

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.650 OF 2016

Shri Deepak Gangaram Ahirrao (Patil),
Age 40 years, Occupation Service,
Resident of : At Dighave Taluka Sakri
Dist. Dhule.

...Appellant.
(Org. Petitioner
Appellant)

VERSUS

Sau Sunita Deepak Ahirrao,
Age 36 years, Occupation Business,
Resident of : C/o Bapurao Khushal
Patil, At Gadkhamb, Taluka Amalner,
Dist. Jalgaon.

...Respondent.
(Org.Respdt./
Respondent)

....
Advocate for Appellant : Mr. M. S. Kulkarni.
Advocate for Respondent : Mr. N. P. Patil Jamalpurkar.

....
CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
21-06-2019.**

**Date of Pronouncing The Order :
23-08-2019.**

JUDGMENT :

1. Present appeal has been filed by the original petitioner husband challenging the concurrent findings of dismissal of his petition under Section 13 of Hindu Marriage Act bearing Hindu Marriage Petition No.121 of 2010 by Joint Civil Judge, Senior Division, Amalner Dist. Jalgaon on 29-08-2011 and Regular Civil

Appeal No.34 of 2011 by learned Adhoc District Judge-1, Amalner Dist. Jalgaon dated 08-01-2016.

2. Before turning to the disputed facts it is necessary to take a glance at the admitted facts. Petitioner - husband got married to respondent - wife on 29-04-2002 at Amalner as per Hindu Rites. At that time the petitioner was serving at Shirur Dist. Pune whereas his native place is Dighave Tq. Sakri Dist. Dhule. Further it is an admitted fact that, wife received burn injuries on 12-04-2003, when she was pregnant of seven months. On the basis of First Information Report lodged by her, an offence under Section 498-A, 307 read with 34 of Indian Penal Code came to be registered against the petitioner and his mother. They were in jail for some days before their release on bail in that matter. The petitioner and his mother faced prosecution in Sessions Case No.84 of 2003, which was on the basis of the said FIR lodged by the wife. They both were acquitted by learned Sessions Court, Dhule on 20-02-2007. Further it is an admitted fact that, the wife had filed Special Civil Suit No.45 of 2004 with Civil Judge, Senior Division, Amalner for expenses of medical treatment and maintenance. It was decided on 08-04-2009 in favour of wife.

3. The original petitioner had come with a case that, after the marriage, the wife was contending that, the marriage was against

her wish. She was not behaving properly. She stayed at Dighave for two months after marriage and during that period she was not doing any household work. She used to pick up quarrels with husband. She also used to say that, she should be taken to Shirur where husband is serving. In 2002 after the festival of 'Rakshabandhan', she was brought to Shirur and husband and wife started residing in rented premises. When the mother of the husband joined them, wife started taking objections, insulting mother-in-law and insisting that a big house should be taken by selling the agricultural land belonging to the father of the husband. She used to give threat to commit suicide. She had raised quarrels with mother-in-law on 10-04-2003. Thereafter after she received burn injuries on 12-04-2003, she was taken to hospital by the husband, his parents and her brother. Initially she had given statement that, she received burn injuries due to the blasting of stove, however later on, on the say of her parents, she changed version and lodged FIR against husband and mother-in-law. It is also contended that, since she has sustained burn injuries up to 38%, she has become ugly and on that count there will not be good matrimonial relations between him and her. Since last about more than six years, when they are separately residing due to the fault on the part of wife and all the efforts to bring them together have failed, he prayed for dissolution of marriage on the ground of cruelty.

4. Wife filed written statement and denied all the allegations against her. She has levelled allegations against husband on the count that, since beginning he was picking up suspicion over her character and he was ill-treating her to bring amount from her parents for purchasing plot and motorcycle. She was threatened to kill and on 12-04-2003, when she refused to give amount to husband, husband and his mother had poured kerosene on her person and ablazed her. The medical expenses on her treatment are borne by her father. At that time she was pregnant and due to the burn injuries, she delivered child prematurely. By way of amendment in the written statement it was submitted that, in her case i.e. Special Civil Suit No.45 of 2004 the competent Court had come to the conclusion that the husband has willfully neglected her, and therefore, the suit is barred by the principles of *res judicata*. It was also contended that, the husband has performed illegal second marriage and now with some concocted story, he want to get their marriage dissolved.

5. After issues were framed, both the parties have led oral as well as documentary evidence. Both the Courts have come to the conclusion that, the husband has failed to prove that, wife has deserted the husband without any reasonable cause. Husband is not entitled to get the decree of divorce as he has failed to prove that the wife had treated him with cruelty. Since both the Courts have

dismissed the suit and appeal respectively, this appeal has been filed.

6. Heard learned advocate for appellant Mr. M. S. Kulkarni and learned advocate for respondent Mr. N. P. Patil Jamalpurkar.

7. It has been vehemently submitted on behalf of the appellant that, perusal of the Judgment of the Sessions Case where the husband and his mother had faced the prosecution would show that, in all seven statements of the wife were recorded and she went on improving the story, statement by statement. Initially it was accidental burns theory, which then tried to be changed as ablazing herself and only the fifth statement, which was recorded on 17-04-2003, for the first time the story came that she was put to fire by mother-in-law. Only in the seventh statement she introduced the husband in the act. Taking into consideration, her FIR the husband and his mother were arrested and then released on bail. They have been acquitted and the revision filed by the State came to be rejected by this Court on 09-07-2013. The entire story and the conduct of the wife would show that, she had framed the husband and his mother with ulterior motive which amounts to cruelty. She had made false allegations against them. The Special Civil Suit filed by wife for recovery of medical expenses and maintenance was partly decreed on 08-04-2009, maintenance was granted @ of

6,000/- per month. In appeal that was filed by the husband in this Court, the said amount was reduced to Rs.5,000/- per month. In that matter it has been specifically stated that, the wife has refused to cohabit with the husband and thereby there is desertion between them. The learned Courts below have wrongly relied on the Judgment of the earlier round of litigation. In fact the plaint and written statement of the earlier suit were never filed on record. Only Judgments were considered in order to hold that in the present appeal the husband has failed to prove that, wife has deserted him. Reliance has been placed on the decision in, *Shripat and Others Vs. Daulat*, reported in [1971 Mh.L.J. 215], wherein the requirements to prove the doctrine of *res judicata* have been explained. It has been held that,

“The party pleading *res judicata* must place pleadings of both the parties in former suit before Court in subsequent suit. In absence of such pleadings or evidence it cannot be held that the subsequent suit is barred by *res judicata*.”

It has been further submitted that, the point of desertion as well as cruelty has not been considered properly by both the Courts here. The wife went on making false allegations and filing false prosecution, therefore it amounted to cruelty. So also the wild allegations against the husband and his mother amounted to cruelty. She was keeping intentionally herself away from her matrimonial

obligations. Her alleged threat or apprehension was not genuine at all. Reliance has been placed on the decision in, *K. Srinivas Vs. K. Sunita*, reported in (2014) 16 Supreme Court Cases 34, wherein it has been held that,

“Filing of false criminal complaint against husband and his family members under Section 498-A read with Section 307 of Indian Penal Code constitutes matrimonial cruelty.”

8. Per contra, the learned advocate appearing for the respondent submitted that, there are concurrent findings given by both the Courts below. The appeal memo does not reveal any substantial question of law, and therefore, the second appeal cannot be entertained. Acquittal by the learned Sessions Court cannot be considered here unless the said Court would have come to the conclusion that it is a false prosecution. Not able to prove the ingredients of the offence is a different point than prosecution of the husband with malafide intention. It was submitted that, since substantial question of law are not arising, the second appeal deserves dismissal. Reliance has been placed on *Apparaju Malhar Rao Vs. Tula Venkataiah alias Venkat Rao (dead) and Others*, reported in [2018 (2) Mh.L.J. 14], wherein it has been held that,

“Existence of substantial question of law is sine qua non for exercise of jurisdiction under Section 100 of Civil Procedure Code. In absence of any substantial question of law arising in appeal, appeal merits dismissal in

limine.”

Similar view was taken in, *Nivruti Dnyanu Patil Vs. Shankar Krishna Bhagat-Patil (Since deceased) through his L.Rs. Uttam Shankar Bhagat -Patil and Another*, reported in [2018 (6) Mh.L.J. 167] and *Vitthal s/o Ganptrao Adhaoo (Akre) and Anr. Vs. Shrikisan s/o Nanaji Kondalkar and Ors.*, reported in 2015 (6) All MR 391.

9. As regards the cognizance of the second appeal is concerned, the decisions relied by the learned advocate for respondent will have to be considered. When it is a *sine qua non* for entertaining the second appeal under Section 100 of Code of Civil Procedure that the appellant should show substantial question of law then it is required to be seen as to whether in this case any such circumstance is shown. At the same time it can also be said that, this Court cannot go much deep into the factual aspects as already the first fact finding Court as well as the last fact finding Court has given concurrent findings on those facts.

10. As regards the point regarding *res judicata* is concerned, there cannot be contrary opinion than the view taken in case of *Shripat and others Vs. Daulat (Supra)*. The pleadings of both the parties before the earlier Court ought to have been produced in this case in order to show that, similar issue was before the another Court of

competent jurisdiction and the finding to that issue has achieved finality. Another fact that is required to be considered here is that, the another suit in this case was for recovery of medical expenses and for maintenance, therefore, the scope of that proceeding was limited. Here in this case the decree for divorce was asked on two grounds one was desertion and another was cruelty. As regards the desertion is concerned, the said desertion is after the incident of burn injuries and not prior to that. The facts are intermingling with each other. Filing of the FIR and the sessions case was stated to be the act of cruelty on the part of the wife on the ground that it contained wild allegations.

11. It is to be noted that, though in all seven statements of the wife were taken, they cannot be reassessed here as they were already assessed in the said sessions case. Changing the version does not amount to falsehood. No explanation was sought from the wife in cross examination conducted on behalf of the husband in this case, as to why she went on changing the versions or improving them. The effect of change in the contention has been seen in the criminal proceedings, resulting in acquittal. However, much more facts were required to infer that the allegations or changes in the statements were made with some malafides. Admittedly the wife was pregnant of seven months on the day when she received burn injuries. There is no explanation offered on behalf of the husband as

to how she received the burn injuries. It has been tried to be contended that, it was an accidental burn but it comes with so many questions as to why the husband had not reported the fact of either accident or attempt to commit suicide by wife to the police. Now after the acquittal, he may come with different story which may be suitable to him but his immediate conduct after the incident was important. It is hard to believe that, a lady of seven months pregnancy who want to enjoy her 'would be motherhood' would try to commit suicide, unless there were forced circumstances. If it would have been an attempt to commit suicide then also it was for the husband to explain as to what were those circumstances under which she had tried to take that extreme step. One more factor that is now emerging is that, since she has suffered 38 % of the burn injuries covering part of her face also, the husband is now branding her as “**ugly**” and now he has no intention to cohabit with her. This shows that, on any count he want to get rid of her.

12. Even if the pleadings of the earlier suit which was partly decreed and then only the amount of maintenance has been reduced in the first appeal by this Court, the fact remains that the said competent courts had considered that the wife is entitled to get maintenance as she has proved the parameters of getting maintenance under the Hindu Adoption And Maintenance Act, it has been awarded. That means, those Courts have not come to the

conclusion that, the said proceedings were false or filed with some ulterior motive. Husband had proper opportunity to contest the said proceedings. He could have brought it on record that, those proceedings are false, but it appears that he failed and therefore the suit was partly decreed, and the appeal filed by him has been partly allowed only to the extent of reduction of monthly maintenance. The ratio laid down in *K. Shrinivas Vs. K. Sunita (Supra)*, cannot be denied, however the said ratio is not applicable to the facts of this case. In that case admissions were given by the wife and on the basis of the facts therein those circumstances and the changes in the statement of the wife under Section 161 of Code of Criminal Procedure were considered as contrived afterthought. Even if for the sake of arguments taking into consideration seven statements of the respondent wife taken under Section 161 of Code of Criminal Procedure were afterthought statements, yet the fact remains that even the husband is accepting a fact that wife had received burn injuries and he is not giving proper explanation for those burn injuries to the wife in this case. Under these circumstances no case is made out for framing substantial question of law. Hence, second appeal is disposed of as not admitted.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.