

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.153 OF 2017
WITH
CA/13913/2016 IN SA/153/2017
WITH
SECOND APPEAL NO.154 OF 2017**

Vikas s/o Shivdas Patil,
Age 45 years, Occupation Agri.,
R/o 41/A, Vidyavihar Colony,
Shirur Dist. Dhule.
Now Residing AT Chincholi
Tq. Yawal Dist. Jalgaon.

**...Appellant.
(Ori.Respdnt.)**

VERSUS

Sau. Gitanjali Vikas Patil,
Age 38 years, Occupation Service,
R/o C/o Shobhabai Arun Khairnar,
Nijampur Tq. Sakri Dist. Dhule.

**...Respondent.
(Ori.Applicant)**

....
Advocate for Appellant : Mr. D. D. Choudhari.
Advocate for Respondent No.1 : Mr. A. S. Sawant.
....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
16-07-2019**

**Date of Pronouncing The Order :
13-08-2019**

ORDER :

1. Both these appeals are between same parties i.e. husband and wife. In Second Appeal No.153 of 2017, the husband is challenging the Judgment and decree passed in restitution of conjugal rights i.e.

under Section 09 of the Hindu Marriage Act by learned Civil Judge, Senior Division, Dhule in Hindu Marriage Petition No.121 of 2010, dated 21-09-2012, and confirmation of the said decree in Regular Civil Appeal No.271 of 2012 by learned Ad-hoc District Judge – 2, Dhule on 08-10-2015. In Second Appeal No.154 of 2017, the husband is challenging the Judgment and decree passed in his petition for divorce under Section 13 of the Hindu Marriage Act by learned Civil Judge, Senior Division, Dhule in Hindu Marriage Petition No.339 of 2011, dated 21-09-2012, which has been confirmed in Regular Civil Appeal No.270 of 2012 by learned Ad-hoc District Judge -2, Dhule on 08-10-2015.

2. At the outset it will have to be observed that, though both the matters were between the same parties, wife had filed petition for restitution of conjugal rights whereas husband was asking divorce. Both the Courts below ought to have given a common Judgment so as to avoid any contrary observations, so also to have a compact view of the dispute between the parties and the adjudication thereof. It would be a harsh statement to make, but it has to be made just to get some disposal units. If such practice is adopted then it is depreciable. The parties approaching the Court should get clear idea as to why their petition/ petitions have been either allowed or rejected and when the evidence has been led in one of the matters only, then just by taking a pursis in another matter, it is not

appropriate on the part of the trial Court to pronounce a total separate Judgments in order to create any confusion. Here in this case trial Court in both the matters had given the Judgment on the same day in both the matters when in fact a common Judgment could have been given. Points for consideration in such matters would be overlapping and under such circumstance a common Judgment ought to have been given. Same happened at the stage of appeal also, therefore at the cost of repetition it can be said that, if such practice is adopted, just to get more disposal units then it is required to be deprecated.

3. The facts which are not in dispute are that, the marriage between the parties took place on 25-04-1999. They have a son and a daughter. Their marriage still subsist and the cohabitation was for about seven years. (Parties are referred as 'husband' and 'wife' hereinafter).

4. The wife had come with a case that, she was harassed on the count of dowry by the husband as well as his mother. The mother-in-law (husband's mother) used to tease her on the count that the husband would have got more dowry if he would have marry to another girl. Husband was having desire to get a bride doing job and under those circumstances the husband and his relatives demanded the amount of Rs.2,00,000/- for constructing Bunglow.

It is also alleged that, husband was not allowing her to cook by saying that, she cannot cook and it was also her contention that, husband used to raise suspicion on her that, she would mix some substance in food in order to kill him and his family members, and under that pretext he was not allowing her to cook food. Wife contends that, she was beaten by the husband and driven out of the house on 12-08-2007 and since then she is residing along with children with her parents. There were attempts to resolve the dispute however husband refused. Husband had issued a false notice demanding divorce which she has replied. She has stated that, she is ready to cohabit but husband has withdrawn himself from her society without any reasonable cause. Hence, she prayed for decree for restitution of conjugal rights.

5. It will not be out of place to mention here that, these are the same contentions which the wife has raised in her written statement filed to the petition for divorce by the husband.

6. The husband has come with a case that, he is a high school teacher. Their married life was happy for about a year after the marriage only. Thereafter he along with wife went to reside at the place of his service. His mother-in-law (wife's mother) had visited his place on 'Rakshabandhan' but on triple ground that mother-in-law had raised quarrel with him and by taking his wife without

intimating him, she left the house. Wife resided with her parents for about three to four months, and thereafter she was brought back by him for cohabitation. It is his contention that, wife's mother had misbehaved with him two to three times in same passion and used to take the wife along with her. He used to give phone calls, letters, telegrams to the wife, asking her to resume cohabitation. His relatives had also mediated but there was no improvement in the behaviour of the wife. The father expired on 26-12-2006, wife came late for last rites. After the last rites were over, he had taken her for cohabitation but then immediately within two days her mother and aunt went to his house, threatened husband and asked him to allow the wife to behave as per her wish. According to him the behaviour of the wife and her family members is giving him mental agony. Wife is not interested in marital life. She was not discharging her matrimonial obligations, and therefore, on these counts he states that, the marriage should be dissolved.

7. Again it can be said that, with the above said contentions the husband had filed written statement to the petition for restitution of conjugal rights filed by the wife.

8. Taking into consideration the rival contentions, issues were framed, parties have led oral as well as documentary evidence. Taking into consideration the evidence on record and hearing both

sides, the petition for restitution of conjugal rights filed by the wife came to be decreed. Husband has been directed to take the wife for cohabitation within two months from the date of order. The appeal filed by the husband has been dismissed. The petition for divorce filed by the husband has been dismissed and the said Judgment and decree has been confirmed in appeal. Hence, these second appeals by husband.

9. Heard learned advocate Mr. D. D. Chaudhari for the appellants in both the cases, and learned advocate Mr. A. S. Sawant for respondent – wife in both the cases.

10. It has been vehemently submitted on behalf of the appellant that, both the Courts below have not appreciated the evidence in both the matters properly. It was not considered that, the wife has left the matrimonial home on 12-08-2007 without intimating husband. Only as a counter blast to the petition for divorce, on the ground of desertion and cruelty; the wife has filed petition for restitution of conjugal rights. Both the Courts below have failed to consider that the wife had deserted the husband and left his company without any reasonable cause. That itself is a ground for cruelty also. Evidence has been led by the husband to show that, there was mediation by his relatives but it did not yield any positive result. The wife had failed to prove that, she was subjected to

cruelty by the husband, levelling this charge would also amount to cruelty for the husband.

11. Per contra, learned advocate for respondent in both the cases submitted that, both the Courts below have correctly assessed the evidence, and therefore, the petition for restitution of conjugal rights has been rightly decreed. In spite of having son and daughter, the husband has not taken care of the wife as well as children. He was not allowing the wife to cook food and as such his crazy behaviour has led to suspicion against wife. Evidence has been led by the wife also to show that, she had made attempts to cohabit with husband but he has not accepted her.

12. At the outset when we are in second appeal, under Section 100 of Code of Civil Procedure framing of substantial question of law is *sine qua non*, re-appreciation of only the evidence is not contemplated in the second appeal. As per the law laid down by Hon'ble Supreme Court in catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of Code of Civil Procedure, after the 1976 amendment, is confirmed only when the Second Appeal involves as a substantial question of law. The existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of the Code of Civil Procedure.

13. A reliance can be placed on decision in *Ishwar Dass Jain (Dead Through LRS. Versus Sohan Lal (Dead) By LRS.*, reported in (2000) 1 Supreme Court Cases 434, in which it was laid down,

“Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.”

Therefore, it is now required to be seen, whether any substantial question of law can be raised by the appellant taking into consideration the facts as well as evidence that has been adduced.

14. Therefore, taking into consideration the observations in the above said case and also on the decision in *Kondiba Dagadu Kadam Versus Savitkibai Sopan Gujar*, reported in (1999) 3 SCC 722, wherein it has been held that,

“In a second appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the

First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

- (i) Contrary to the mandatory provisions of the applicable law ; OR
- (ii) Contrary to the law as pronounced by the Apex Court. OR
- (iii) Based on inadmissible evidence or no evidence.

Further it is observed in the said case that, if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal.

15. Taking into consideration the above said legal position, it can be said that, both the Courts below have considered the evidence led by both the parties. Wife has examined herself and her maternal uncle who had tried to mediate and then the husband has examined himself and had examined two of his relatives who had also alleged to have attempted to mediate between the parties. Most of the evidence on the facts is word against word. However what is important to be noted is that, both the parties are agreeing to the fact that, wife left matrimonial home on 12-08-2007. As per wife she was driven out whereas as per husband she had voluntarily left. We are required to consider the period thereafter because as regards the earlier events are concerned, the wife uses to come and go as per the contention of the husband. But then when admittedly after

12-08-2007 they have not come together then it is required to be seen as to what was the reason behind it. The learned Trial Court has highlighted that, there is evidence in respect of the fact that the husband was not allowing the wife to cook food under the suspicion that she would mix something in the food in order to kill him and his family. Though initially the husband has denied the said suggestion but when it was specifically asked to him that, since the wife intends to cohabit with you, whether you would take her ? He has answered that, there is danger to his life from her. Thus there appears to be some substance in what the wife is saying. Another fact that is also required to be considered is that, after seven years of cohabitation, may be intermittent, and having a son and a daughter why the wife would be interested in staying with her parents that too at their mercy is a question, and no reason can be found from the evidence led by the husband to support the fact that without any reason or with some reason the wife is residing with her parents by ignoring her matrimonial obligation. Under such circumstance when the facts and evidence have been appreciated properly by both the Courts and it is not shown that the said finding is perverse, second appeal will not lie. Under such circumstance both the second appeals are dismissed. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE