

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3793 OF 2020

Vaishali w/o. Vijay Burande,
 Age 38 years, Occu. Govt. Service,
 R/o. C/o. Kashinath Kapse,
 Ganesh Nagar, Ambejogai,
 District Beed.

.. Petitioner
 (Original Respondent)

Versus

Dr. Vijay s/o. Gangadharappa Burande,
 (Died) through his legal representative
 Mahananda w/o. Gangadharappa Burande,
 Age 73 years, Occu. Household,
 R/o. Municipal House No. 9-92 (Old No.9-78),
 Bansilal Nagar, Ambejogai, District Beed

.. Respondent
 (Original Applicant)

...

Ms. Vaidehi Deshmukh, Advocate holding for Mr. Anand D. Kawre
 and Ms. Ranjita R. Barhate, Advocates for Petitioner
 Mr. Kedar Warad, Advocate holding for Mr. Sunil V. Warad,
 Advocate for Respondent

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 07-12-2021

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with
 the consent of the learned Advocates for the parties.

2. This petition takes exception to order dated 27-01-2020
 passed below Exhibit-118 by the learned Civil Judge, Senior
 Division, Ambejogai, District Beed, in Hindu Marriage Petition
 No. 11 of 2011, thereby allowing the application filed by the legal

representatives of husband and permitting them to prosecute the proceedings of HMP No. 11 of 2011.

. Dr. Vijay Gangadharappa Burande (husband) filed the above Hindu Marriage Petition under section 13(1)(i)(i-a)(i-b) of the Hindu Marriage Act, 1955 (in short, "H.M.Act") seeking divorce from the petitioner-wife on the ground of adultery.

. During the course of trial, after the evidence of husband was recorded, he expired on 26-09-2018. After the death of the petitioner-husband in HMP No. 11 of 2011, his mother (Respondent, here-in) filed application Exhibit-118, claiming that she and two sons of the petitioner namely, Kshitij, aged 20 years and Prachet, aged 13 years, may be added as legal representative of the petitioner – Vijay. It is contended that the proposed amendment is necessary for determining the real dispute between the parties and it would not change the nature of the petition. The application, therefore, may be allowed and the legal representatives of the deceased petitioner-husband may be brought on record by carrying out the amendment in cause title of Hindu Marriage Petition. The said application was resisted by the wife – present petitioner.

. By the impugned order, the trial Court allowed the application Exhibit-118, as per prayer therein. The petitioner is aggrieved by this order.

3. Heard the learned Advocate for the petitioner and the learned Advocate for the respondent.

4. The learned Advocate for the petitioner, by relying on the decision in *Yallawwa (Smt) Versus Shantvya (Smt), (1997) 11 Supreme Court Cases 159*, submits that the divorce proceedings between the husband and the wife are of personal nature and the proceedings abates if either of the spouse expires. The right to sue does not survive after the death of either of the spouse. The Trial Court has failed to appreciate the ratio in the case of *Yellava (supra)* and has erred in allowing the application filed by the respondent. She, therefore, submits that the impugned order is liable to be quashed and set aside by allowing the present petition.

5. Mr. Warad, learned Advocate for the respondent, on the other hand, vehemently opposed the prayer of the petitioner. According to him, since the divorce petition was filed on the ground of adultery, the right to sue will survive, if the divorce decree on the ground of adultery is granted, in that case, the wife is deprived from claiming the pensionary benefits as well as any share in the property. He, therefore, states that the right to sue survives and the trial Court is justified in allowing the application.

. By placing reliance on Section 13(1)(i)(vii) of the H.M.Act,

he submits that when the divorce can be sought against a dead person, then when a divorce decree is sought on the ground of adultery, the proceedings should be allowed to be continued, as social stigma is attached to the family, because of the adulterous life led by a spouse. He further submits that in-chief and cross-examination of husband is already over, and therefore, the respondent is rightly permitted to step into the shoes of the husband and conduct divorce proceedings against the wife.

. By placing reliance on Rule 116 of the Maharashtra Civil Services (Pension) Rules, 1982, he submits that, if the wife is living adulterous life, then she is not entitled to claim the pensionary benefits. Taking into the consideration this fact also, the trial Court was justified in permitting the respondent to continue the divorce proceedings as legal representatives of the deceased husband. He, therefore, supports the impugned order and submits that there is no substance in the petition and the petition is liable to be dismissed.

6. The filing of divorce petition on the ground of adultery and the death of husband is not in dispute. It is also not in dispute that the examination-in-chief and cross-examination of husband was over before his death. The learned Advocate for the respondent, therefore, contended that since the chief and cross-

examination is over, right to sue survives and the proceedings was rightly permitted to be prosecuted by the respondent.

7. In **Yallawwa** (*supra*), the Honourable Apex Court held thus :

“6. ... So far as the contention of maintainability of the application of the respondent-wife is concerned, it must be kept in view that petition of divorce was moved by the husband for getting his marriage with the respondent dissolved by a decree of divorce on the ground that the respondent deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. It is also to be kept in view that such petition for divorce can be moved either by the husband or the wife, as the case may be. To that extent it is certainly a personal cause of action based on one or more matrimonial misconducts alleged in the petition against the erring spouse. Consequently, in such proceedings before and decree comes to be passed of either of the spouse expires pending the trial then the personal cause of action would die with the person. Such civil proceedings would not abate only if right to sue survives after the death of one or more of the parties to the proceedings as laid down by Order XXII Rule 1 C.P.C. However, if during the pendency of the petition for divorce either of the spouses expires, the cause of action being personal to both of them, the right to sue would not survive. The next question is whether after the decree of divorce of passed ex parte or bipartite against the other spouse whether the right to sue would survive for the spouse against whom such decree had been passed by the Court and whether such a decree can be got set aside by the surviving spouse either by filing an appeal or by moving an application under Order IX Rule 13 C.P.C. for

getting it set aside if it is an ex parte decree. The answer to the question will depend upon the legal effects of such a decree of divorce passed by the Trial Court under Section 13(1) of the Hindu Marriage Act. It is obvious that so long as the decree is not passed and proceedings are at any stage prior to the decree, no rights or obligations of either spouse get crystalized. The marital status of both the spouses remains then intact as it was prior to the filing of the suit.”

7. It is true that Section 13 of the Hindu Marriage Act lays down that marriage whether solemnized before or after the commencement of the Act may be dissolved by a decree of divorce on the grounds mentioned therein on a petition presented by either the husband or the wife, thus, initially when such petition is to be presented. The person who presents such petition must be either wife or husband and the other party would be the other spouse. But once these proceedings are initiated by the concerned aggrieved spouse, the trial then proceeds further. It is of course true that pending such trial if either of the spouses expires then, as seen earlier, the personal cause of action against the husband or the wife, as the case may be, dies with the departing spouse. As no rights are still crystallized by then against or in favour of either spouse, no proprietary effect or any adverse effect on the status of the parties would get generated by mere filing of such petition and the status quo ante would continue to operate during the trial of such petition.”

8. In the light of above ratio, it is clear that in a divorce proceeding moved either by husband or wife, during pendency of

the trial, if either of the spouses expires then the personal cause of action against the husband or the wife, as the case may be, dies with the departing spouse. The divorce proceeding may be moved either by husband or wife and to that extent, it is certainly a personal cause of action based on the one or more matrimonial misconducts alleged in the petition against the erring spouse. If during pendency of the trial of divorce proceeding before passing of decree, either of the spouses expires, the cause of action being personal to both the spouses, right to sue would not survive, so long the decree was not passed in the proceeding, no rights or obligations of either spouse get crystalized and the marital status of the spouses remains intact as it was prior to filing of the divorce proceeding.

. This ruling was cited before the trial Court and it is also referred by the trial Court in the impugned order. The trial Court, however, failed to consider the ratio in ***Yallawwa*** (*supra*) in proper perspective and has erroneously allowed the application filed by the respondent. The reasons assigned while allowing the application are not acceptable in view of the ratio in ***Yallawwa*** (*supra*).

. This Court is unable to agree with the submissions of learned Advocate for the respondent to the effect that since the ground of adultery is raised in the divorce proceedings, the cause

of action survives and the legal representatives of the husband may be permitted to pursue the proceedings, in the light of ratio of *Yallawwa (supra)*.

. Since, in the present case, the husband, who filed divorce proceeding, expired, his personal right came to an end and the divorce proceeding stands abated. There is no question of survival of right to sue.

9. For the afore-stated reasons, the impugned order cannot be sustained and the same is liable to be quashed and set aside. Hence, the following order :-

ORDER

- I. The writ petition is allowed.
- II. The impugned order dated 27-01-2020 passed below Exhibit-118 by the learned Civil Judge, Senior Division, Ambejogai, District Beed, in Hindu Marriage Petition No. 11 of 2011, thereby allowing the application filed by the legal representatives of husband, permitting them to prosecute the proceedings of HMP No. 11 of 2011, is hereby quashed and set aside.
- III. Rule is made absolute in above terms.
- IV. No order as to the costs.

(NITIN B. SURYAWANSHI)
JUDGE