

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 463 OF 2015

Sachin S/o Ashok Nannaware,
Age : 33 years, Occu. Service,
R/o. C-06, Shivajinagar, Policeline,
Shivajinagar, Pune-5

.. Appellant
(Defendant)

VERSUS

Sau. Sonali Sachin Nannaware,
Age 28 years, Occu. Household,
R/o C/o Rajaram Dattoba Zarekar,
At. Po. Deoulgaon-Siddhi,
Tq. & Dist. - Ahmednagar

.. Respondent
(Plaintiff)

WITH
CIVIL APPLICATION NO. 11226 OF 2015
AND
CIVIL APPLICATION NO. 2402 OF 2017

...
Advocate for the appellant : Mr. Rajendra S. Kasar
Advocate for the respondent : Mr. V.S. Bedre
...

CORAM : MANGESH S. PATIL, J.

DATE : 06 APRIL 2022

ORAL ORDER :

The appellant is the husband who has suffered a decree for restitution of conjugal rights passed under section 9 of the Hindu Marriage Act at the hands of the lower appellate court in the judgment and order under challenge *albeit* the trial court had rejected the respondent's petition.

2. I have heard learned advocates of both the sides at the stage of admission.

3. The stand of the respondent is to the effect that after the marriage when she started cohabiting with the appellant at the matrimonial home, he started making demand for money for purchasing a flat and even compelled her to work as a maid. Even when she was ill instead of providing treatment to her, she was left at her parental home. In spite of the attempts to resume cohabitation he was insisting for payment of money and ultimately flatly denied to resume cohabitation. Notice was also issued but to no avail. Hence she averred that he had left her company without sufficient cause.

4. The appellant – husband contested the petition by the written statement - Exhibit 17. He denied the entire contents. He contended that after the marriage, she once disclosed to him that she was having an affair before the marriage and she was marrying him against her wish. She even refused him matrimonial relations and threatened to commit suicide if she was compelled to do so. He further contended that she even filed a false case involving him and his relations in an offence under section 498-A of the Indian Penal Code and prayed to dismiss the petition.

5. The trial court framed necessary issues and dismissed the petition holding that she miserably failed to prove about he having deserted her without sufficient cause. In the process, the trial court disbelieved her testimony.

6. The respondent challenged the judgment and order before the district court which has quashed and set aside the judgment of the trial court and allowed the petition.

7. The learned advocate Mr. Kasar for the appellant would submit that the reasons being put forth by the respondent were not duly proved. The trial court had given sufficient reasons to discard her testimony. It was noticed that the petition was preferred after the appellant had filed a similar petition, as a counter blast. There was also evidence on the record to show that he had already purchased a flat at Aundh to improbabilize her stand that he was demanding Rs.2,00,000/- for purchasing a flat in Pune. The trial court had also noticed that all the relations of the appellant were in Police force and were occupying separate quarters to disbelieve the stand of the respondent that he made her to work as a maid and to serve them.

8. Learned advocate Mr. Kasar submits that in spite of such cogent and convincing reasons assigned by the trial court, lower appellate court without undertaking further scrutiny on the lines done by the trial court has reversed the judgment and order for superfluous reasons. The important facts were ignored and the facts which were not important have been relied upon giving rise to substantial questions of law and the second appeal be admitted.

9. Mr. Bedre learned advocate for the respondent supports the judgment of the lower appellate court. He points out that there was

a strong circumstance which was clearly ignored by the trial court but has weighed with the lower appellate court to reach a plausible conclusion regarding absence of sufficient grounds for the appellant to desert the respondent. Admittedly, the respondent had examined her father as a witness but he was not cross-examined on behalf of the appellant. Even the appellant himself did not step into the witness box. Considering the fact that the dispute was pertaining to the matrimonial relations between the two sides, they alone being the best witnesses, it was imperative for him to step into the witness box and in the absence an adverse inference as has been rightly drawn by the appellate court which was available even for the trial court but was overlooked. It has conspicuously ignored this vital circumstance.

10. The learned advocate Mr. Bedre would further submit that though the appellant had filed a similar petition on 31-03-2010, and the respondent's petition was lodged on 28-04-2010, he had allowed his petition to be dismissed in default and never took steps to prosecute it. Even this circumstance was available to be seen by the trial court but was ignored. These circumstances certainly reflects on the conduct of the appellant which has been rightly considered by the lower appellate court.

11. Mr. Bedre, lastly, submits that though the parties are separate since last more than 10-12 years, he has not taken care to provide her bare minimum maintenance. She had to file proceeding

and even now he is in arrears of more than Rs.5,00,000/-. This conduct is also important and would be decisive in the matter in hand. No substantial question of law arises. This being a second appeal, a plausible view taken by the lower appellate court which is the last fact finding court, should not be interfered with.

12. I have carefully considered the rival submissions and perused the papers. It is a matter of record that this is a matrimonial dispute. Obviously, the relations between the couple and their attitude towards each other would be a pure question of fact exclusively within their personal knowledge. The respondent was bold enough to step into the witness box to testify her side of the matter. As against this, the conspicuous absence of the appellant from the witness box was indeed a strong circumstance requiring the courts to draw an adverse inference as has been laid down in *catena* of cases including **Vidhyadhar Vs. Manikrao and another; (1999) 3 SCC 573** and **Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and other; (2005) 2 SCC 217.**

13. True it is, the onus was on the respondent to prove that without there being sufficient ground, the appellant had deserted her. However, it is a matter of drawing inference based on all the attending circumstances. Apart from her testimony, there was a testimony of her father. Even he was not cross-examined on behalf of the appellant. Such testimony which has gone unchallenged was also available for

the trial court to be looked into but it has flatly refused to consider that aspect.

14. The net result of all the afore-mentioned circumstances is to the effect that there is testimony of the respondent and her father, latter having gone unchallenged and the absence of the appellant from the witness box. If these circumstances were pitted against each other, the trial court had indeed erred grossly in refusing to take cognizance of these circumstances and discarding the testimony of the respondent. The error has been corrected by the lower appellate court.

15. Admittedly, both the sides had filed proceeding for restitution of conjugal rights. The trial court refused to believe the version of the respondent by pointing out that her proceeding was instituted at later point of time than the one instituted by him. However, it conspicuously omitted to note that subsequently his petition came to be dismissed in default in the month of August 2011 i.e. even before he filed written statement in the present matter which he filed on 21-08-2011. The trial court, in-fact, ought to have borne in mind this circumstance to draw inference as to the conduct of the appellant which it had miserably failed to. This would certainly indicate the passive attitude of the appellant and reflect on his keenness to resume cohabitation. In the matter of restitution of conjugal rights, such an approach of a spouse can certainly play a vital role in convincing the other spouse as to the *bona fides* of the former in resumption of the

cohabitation. If the conduct is demonstrative of his passive approach, in my considered view, it certainly would be an additional circumstance to demonstrate that without there being sufficient cause, he has deserted the respondent.

16. In view of the above state-of-affairs, the view taken by the lower appellate court which is the last fact finding court, is a plausible view. As laid down in the matter of **Narayanan Rajendran and Ors. Vs. Lekshmy Sarojini and Ors.; (2009) 5 SCC 26 4** and **Hero Vinoth (Minor) Vs. Seshammal; (2006) 5 SCC 545**, when two views are possible to be have on re-appreciation of the evidence, this court cannot, in exercise of the powers under section 100 of the Code of Civil Procedure, undertake such an exercise. A mere erroneous finding of the lower court does not automatically give rise to a substantial question of law.

17. Going by the observations made herein-above, no substantial question of law arises for the determination in this second appeal. It is dismissed.

18. Pending civil applications stand disposed of.

[MANGESH S. PATIL]
JUDGE

arp/