

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

SECOND APPEAL NO. 115 OF 2003

Shri Gulabrao s/o Mirgaji Malkhede,
aged about 43 years, occupation - Service,
R/o C/o Divisional Joint Director of Agriculture,
Amravati Division, Jaisthambh Chowk,
Amravati.

...APPELLANT
(Original Petitioner on RA)

Versus

Sau. Baby w/o Gulabrao Malkhede,
C/o Shri Narendra B. Verulkar,
House No. 21, Nandanvan Colony Post,
VM.V. Police Station, Gadge Nagar,
Amravati – 444 604.

...RESPONDENT
(Original Defendant on RA)

Shri Rohit Vaidya, Advocate h/f Shri Anand Parchure, Advocate for
the appellant.
None for the respondent.

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CORAM : PUSHPA V. GANEDIWALA, J.
DATE OF RESERVE : JANUARY 07, 2021.
DATE OF PRONOUNCEMENT : JANUARY 15, 2021.

JUDGMENT :

Heard Shri Rohit Vaidya, learned counsel, holding
for Shri Anand Parchure, learned counsel for the appellant.
None appeared for the respondent, though served.

2. This appeal challenges the judgment and decree dated 17/02/2003 passed by the Joint District Judge, Amravati in Regular Civil Appeal No. 290/1998, whereby the judgment and decree of divorce dated 18/11/1998 passed by the Joint Civil Judge, Senior Division, Amravati, in Hindu Marriage Petition (HMP) No. 201/1996, was reversed.

3. The appellant – husband is the petitioner before the trial Court. The marriage between the parties was solemnized on 04/07/1987. Out of this wedlock, the parties are blessed with two children, born in 1987 and 1989 respectively. After 2 – 3 years of marriage, on account of marital discord and differences, the respondent – wife left the company of the appellant. The elder son remained in the custody of the appellant, since beginning. As she did not return for 2 – 3 years, the appellant filed a petition for divorce on account of cruelty and desertion before the Court of Civil Judge, Senior Division, Amravati, which was allowed by the judgment and decree dated 18/11/1998. The trial Court recorded positive finding on both the issues of cruelty and desertion.

4. The respondent – wife impugned the judgment and decree of divorce before the District Judge, Amravati, and the learned District Judge reversing the judgment and decree of the trial Court, dismissed the petition. Hence, the appellant approached this Court. This Court framed the following substantial questions of law vide order dated 19/03/2010 :

“1. Whether the first appellate court has exercised jurisdiction under Section 96 of the Code of Civil Procedure as laid down by the Hon’ble Apex Court in 2001 (2) Mh.L.J. 786 (in the matter of Santosh Hazari vs. Purushottam Tiwari) while writing a judgment of reversed ?

2. Whether any court can assume pleadings on behalf of a party ? Or, Whether the first appellate court right in holding that it was the appellant who meted out cruelty to the respondent when the same was not even pleaded ?

3. Whether any amount of evidence is admissible can prove a plea which was never taken by the respondent ? If no, then whether

the judgment of the first appellate court can be sustained ?”

5. Shri Rohit Vaidya, learned counsel for the appellant, brought to the notice of this Court the relevant paragraphs in the judgments of both the Courts below, and submitted how the First Appellate Court committed error in exercising its jurisdiction under Section 96 of the Code of Civil Procedure, 1908 as laid down by the Hon’ble Supreme Court in the case of Santosh Hazari vs. Purushottam Tiwari, reported at 2001(2) Mh.L.J. 786. The learned counsel also brought to the notice of this Court the judgments of the Criminal Courts wherein, the appellant came to be acquitted of the offence punishable under Section 498A of the Indian Penal Code, 1860 (for short “IPC”). It is also not disputed that the respondent had also lodged complaints against the present appellant for the offence punishable under Sections 504, 506 and 406 of IPC.

6. The trial Court recorded the finding of cruelty in favour of the appellant mainly on the ground of series of criminal cases filed by the respondent against the appellant

which amounts to cruelty to the appellant, and furthermore, the respondent has failed to prove before the Court that there were sufficient reasons to desert the company of the appellant.

7. As regards question No.1, a perusal of the impugned judgment of the First Appellate Court would not reflect any consideration of reasoning recorded by the trial Court. The Hon'ble Supreme Court in the case of Santosh Hazari (*supra*), while discussing scope and ambit of powers and duties of the First Appellate Court, in para 15 of the judgment, observed as under :

“15. XXXX While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the Appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the Appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures

and surmises, the Appellate Court is entitled to interfere with the finding of fact. The rule is – and is nothing more than a rule of practice – that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge’s notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the Appellate Court should not interfere with the finding of the trial Judge on a question of fact. Secondly, while reversing a finding of fact the Appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first Appellate Court had discharged the duty expected of it. We need only remind the first Appellate Court of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. XXXX”

8. In the instant case, the First Appellate Court reversed the positive findings of divorce returned by the trial Court on the ground of cruelty and desertion. Surprisingly, the First Appellate Court failed to discuss any part of reasoning as has been given by the trial Court.

9. A careful perusal of the impugned judgment would reflect that the First Appellate Court appreciated the evidence on record on the basis of conjectures and surmises. Furthermore, even though, pleadings with regard to cruelty to her at the hands of the appellant are absolutely absent in the written statement of the respondent yet, the same was considered by the First Appellate Court in the absence of pleadings.

10. On the other hand, it is clearly discernible from the evidence of the appellant, and which is not disputed, that at the instance of the respondent, the appellant was prosecuted for the offence punishable under Section 498A of the IPC, wherein he got acquittal and got discharged for the offence punishable under Section 406 of the IPC. The respondent had also lodged report for the offence punishable under Sections 504 and 506 of the IPC. The trial Court considered these grounds as sufficient to infer cruelty to the appellant at the hands of the respondent.

11. In the instant case, in the absence of pleadings of cruelty, the First Appellate Court could not have recorded the finding in favour of the respondent that it was the appellant, who meted out cruelty to the respondent.

12. In the absence of pleadings, and on the basis of conjectures and surmises, the impugned judgment of the First Appellate Court cannot be sustained in the eyes of law.

13. Given the aforesaid facts and circumstances of the case, this Court is inclined to allow the appeal and hence, the following order :

ORDER.

- i. The appeal is allowed.
- ii. The judgment and decree dated 17/02/2003 passed by the Joint District Judge, Amravati in Regular Civil Appeal No. 290/1998, is quashed and set aside.

iii. The judgment and decree dated 18/11/1998 passed by the Joint Civil Judge, Senior Division, Amravati, in Hindu Marriage Petition (HMP) No. 201/1996, is upheld.

14. I answered all the three questions accordingly. No costs.

JUDGE

GS/Sumit