

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.372 OF 2016

Sou.Amruta w/o. Nilesh Kotangale,
Aged about 25 years, Occ.Household,
r/o. c/o. Ashok Kamble, Near Khatri
College, Tukum, Chandrapur, Tq.
and District Chandrapur. **APPELLANT**

// VERSUS //

Nilesh s/o. Domaji Kotangale,
Aged about 28 years, Occ.Business,
r/o. Near Dr.Bhattacharya Clinic,
in front of Krishna Nagar, Mul
Road, Chandrapur, Tq. and District
Chandrapur. **RESPONDENT**

Mr.S.D.Chande, Advocate for the Appellant.
Mrs.R.S.Sirpurkar, Advocate for the Respondent.

Date of reserving the Order : 7.11.2019.
Date of pronouncement of the Order : 18.11.2019.

CORAM : VINAY JOSHI, J.

ORAL ORDER :

1. This Second Appeal of wife arises out of Judgment and Order dated 10.6.2016 passed in Regular Civil Appeal No.125 of 2015 by which decree of divorce passed in Hindu Marriage Petition No.169 of 2014, dt.1.4.2015 by 2nd Joint Civil Judge (Sr.Dn.) was affirmed.

2. Initially, the respondent/husband had filed Hindu Marriage Petition No.169 of 2014 for grant of decree of divorce on the ground of cruelty as mentioned in Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as "**the Act of 1955**"). It was alleged that since inception, appellant/wife was least interested in co-habitation with the respondent. She had love affair with some one prior to marriage as well as she was desirous to

marry with somebody else. After marriage, her behaviour was abnormal. She was of whimsical nature and used to frequently leave the matrimonial house without informing anybody and was returning in the late hours. She was also not sexually satisfying the respondent/husband. The appellant used to pick up quarrel with respondent as well as with his parents for no reason. The said abnormal behaviour of appellant was a routine affair which has mentally shocked the respondent and since her behaviour amounts to mental cruelty, the respondent/ husband sought for decree of divorce.

3. The summons was duly served on the appellant/ wife by way of substitute service in terms of Order V, Rule 17 of the Code of Civil Procedure. However, she remained absent. In consequence thereof, as the appellant's evidence remained uncontroverted, learned trial Court believed the same and passed the decree of divorce dated 1.4.2015.

4. Being aggrieved and dissatisfied by annulment of marriage, appellant/wife preferred Regular Civil Appeal

No.125 of 2015. However, she was unable to succeed. In the wake of such background, she has preferred present Second Appeal challenging the Judgment and decree passed by both the Courts below.

5. Heard both the sides finally at the stage of admission. Learned Counsel appearing for the appellant/wife raised two preliminary objections on the point of sustainability of decree of divorce. Initially, it is submitted that the Divorce Petition was instituted within a period of one year from the date of marriage, which is in contravention to Section 14 of the Act of 1955. Nodoubt, Section 14 of the Act of 1955 provides a rider on the Courts to entertain any petition for dissolution of marriage by decree of divorce if it is filed within one year from the date of marriage. In the case at hand, admittedly, the marriage was solemnized on 9.6.2013. It reveals from the record of trial Court that the petition for divorce was instituted and registered on 5.8.2014; meaning thereby - after statutory period of one year. It is pertinent to note that there happens to be an endorsement (Exh.1) in Divorce Petition

that, in view of order passed in M.J.C. No.79 of 2014, petition is registered on 4.8.2014. The nature of Misc. Civil Application has not come on record nor it is clarified by either of the parties. Perhaps that may be an application seeking leave by respondent/husband to file Divorce Petition within one year. However, the result would be that the petition is filed on 4.8.2014 i.e. one year after solemnization of the marriage and therefore, the first objection would not survive.

6. The second objection is about maintainability of the petition on account of not joining the paramour to the Divorce Petition. It is argued that the respondent/husband himself came with a case that the appellant/lady was having love affair with a boy namely Sheetal and was desiring to marry with another boy namely Dhiraj. Rather, the appellant made submission on the basis of such pleadings incorporated in the Divorce Petition. In terms of Rule 5 of the Bombay High Court Hindu Marriage and Divorce Rules, 1955, in every petition for divorce or judicial separation on the ground that the respondent is living in

adultery or has committed adultery with any person, the respondent may seek leave to dispense with joinder of such person as a co-respondent. It means that, in absence of leave, such person is required to be joined as co-respondent in case of petition for divorce on these grounds.

7. However, said procedural aspect would not apply to the facts of this case. Primarily, the respondent/husband is not seeking divorce on the ground of adultery. Moreover, there are no allegations that the appellant/wife was leading an adulterous life or she had committed adultery with another person. The only allegation is about having love affair with some one and her desire to marry with some other person. Besides that, the husband has not claimed divorce on the ground of adultery. Therefore, the second objection would also fail.

8. Coming to the facts of the case, the appellant would argue that there was no proper service on her and therefore, the decree is liable to be set aside. Secondly, it is argued that there is no sufficient evidence led by the

respondent/husband to prove cruelty so as to obtain decree of divorce. As regards to the first contention, undisputedly the decree passed by the trial Court is an ex-parte decree. There is no quarrel that there was substituted service on appellant/wife as provided in terms of Order V, Rule 17 of the Code of Civil Procedure. The said provision contemplates that if the defendant cannot be found after due diligence or he refuses to sign the acknowledgment or there is no likelihood of his being found at the residence, then substitute service can be effected. The record of trial Court bears a copy of Bailiff report (Exh.6) about effecting substituted service on appellant/wife. The Bailiff's report indicates that, on 18.8.2014, around 9.45 a.m., he went to the residential place of appellant where she was very much found. The Court bailiff read over the notice and copy of petition, which the appellant refused to accept by stating that she is no way concerned with the matter. Having no other option, the Court bailiff affixed copy of notice on the outer door and reported the same to the Court. Relying on the Bailiff's report, the trial Court vide order dt.5.3.2015 proceeded ex-parte.

9. It is argued that since the appellant/wife said to the bailiff that she was no way concerned with the proceedings, therefore, the service cannot be treated to be a good service. It is not possible to accept the said submission because Bailiff went with the particular summons of the Divorce Petition for which she disowned the concern. One can take note of the fact that it is tendency of the litigants to avoid service by saying that they have no concern with the matter. The Bailiff's report is explicitly clear to indicate that the appellant was well informed about the Divorce Petition, but she has consciously refused to accept the notice. In order to meet such a situation, the procedure is provided in terms of Order V, Rule 17 of the Code of Civil Procedure to make substituted service, which was effected by the Court Bailiff.

10. A party who suffers an ex-parte decree has two simultaneous remedies, one under Order IX, Rule 13 for setting aside ex-parte decree and secondly to challenge impugned order by preferring appeal under Section 96 of the Code. The scope of appeal is much wider so as to

consider sustainability and decree as per parameters led down under Order IX, Rule 13 and also on merits of the case.

11. It is pertinent to note that, while setting aside ex-parte decree in terms of Order IX, Rule 13, one has to make out that the Court summons was not duly served or that the party was prevented by any sufficient cause for appearing in the proceedings. However, second proviso added to Order IX, Rule 13 speaks that, no Court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if Court is satisfied that defendant had notice of the date of proceedings. In the case at hand, the Bailiff's report indicates that the appellant was made aware about the Court summons, but she avoided and therefore, he has effected substituted service. It also bars the reference that, since no witnesses were present at the relevant time, their names are not mentioned. Absolutely, no fault can be found in the substituted service which is an alternate mode provided by the Code to come out from the situation where

the party refuses to accept the service. In the circumstances, the appellant's submission that she was not duly served does not hold water.

12. Coming to the next submission, on merits, it is appellant's case that there was no sufficient evidence to pass a decree of divorce on the ground of cruelty. For this purpose, I have gone through the evidence affidavit (Exh.7) filed by the respondent/husband in the trial Court. In paras.3, 4 and 5, the respondent/husband has stated about whimsical behaviour of appellant. It is alleged that she was not living properly and used to return to the house at late night. It is stated that she was not sexually satisfying the respondent and had disclosed him about her intimate relations with some one prior to marriage. The evidence affidavit further states that the appellant was not living properly and frequently she used to quarrel with the respondent and his parents. Learned trial Court has considered the uncontroverted evidence and on that basis, passed the decree of divorce.

13. Herein, the respondent/husband is claiming decree of divorce on the count that the appellant/wife treated him with cruelty which is one of the grounds provided under Section 13(1)(a) of the Act of 1955. The word 'cruelty' has not been defined by the Statute. It has been used in relation to human conduct or human behaviour. It is the course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. Always it is a question of fact and degree. If it is mental, the problem presents difficulty. Though the burden of proving cruelty lies on the petitioner; however, the amount of evidence must be to the satisfaction of the Court that the other party had cruel behaviour.

14. It has come in the respondent's evidence that the appellant/lady was desiring to marry with somebody else which may be the cause of disapproval for her marriage with the petitioner. It has come in the evidence that the appellant's behaviour was abnormal. She used to leave the house frequently and return late in the night. She also

used to quarrel with the inmates of house. Certainly, the impact of such treatment on the mind of spouse has to be seen. Ultimately, it is a matter of inference to be drawn by taking into account nature and conduct and its effect on the complaining spouse. It is apparent from the evidence that the relations between the parties had deteriorated and the wife was dissatisfied to live with the husband and therefore, she used to misbehave and quarrel with him. Said entire evidence of respondent/husband remained unchallenged. Certainly, such conduct would affect mental health of husband and would amount to cruelty in peculiar facts of the case.

15. It is pertinent to note that the fighting couple has no issue at all. From the year 2014, they are living separately. After dismissal of First Appeal, the respondent/husband has re-married, for which the Contempt Petition is pending. Be that as it may, the appellant failed to make out either of the course to upset the decree of divorce which is confirmed by the first Appellate Court. In view of that, the appeal carries no merit. Hence, it stands dismissed.

In the circumstances, no order as to costs.

JUDGE

[jaiswal]