsequent thereto at the discretion of the Trial Court, however, not later than one month from the date of appearance.

- c] Parties are at liberty to adduce oral and documentary evidence in support of their rival contentions.
- d] The parties shall appear before the Trial Court on 4th of July, 2019.
- e] The Trial Court shall dispose off the Regular Civil Suit within NINE MONTHS from the date of appearance of the parties.
- IV] Second appeal is accordingly disposed off.
- V] Record and Proceedings shall be returned to the Trial Court, forthwith.

(V.K. JADHAV, J.)

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