

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 851 OF 2018
WITH
CIVIL APPLICATION NO. 2329 OF 2022
WITH
CIVIL APPLICATION NO. 7243 OF 2023
IN
SECOND APPEAL NO. 851 OF 2018

Dr. Saurabh s/o Shivhar Yelurkar
Age- 33 years, Occu- Medical Education,
R/o. Meghdoot, Kava Naka, Katpur Road,
Latur, Tq. Dist. Latur.

...Appellant
[Orig. Plaintiff]

VERSUS

Dr. Mayuri W/o Saurabh Yelurkar
Age: 29 years, Occ- Doctor,
C/o. Arun Venkat Shete,
R/o. Near Hanuman Temple
Vakil Colony, Gangakhed,
Tq. Gangakhed, Dist. Parbhani.

...Respondent
[Orig. Defendant]

.....
Mr. Saurabh Yelurkar, Appellant, Party-in-person.
Mr. Subhash Mundhe, Advocate for the Respondent.

.....

CORAM : KISHORE C. SANT, J.

RESERVED ON: 30th AUGUST, 2023
PRONOUNCED ON: 26th OCTOBER, 2023

JUDGMENT:

1. This second appeal is admitted by this Court on following substantial question of law vide order dated 19.04.2022.

Bhagyawant Punde

"I) Whether the courts below have recorded a perverse and arbitrary finding overlooking the material pieces of evidence, particularly when the respondent admittedly got operated soon after the marriage without disclosing the fact to the appellant and his relations?"

2. The case is that both the parties are well educated medical professionals. Appellant-Husband had filed Hindu Marriage Petition against wife seeking divorce under section 13(1) (ia) and 13(1)(ib) of the Hindu Marriage Act, 1955. It is the case of the husband that he happens to be a doctor having degree of M.D. Physician. He married with the respondent on 14.02.2013. After marriage they had been to Keral on honeymoon tour from 21.02.2013 to 26.02.2013. Immediately, after return from the tour, wife went to her parental house on 27.02.2013. After return she stayed in the matrimonial house till 23.05.2013 at Latur. However, before that husband had already left for his job at New Delhi. Couple resided together hardly for 10-12 days. For that period also wife avoided physical relations with husband stating to be not well. It later on revealed that she suffers from serious disease of back pain. On 29.04.2013, when the husband was at Delhi, his mother suffered heart attack on 29.04.2013 and she was admitted to ICU at Latur. However,

respondent-wife did not inform this even to the husband and his father. On 23.05.2013, wife left the matrimonial house without informing the husband. In June, 2013, she got operated for her back pain at Nanded, without taking consent of the husband. Wife thus stayed away from the husband and did not come even for the Ganpati and Mahalaxmi festival. She also did not come to Diwali festival in 2013. Thus, there was no contact between husband and wife, still she filed complaint under section 498-A, 504, 506 read with 34 of IPC in January 2014. She also further filed proceeding under section 125 of Cr.P.C. Thereafter, she filed proceeding under Domestic Violence Act. Wife thereafter even filed various complaints to the Superintendent of Police at Latur against husband and his parents, solely with an object to extract money. The husband is the only child to his parents. Because of the conduct of the wife, husband and his family suffered a lot. It is alleged by the husband that this amounted to cruelty and therefore filed petition for divorce.

3. It is the case of the wife that at the time of marriage there was demand of dowry and 21 tolas of gold, 5 Lakhs rupees, silver utensils and wooden furniture of amount of Rs. 3,25,000/- were given in dowry. It is alleged that husband

thereafter even demanded Rs. 20,00,000/- for his post graduation education at Wardha. She was forced to fetch water from the tank and therefore she suffered back pain. The allegation of performing operation without intimation is specifically denied. It is because of ill treatment at the hands of in-laws she was required to file proceeding under section 498-A of IPC and 125 of Cr.P.C., so also, under the Domestic Violence Act. It is submitted that there is no ill treatment at the hands of the wife amounting to cruelty and she prayed for dismissal of the proceeding.

4. The learned Trial Court on recording evidence of both the parties held that the husband has failed to prove the cruelty at the hands of the wife and dismissed the petition. The husband, therefore, filed appeal in the Court of learned District Judge- Gangakhed bearing Regular Civil Appeal No. 40/2017. The learned District Judge, also dismissed the appeal holding that the husband has failed to prove cruelty at the hands of wife by the impugned judgment dated 01.10.2018. The appellant is thus before this Court.

5. The appellant has argued in person. It is argued that the conduct of the wife clearly shows that she treated the

husband with cruelty. Filing of false complaint under section 498-A and also the other proceedings clearly show that the same are filed only to harass the in-laws amounting to cruelty. It is the case of the husband that during the course of trial on five occasions he demanded examination of the wife from medical board. However, the same were rejected, by the Trial Court. He submitted that against the order of rejection for physical examination he was required to file Writ Petition No. 1956/2017 seeking physical examination of the wife through medical board. This Court had even issued notice to the wife, however, without waiting for the report of the medical board and the decision of the petition, Trial Court passed judgment in haste. He submits that the wife has made contrary statements about her physical fitness. On one hand she stated that she was not suffering from any abnormality. However, at the same time in spite of his request, she opposed application filed for examination by Medical Board. The husband had issued notice on 04.06.2014 calling the wife for co-habitation, however, in spite of notice she did not co-habit. He submitted that wife lodged complaint under section 498-A, however, did not appear herself for cross examination for long time and the proceeding was pending for four years. In the complaint under section 498-A there is an allegation of beating

by husband on 23.05.2013 when the husband was at Delhi on duty. He invited attention to his evidence wherein he has clearly stated about refusal to have physical relations. She never informed about her ailment to the in-laws. The husband relied upon the evidence of his mother, PW2 who supported his case. The husband also relied upon the case of Samarghosh vs. Jayaghosh, 2007 (4) SCC at Page 511.

6. Learned advocate Mr. Mundhe argued that both the Courts are concurrent on the point of cruelty. Both the Courts have clearly held that cruelty is not proved. He admitted that there was desertion by wife, however, he submits that no case of cruelty is made out in this case.

7. In this case, the husband has also produced on record evidence of the wife recorded in Regular Criminal Case No. 253/2018 under section 498-A and also in Miscellaneous Criminal Application No. 75/2015 filed under the Domestic Violence Act.

8. On going through the evidence recorded by both the Courts below this Court finds that both the witnesses for the husband have clearly stated about all the facts stated in the

pleadings. In the evidence of the husband he has clearly stated about the suppression of the fact of ailment by the wife, and her refusal to have physical relations with the husband. It is further stated about filing of complaint under section 498-A, 504, 506 read with 34 of the IPC as well as proceeding filed under section 125 of Cr.P.C. and under Domestic Violence Act. He referred to the notice issued by him requesting the wife to come for cohabitation. In the cross examination, nothing is brought on record to disbelieve the evidence of the husband.

9. In the evidence of mother of appellant she has also deposed about conduct of the wife. It has specifically come on record that the wife got herself operated without informing the in-laws. From the MRI test it was found that she was suffering from serious disease. In the MRI it was found that she was suffering from spinal canal stenosis. Her two disks were eroded indicating that she was suffering from the said disease since long. It is also stated that attempts were made to bring the wife back to the matrimonial home. In her cross examination nothing is brought on record to disbelieve her evidence in-chief.

10. The wife got herself examined. In her evidence she accepted her bio data given to in-laws before marriage, wherein

she had given her educational qualification. She could not give even details as to when she took admission for the course of Ayurved doctor. She could not tell as to how much fee was charged for the said course. Later on she accepted that she has only done diploma and not the course of BAMS. She even refused to produce report of her MRI. She further accepted that she was operated in the hospital for back pain. However, she avoided the question as to what operation was performed. She accepted that she was required to get treatment for various ailments. She accepted that she had filed criminal complaints against the husband and in-laws. However, surprisingly she could not give any detail about her own educational qualification, her ailments, though those are serious. She accepted that she never made any attempt to reside with the husband.

11. The wife also got examined her father. In his cross examination he did not answer many questions by saying that he does not recollect the details. He also could not tell the details about treatment of his daughter. Thus, evidence of both the witnesses i.e. wife and her father does not inspire confidence. They avoided answering questions regarding health conditions, education etc. Even a third witness was examined by wife who

deposed that in the marriage proposal there was a demand of dowry etc. But in the cross examination he could not give sufficient details and avoided many questions by saying that he does not recollect.

12. From the evidence of the wife in the criminal trial it is seen that the wife could not give any details of the cruelty to her in a case under 498-A. In the evidence in Regular Criminal Case No. 253/2018, the wife has deposed against the in-laws. In the cross examination she could not given details about the incident of assault. She accepted that she deposed contrary to what she stated in Regular Criminal Case No. 253/2018 and what she stated in the Miscellaneous Criminal Application No. 75/2015. She accepted that the husband was on duty in Delhi at the relevant time when she had made allegations of cruelty. Her parents in-laws were also staying at Pune and not at Latur. She even refused to answer about her contents of her statement before Police. Though she accepted that she herself has lodged FIR, she could not give details as to when allegation of demand of 20,00,000/- was made. She accepted that though she had stated that she was physically fit, however, she was not submitted any certificate stating that she does not know as to

how the same is required. She also could not give details of assault by parents in-laws stating that she does not remember the same.

13. In a deposition recorded in Criminal Miscellaneous Application No. 75/2015 in the cross examination the wife could not give specific answers about her operation and her MRI reports. From the cross examination in both these criminal proceedings it is clear that she could not support her case at all and in cross examination she avoided to answer many questions on some or other pretext.

14. Coming to the impugned judgment, this Court finds that the Court has rendered a finding that husband could not prove desertion for continuous period of two years immediately preceding the presentation of the petition. It is accepted by both the parties that they are residing separately from 23.05.2013. The wife had left the house without informing the in-laws. The Court has considered that nothing is shown by the husband that he went to fetch the wife, however, it is considered that on 01.06.2015 an attempt was made to bring the wife for co-habitation. Merely, because the wife has denied that the husband tried to fetch her in June 2015, the Court has taken that the

desertion is not proved. This Court finds that wife left the matrimonial house on 23.05.2013, petition is filed on 29.03.2016, thus there is clearly a desertion for two years which made husband entitled to seek divorce. This finding is recorded as the wife in her evidence deposed that she had not deserted and further that on 09.01.2014 her parents taken the wife to the husband, but, it is the husband who refused to take her. However, looking to the evidence of the wife, this Court has observed that her evidence is not reliable. The Court has given this finding only by relying on the evidence of the wife. There is no other evidence to show that wife ever tried to join company of the husband. The wife has filed various criminal proceedings, however, no proceeding is filed by her for restitution of conjugal rights. This conduct shows that she never shows any interest in cohabiting with husband. The finding of the Courts below is thus without any material and deserves to be set aside.

15. So far as the cruelty is concerned this Court finds that it has clearly come on record that there is no physical contact between husband and wife. Denying physical relations by wife also amounts to cruelty. The wife in this case could not bring on record anything contrary to the allegations of the

husband on this point. It is further seen that there was a specific prayer to send the wife for examination, but the said was not accepted. The husband was required to file writ petition in this Court. However, before decision of the said petition, marriage petition came to be decided. When a case was made out to send the wife for physical examination, it was necessary for the Court to send the wife for medical examination. Filing of several cases against husband without substance also amounts to cruelty.

16. The Hon'ble Apex Court in *Samarghosh* (supra) as given the instances of the mental cruelty. This Court finds that in the present case refusing to have physical relations with the husband, making criminal complaints without sufficient material clearly amounts to cruelty. So far as desertion is concerned this Court has considered it and has recorded that clearly a case was made out for desertion. Thus, this Court finds that the judgment and decree passed by learned District Judge-1 Gangakhed in Regular Civil Appeal No. 40/2014 deserves to be quashed and set aside. The appeal therefore succeeds.

17. Judgment dated 01.10.2018, passed by learned District Judge-1, Gangakhed, in Regular Civil Appeal No. 40/2017 is hereby quashed and set aside.

18. Hindu Marriage Petition No. 25/2016 is hereby allowed.

19. Decree of divorce is passed under section 13(1) (ia) and 13(1)(ib) of the Hindu Marriage Act, 1955. No order as to costs.

20. Civil Application No. 2329 of 2022 stands allowed and is disposed of accordingly.

21. Civil Application No. 7243 of 2023 stands disposed of.

[KISHORE C. SANT, J.]