

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

SECOND APPEAL NO.78/2019

Arvind Rajaramji Gulhane

..VS..

Sau.Sunita Arvind Gulhane

.....  
Office Notes, Office Memoranda of Coram,  
appearances, Court orders or directions  
and Registrar's orders

Court's or Judge's Order

.....  
Shri S.C.Bhalerao, Counsel for the Appellant.

**CORAM : V.M.DESHPANDE, J.**

**DATED : JUNE 11, 2019.**

1. The appellant challenges judgment and decree dated 14.9.2018 passed by learned 2<sup>nd</sup> District Judge, Yavatmal in Regular Civil Appeal No.69/2014 whereby the Lower Appellate Court allowed the appeal filed by wife and upset the decree of divorce granted in favour of the husband.
2. Heard learned counsel Shri S.C.Bhalerao for the husband.
3. According to learned counsel for the husband, learned Judge of the Lower Appellate Court ought to have granted decree of divorce on the ground of desertion by his wife.
4. Few admitted facts will have to be mentioned in this order while dismissing the present appeal.
5. On 22.5.1993, marriage took place between the husband and the wife. From their wedlock, the wife delivered a son whose custody is with the wife.

6. Husband filed a hindu marriage petition i.e. HMP No.23/1995 against the wife on the ground that he was subjected to cruelty at her hands. Pertinent to note here that on 21.2.1994, according to the husband, wife left her matrimonial house on her own. The said hindu marriage petition on the ground of cruelty was contested by the wife which resulted into its dismissal by learned Judge of the Trial Court on 7.3.2001. The said was challenged by the husband by filing an appeal before before the Lower Appellate Court. However, the said appeal bearing Appeal No.102/1996 was dismissed by the Lower Appellate Court. Learned counsel for the husband could not give exact date of dismissal of the said appeal. Though it was open for the husband to challenge the said before this Court, for the reasons best known to the husband, no appeal was preferred before this Court. Consequently, the decree dismissing the petition for divorce on the ground of cruelty has attained its finality.

7. The husband who is teacher was bent upon to see that legal matrimonial ties between him and his wife are to be severe and, therefore, he preferred another hindu marriage petition i.e. HMP No.55/2001 on the ground of desertion alone. The said was withdrawn. Even, learned counsel for the husband could not give the date of withdrawal of the said hindu marriage petition nor the order was made available for perusal of this Court as to whether any liberty was granted in his favour.

8. Be that as it may, thereafter another hindu

marriage petition was filed by the husband i.e. HMP No.27/2005 which gives rise to the present second appeal. The divorce was claimed on the ground of cruelty. However, during pendency of the said, amendment was sought and divorce was claimed on the ground of desertion also.

9. Learned Judge of the Trial Court decreed the hindu marriage petition on 16.6.2014. Though learned Judge observed in the judgment that the petition is barred on the principle of *res judicata* insofar as allegation in respect of cruelty is concerned. The wife filed an appeal before the Lower Appellate Court granting divorce in favour of the husband. The said appeal was registered as Regular Civil Appeal No.69/2014.

10. Needless to mention that the husband also filed a cross appeal challenging finding recorded by learned Trial Court for refusing decree on the ground of cruelty in view of principle of *res judicata*. Learned Judge of the Lower Appellate Court on 14.9.2018 allowed the appeal filed on behalf of the wife and upset the decree of divorce granted in favour of the husband. At the same time, cross objection filed on behalf of the husband was also rejected.

11. Hence, this appeal.

12. However, during course of submission before this Court, learned counsel for the husband did not pray for decree of divorce on the ground of cruelty since it is barred by principle of *res judicata*.

13. Even, case of the husband is that on 21.2.1994

without there being any justification wife left her matrimonial house. This, ground of desertion was also available for the husband in the year 1995 when he filed a petition i.e. HMP No.23/1995 only on the ground of cruelty seeking divorce. However, ground of desertion to claim decree of divorce was not press into service though it was available to the husband. Thus, he abandoned the said cause and, therefore, in the present appeal the submissions of learned counsel for the husband to that extent are also hit by the principle of constructive *res judicata*.

14. Be that as it may, at no point of time the husband took any step for co-habitation. It was always open for the husband to file a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. On the contrary, learned Judge of the Lower Appellate Court recorded finding that after alleged desertion, husband gave a Notice on 3.1.1995 and asked divorce from the wife. Thus, right from beginning the husband was intending to secure and obtain divorce from the wife.

15. Insofar as conduct pointed out by learned counsel for the husband is nothing but an appreciation of evidence, rightly appreciated by learned Judge of the Lower Appellate Court which was last finding of Court, warranting no interference from this Court.

16. In the result, the second appeal is dismissed with costs of Rs.10,000/- to be paid to the wife within a period of one month from today. If the said costs are not paid to the wife within the stipulated period, it shall be open

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for the wife to recover the said amount as arrears of land revenue and the Collector at Yavatmal is directed to submit a report in that behalf.

JUDGE

!! BRW !!