

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 86 OF 2011
WITH
CIVIL APPLICATION NO. 160 OF 2011
IN
FAMILY COURT APPEAL NO. 86 OF 2011

Prasanna Krishnaji Musale
Age : 33 years, Occu : Artist,
R/o : 101, 6th Sense Society,
More Baug, Katraj, Pune – 46.

... Appellant.
[Orig. Petitioner.]

Versus

Mrs. Neelam Prasanna Musale
c/o Neelam Vinayak Bhosale,
Age : 33 years, Occu : Service,
R/o : Anandi Niwad, Near Ice Factory,
Virar (East), Mumbai.
At present R/o Loni Kalbhor
MAEER's Insitute of Design Rajbag,
Loni Kalbhor, Pune – 412201.

... Respondent.
[Orig. Respondent.]

Mr. S.N. Chandrachood, Advocate for the Appellant.
Mr. Purushottam G. Chavan, Advocate for the Respondent.

**CORAM : NITIN JAMDAR &
SHARMILA U. DESHUMKH, JJ.**

DATE : 16 November 2022.

Judgment (Per Sharmila U. Deshmukh, J.) :

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RAMCHANDRA
PATIL

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The Appeal has been filed by the Appellant–husband challenging the judgment and decree dated 6 April 2011 passed by the Principal Judge, Family Court Pune-1, Pune in PTN No.A-506 of 2008, whereby the petition of the Appellant–husband, filed under section 13(1)(i-a), (i-b) and (v) of the Hindu Marriage Act, 1955, is dismissed and the application of the Respondent wife under Section 12 of Protection of Women from Domestic Violence Act, 2005 was partly allowed.

2. For the sake of convenience, the parties are referred to by their status before the Family Court. The Petitioner and Respondent were married on 16th March, 2003. In the Petition, it is the case of the Petitioner that after the marriage, the Respondent-wife was suffering from Tuberculosis for which the Petitioner provided her with medical treatment. The Respondent was of whimsical nature, short-tempered and stubborn and the Respondent did not behave properly with the family members of the Petitioner. There were constant fights between the Petitioner and the Respondent by reason of which the Petitioner suffered mental agony. In the month of December 2004, the Respondent was admitted to the hospital as she contracted “herpes”. During her treatment at the hospital, HIV test of the Respondent was conducted, which came positive, causing mental agony to the Petitioner and his family members. Subsequently, the Respondent left the house

in the month of February 2005 and did not return back to the matrimonial house. Thereafter, when the Respondent recovered from the sickness, the Petitioner brought her back to the matrimonial house. However, the mother of Petitioner was mentally disturbed by the Respondent's return and hence the Petitioner asked the Respondent to return back to her parents house. After a period of two months, thereafter, the Petitioner had gone to meet the Respondent and at that time also the Respondent was not in a healthy condition and hence the Petitioner was not ready to bring her back to the matrimonial house. The Petitioner was also informed by a doctor known to him that HIV test of the Respondent was still positive. The Petitioner was, therefore, constrained to file the petition seeking dissolution of marriage solemnized between the parties on 16 March 2003.

3. The Respondent-wife contested the said petition and filed her written statement denying the allegations made against her. She has specifically stated in the written statement that the HIV test reports came with the result "not detected" and the said test was negative. And in spite of the negative test, the Petitioner made allegations that the Respondent was HIV infected and also spread such rumours amongst his relations and friends. Due to the false rumors of the Respondent being HIV positive, the Respondent has undergone great deal of mental agony and the social life of the Respondent was destroyed.

4. In the said proceedings, the Respondent filed an application under section 12 of the Protection of Women from Domestic Violence Act, 2005 claiming a sum of Rs.5 lakh from the Respondent towards the damages and 1-BHK flat in the vicinity of Hadapsar for her accommodation. The said application was opposed by the Petitioner.

5. Heard Learned Counsel Shri S.N. Chandrachud for the Appellant and Learned Counsel Shri Purshottam G. Chavan for the Respondent.

6. Learned counsel for the Petitioner made two submissions. The first submission is that there has been an irretrievable break down of marriage and on that ground decree of divorce ought to be granted. In support of the submission of irretrievable break-down of marriage, he has relied on the decisions of the Apex Court in *Durga Prasanna Tripathy v. Arundhati Tripathy* [(2005) 7 SCC 353], *Naveen Kohli v. Neetu Kohli* [AIR 2006 SC 1675], *Samar Ghosh v. Jaya Ghosh* [(2007) 4 SCC 511], *Sanghamitra Ghosh v. Kajal Kumar Ghosh* [(2007) 2 SCC 220], *K.Srinivas Rao v. D. A. Deepa* [(2013) 5 SCC 226] and *Sukhendu Das v. Rita Mukherjee* [(2017) 9 SCC 632]. The second submission is that the evidence of the doctor, who is examined by the Respondent as her witness, proves that the Respondent was HIV positive. No other submissions were advanced.

7. Learned counsel for the Respondent submits that the issues

framed by the Family Court casts the burden on the Petitioner to prove cruelty and desertion on part of the Respondent and that the Respondent wife was suffering from venereal disease in a communicable form, which has not been discharged by the Petitioner. He further submits that the Petitioner has not examined the doctor from the hospital where the test of Respondent was conducted during her stay in the matrimonial house based on which the Petitioner claims that the Respondent's HIV test had come positive and neither the report has been produced by the Petitioner in his evidence. As far as cruelty is concerned, the pleadings are extremely vague, general in nature and devoid of any particulars. The Petitioner has admitted in his evidence that after the Petitioner brought the Respondent back to the matrimonial house, due to the opposition by mother of Petitioner, he had asked the Respondent to go back to her parents' house.

8. We have considered the rival submissions.

9. The Petitioner has examined himself and has filed his affidavit in lieu of evidence, which is a reproduction of the Petition. The Petitioner has deposed about the nature and conduct of the Respondent with his family members but has failed to give details of any specific incidents which have taken place. Similarly, there are no details whatsoever in respect of the alleged quarrels between the Petitioner and the Respondent. The deposition of the Petitioner in that respect is general and devoid of material particulars. In the cross-examination, the

Petitioner has given vital admissions. The Petitioner has admitted that during the period of 2 years when the parties were together, no bitter quarrel had taken place between the Petitioner and Respondent. It is also admitted by the Petitioner that the Respondent never harassed him mentally or physically. It is settled that the cruelty must be of such a nature so as to give rise to a reasonable apprehension in the mind of the Petitioner that it is harmful or injurious to live with the Respondent. The Petitioner has himself admitted that no bitter quarrel had taken place between him and the Respondent and that the Respondent has not harassed him. The evidence of the Petitioner does not give any material particulars of cruelty and on the contrary vital admissions are given by the Petitioner in the cross examination.

10. On the aspect of the Respondent suffering from HIV, the Petitioner has deposed that the HIV positive result of the Respondent has caused the Petitioner mental agony. However, the Petitioner has not produced the HIV test report of the Respondent which was conducted in the hospital of Dr Sancheti. In the cross examination of the Petitioner, the report was shown which is marked as Exhibit-27, which the Petitioner admitted as correct. The relevant part of the said report dated 7 January 2005 reads thus :

HIV DNA DETECTOR

HIV-1 DNA	NOT DETECTED.
HIV-2 DNA	NOT DETECTED.

11. The Respondent has examined Mr. Arun Ramchandra Risbud, a scientist in National Aids Research Institute who has produced on record 4 reports marked as Exhibit-39 to 42. He has identified the reports of the tests conducted by his institution and has deposed that the conclusion of these 4 reports is that the concerned person was not suffering from HIV. He has further deposed that AIDS is a later stage of HIV. In the cross-examination, the Petitioner has attempted to make a distinction between the screening test and the confirming test. There is nothing brought on record in the cross-examination to disbelieve the deposition of this witness as far as the conclusion of 4 reports that the concerned person was not suffering from HIV is concerned. The burden was cast upon the Petitioner to prove that the Respondent was suffering from venereal disease in a communicable form. The Petitioner has not examined any expert to establish that Respondent is a HIV positive patient, and on the contrary the report which is at Exhibit-27 shows that HIV-1 and HIV-2 DNA not detected. There is not an iota of evidence produced by the Petitioner that the Respondent had tested positive for HIV, which caused him mental agony or that the Respondent has treated him with cruelty.

12. As far as desertion is concerned, the Petitioner has himself deposed that after the Respondent was treated, he had brought her back to the matrimonial house but due to the objection of his mother, he

asked the Respondent to go back and has decided not to cohabit with her. The deposition of the Petitioner makes it clear that the Petitioner has compelled the Respondent to leave the matrimonial house. In this context, it is necessary to refer to the Explanation to Section 13 which reads as under :

“The expression “desertion” means the desertion of the Petitioner by the other party to the marriage without reasonable cause and without the consent and against the wish of such party, and include the wilful neglect of the Petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.”

13. In our opinion, the Petitioner has failed to prove the essential ingredients of desertion i.e. both the factum of separation and *animus deserendi*.

14. In so far as the submission regarding the irretrievable break down of marriage is concerned, the reliance on the decisions of Apex Court is misplaced, wherein the Apex Court in exercise of the powers under Article 142 of Constitution of India had granted the decree of divorce. This Court, while exercising its appellate jurisdiction is required to consider whether the Family Court has rightly assessed the material on record and has come to a correct finding as per the statutory provisions. Apart from the fact that the ground of irretrievable breakdown of marriage has not been taken in the Appeal Memo, we find that on the ground of irretrievable breakdown of marriage, the

Petitioner cannot be permitted to take advantage of his own wrong. In spite of the report at Exh 27 which shows the test result as HIV DNA “not detected”, the Petitioner has refused to co-habit with the Respondent and defamed the Respondent in the society by informing relatives and friends that the Respondent has tested positive. The submission of the Ld. Counsel for Petitioner seeking grant of divorce on ground of irretrievable break down of marriage is liable to be rejected outright.

15. In our opinion, the Family Court has assessed the evidence on record in proper perspective and rightly dismissed the Petition seeking divorce under Section 13 (1)(i-a) (i-b) and (v) of Hindu Marriage Act, 1955. Considering the above discussion, we do not find any merit in the appeal and accordingly pass the following order :

: ORDER :

The appeal is dismissed.

16. In view of the disposal of the appeal, applications taken out in this appeal are rendered infructuous and the same are accordingly disposed of.

(SHARMILA U. DESHMUKH, J.)

(NITIN JAMDAR, J.)