

P. Vs. P. and ors.

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Court : Mumbai

Decided On : Aug-11-1981

Reported in : AIR1983Bom8; 1982(1)BomCR236

Judge : Mody, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13 (1)

Appeal No. : First Appeal No. 729 of 1980

Appellant : P.

Respondent : P. and ors.

Advocate for Def. : C.R. Dalvi,;P.N. Karlekar, ;R.N. Vakharia and;K.J. Vasavada, Advs.

Advocate for Pet/Ap. : Hemendra K. Shah and;K.H. Panchal, Advs.

Judgement :

1. This appeal arises out of the matrimonial petition filed by the appellant (original petitioner) in the Bombay City Civil Court at Bombay against his wife, the 1st respondent (original respondent) for divorce on the ground of adultery alleged to have been committed by her with the respondents Nos. 2 and 3 (original co-respondents Nos. 1 and 2) and in the alternative on the ground of cruelty. The appellant husband had also earlier filed an infructuous petition for divorce. The 1st

respondent wife however, did not emerge unscathed though she succeeded in the earlier petition.

2. The petitioner had filed the earlier petition being M. J. Petition No. 1973 of 1972 on the same grounds as the present petition. The co-respondent therein was one R. and not the present respondents Nos. 2 and 3. He lost the said petition in the trial Court. He filed an appeal to this Court being First Appeal No. 599 of 1979, which was dismissed by me on 5/6th Aug., 1981 : (reported in : AIR1982 Bom498). He lost the said appeal on the ground that out of the several incidents, only one incident of the 1st respondents, and the said R. having been found in the family room of a restaurant can be possibly said to have been proved and even on the assumption that the same was proved, no inference of adultery can be drawn and as regards cruelty there was no evidence of any danger to the health or apprehension of any danger to the health of the appellant which is the requirement now imposed by law as decided by division Bench of this Court in Madanlal Sharma v. Santosh Sharma, L. P. Appeal No. 28 of 1980 by Rege and Kanade, JJ. dated 10th Mar., 1981.

3. During the pendency of the above petition, the appellant again engaged another detective agency and based on the reports thereof, filed the present petition. An application was made for amendment of the earlier petition to include the new facts. which was rejected by the trial Court as well as by the appellate Court.

4. The allegations relied on by the petitioner in support of his case are to be gathered from the report of the detective agency rather than the petition which is delightfully and unjustifiably vague, resulting in vague denials in the written statements.

5. The appellant was suspicious of the character of the 1st respondent and in the year 1967, made a complaint to her maternal uncle as also to her brother about the 1st respondent living in adultery to which no reply was sent. The 1st respondent did not improve in her behaviour and an advocate's notice dated 16th May, 1969 was also sent, which also was ignored by her. Being suspicious, he engaged a detective agency who kept a watch and whose reports led to the earlier petition. The incidents in the earlier petition may be ignored for the purpose of this

petition in view of the fact that most of them were held not to be proved and only one incident was held to be worthy of belief by the trial Court while the appeal was decided without going into the question as to whether the same was proved. It was held that even on an assumption that the same was proved, there cannot be an inference of adultery nor can it be said that evidence established legal cruelty.

6. After the earlier petition was filed, another detective agency viz; Globe Detective Agency was engaged by the appellant. One Sunderjit Tacker, an employee of the said agency was the operative in charge of gathering material about the 1st respondent. The work was done by the said Tacker along with other employees of the agency but only he has given evidence. Basically, the evidence is that what is state in the report is correct but that because of passage of time when he is giving evidence, he is not able to recollect anything except what is stated in the report. As per the report, he kept the 1st respondent under surveillance on 2, 8, 9, 13 to 17, 19, 20 to 24, 28 and 29 Jan., 1976. Out of this nothing material transpired on the dates other than 13th to 17th and 24th and 29th Jan., 1976. The relevant date as regards the 3rd respondent (original 2nd correspondent) is the 17th Jan., 1976 and the remaining dates concern the 2nd respondent (the original 1st co-respondent). The case of the appellant as emerges from the petition, the report and the evidence is as follows.

7. On 13th Jan., 1976, the 1st respondent came out of the house and met the 2nd respondent near Taj Talkies. They hired a taxi and they proceeded in the direction of Grant Road but the detective missed them near Shalimar Talkies. On 14th Jan., 1976 at about 4.15 p.m. the 1st respondent hired a taxi bearing No. MRR 3932 which at about 4.32 p.m. stopped at the corner of Khetwadi Back road and 7th Lane. The 2nd respondent got into the taxi, the taxi proceeded towards Charni Road junction and then went to Chowpatty and stopped in front of Paramount Restaurant. The couple went into the cabin on the first floor at about 4.40 p.m. They came out at about 5.20 p.m. and thereafter the photographs, were taken. A taxi was hired in which the couple were seen sitting very close to each other. The taxi came to the Mercantile Bank near High Court, the 1st respondent got down and the taxi entered the High Court compound. The 2nd respondent paid the bill and then followed the 1st respondent in the High Court but remained only in the

verandah on the ground floor of the High Court. The 1st respondent came down. Both, the respondent No. 1 and respondent No.2 took a taxi. The 1st respondent got down on the Khetwadi Main Road and walked to her residence. The 2nd respondent went away in the taxi. On 15th Jan., 1976, at about 3.18 p.m. the 1st respondent went to the Roxy Theater and found that the tickets were not available and waited for someone. The 2nd respondent came, both of them hired a taxi, went to Swastik Theatre, found that the tickets were sold out, hired another taxi, went to Shabnam Restaurant near Minerva Theatre and entered a family room. A photograph was taken showing them near Shabnam Restaurant. They entered the restaurant at about 3.45 p.m. and came out at about 5.10 p.m. More photographs were taken. They took a taxi bearing No. MRR 3376. The 2nd respondent was observed putting his arms around the 1st respondent and talking intimately. Several photographs were taken. the 1st respondent then got out of the taxi at about 4.20 p.m. did some shopping and went home. On 16th Jan., 1976, the respondents Nos. 1 and 2 again met at a bus stop near Messrs A. B. Mistry and Co., a taxi bearing No. MRP 8964 was hired and the couple got down near Original Restaurant, Gowalia Tank, entered a cabin on the first floor; the detective entered the next cabin and from the mirror which was fixed outside the cabin on the roof observed the respondents Nos. 1 and 2 kissing each other and also observed the 2nd respondent holding breasts of the 1st respondent. The detective went out of the cabin once or twice and saw both the respondents sitting very close and indulging in the aforesaid acts. They were inside the cabin from about 5 to 6.30 p.m. After coming out, a taxi bearing No. MRB 1759 was hired, the two respondent were sitting in the rear and the 2nd respondent was observed putting his arms around the 1st respondent. The 1st respondent was dropped near her residence. On 24th Jan., 1976, the 1st respondent went by a taxi to the corner of 7th Khetwadi Lane, where the 2nd respondent entered the taxi and again when to the said Oriental Restaurant, where similar events took place as earlier and were observed by the defective through the mirror on the roof. On this occasion the couple had been there between 5.35 p.m. and 6.50 p.m. and they returned by a taxi. On 29th Jan., 1976, the 1st respondent took a taxi near her residence and in the same way as earlier picked up the 2nd respondent and both of them went to Sangam Vegetarian Restaurant at Marine Drive and entered the same. The

petitioner was informed about this and came there. The said respondents rushed out of the restaurant and there was a scuffle, they were taken to the police station and complaints were lodged.

8. As regards the 3rd respondent, the report is that on 17-1-1976, at about 5.42 p.m. the respondent No. 1 was seen entering the office of the 3rd respondent. They came out of the building at about 5.52 p.m. and entered Moonlight Hotel at 5.53 p.m. They went to the 3rd floor. The detective got hold of a woman of easy virtue from nearby and followed them in the hotel. The 1st and the 3rd respondents were supposed to have been registered as Mr. & Mrs. Shah. The detective registered himself in the register. The detective came out soon thereafter and the respondents Nos. 1 and 2 came out at about 6.55 p.m. The report does not mention any photographs having been taken, but three photographs are produced, alleged to have been taken at the same time, that is at about 5.53 p.m.

9-28. (His Lordship then considered the evidence and proceeded).

29. In the circumstances I am convinced of the following facts:

(a) that the respondents nos. 1 and 2 were meeting frequently in a dubious manner and in suspicious circumstances and it is clear that the purpose of meeting was not innocent or what is alleged in the instant petition.

(b) that they were seen by the detective in the Shabnam and Paramount Restaurants and the story that they had met at saree centres or hospital is not worthy of any credence.

(c) that they were travelling together in taxis and were seen travelling in a taxi at least once. Assertion by both of them to the contrary cannot be believed.

(d) that the visit of the 1st respondent at least to the office of the 3rd respondent on 17th Jan., 1976, is proved and that, visit was for some unexplained purpose which is bound to arouse anybody's suspicion as to the purpose of the visit.

(e) that the 1st respondent carried on with her flirting in spite of two complaints in writing by the petitioner, to which there is no reply nor any explanation as to why

replies were not given.

(f) It is clear that the 1st respondent did not care for the feelings of the petitioner and had at no time made any attempt to allay such suspicions; on the contrary she continued to act in a manner which would fan the fire of suspicion.

30. Another thing which requires mentioning is the attack on the other family members of the petitioner. The instructions of the 2nd respondent to his advocates to attack the petitioner's mental condition by referring to the family history was thoroughly unjustified. Before me, Mr. Vakharia for the 2nd respondent referred to the case put to the petitioner about the litigation between himself and his brother and about his father being of unsound mind and the case put that the suspicions of the petitioner were due to the suspicions of the petitioner were due to his mental debility inherited from his father. The advocates have also raked up the family history about the brother of the petitioner by alleging that the brother of the petitioner and his wife had been living separately before their death; that one of the sons of his another brother had taken divorce twice; that two sons of another brother had taken divorce and that in those cases the wives had filed the petitions. It is also raked up that another son of an uncle of the petitioner had left his wife and children. I do not think that this type of attack is at all justified and the cross examination on this line ought to have been stopped by the trial Court. The family history of the relatives does not and cannot reflect on the mental condition of the petitioner. When such questions were asked, the learned Judge ought to have enquired from the advocates for the respondents how they were relevant and as to whether they were going to lead any medical evidence on the subject that the father of the petitioner suffered from mental debility which could have been inherited by the petitioner and that the character of the other family members who were involved in divorces would also medically make the petitioner prone to entertain unjustifiable suspicions. It is obvious from the fact that no such evidence was led, that the respondents did not at any time desire to lead any such evidence and the entire cross-examination to say the least, is irresponsible and was conducted only to throw mud at and run down the petitioner and ought not to have been indulged into. The learned advocate for the 1st respondent ought not to have indulged in such scurrilous cross-examination. Even the advocate for the 2nd

respondent after adopting the contention of the 1st respondent in this appeal insisted on relying on this part of the cross-examination in spite of my request not to do so. This attitude of the advocate has to be strongly deprecated.

31. There is nothing in the established facts to show that the 1st respondent was guilty of adultery, though there is enough evidence to show that she was carrying on with the 2nd respondent. As regards the other incidents in the report regarding Oriental Restaurant, I am not prepared to accept them in the absence of any corroborative evidence. There are no photographs near that place, which the detective could have easily taken. Therefore, I deem it inadvisable to rely on this evidence, particularly, in view of the tendency on his part to booster up the incidents or add imaginary incident.

32. This brings me to the question as to whether the conduct of the 1st respondent was such, as to have caused danger to life, limb or health, bodily or mentally of the petitioner or as to give rise to reasonable apprehension of such danger.

33. Mr. Shah has relied on *Parihar v. Parihar*, for the purpose of showing as to what constitutes mental cruelty. We are not concerned with the facts of this case. Various judgments are considered in the said judgment and observation made on the basis thereof. The relevant observations are as follows:

'19. ... Cruelty is wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health bodily or mental as to give rise to reasonable apprehension of such a danger. It includes action or omission which injures the susceptibilities of the affected spouse and causes him or her mental agony which the sufferer alone can state. Bucknill J. in *Horton v. Horton*, 11940 P. 187 at p. 193 was of the view that a man takes the woman for his wife for better, for worse. He cannot establish cruelty merely because he finds life with her is impossible. He must prove that she has committed wilful and unjustifiable act inflicting pain and misery on him and causing him injury to health. In *Siddangangiah v. Smt. Lamshamma*, AIR 1969 Mys 115, it was held that it is not restricted to acts of physical violence and may extend to behaviour which may cause pain and injury to the mind as well, and so renders the continuance in the matrimonial home an agonising ordeal. In *Smt. Putul Devi v. Gopi Mandal*, : AIR1963 Pat93 it was

observed that a husband or a wife may not prima facie documents anything directly. against the other and apparently there may be good relations. Nonetheless, the behaviour may be such as to cause an extreme mental distress and consequent detriment to health. What acts will constitute mental agony will obviously depend upon the circumstances of each case. Several factors will have to be taken into account, such as, environment, status in society, education, cultural development, local custom, social condition, physical and mental condition of the parties etc. In *Dastane v. Dastane*, : [1975]3SCR967 a decision handed down before the Act was amended in 1976. the Supreme Court held that the Court has to deal not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The threat by the wife to her husband that she will put an end to her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the husband and his parents were held all of so grave an order as to imperil the husband's sense of personal safety, mental happiness, job satisfaction and reputation.'

34. He then relied on *Rajinder Singh Joon v. Tara Wati*, : AIR1980 Delhi213 , wherein it is observed:

'7. Cruelty means 'delight in or indifference to pain or misery in others'. It connotes acts which give unnecessary pain to other, or which are savage or inhuman or merciless. As an adjective the word 'cruel' is often used to indicate the quality of the thing described. For example the sea and the fate are called 'cruel'. This means each is without mercy. The wife's conduct was one of indifference. She was self-centred. If she appreciated but was indifferent to the husband's suffering, the cruelty was worse. If she intended to hurt it was worst of all. 'Conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference'. *Gollins v. Gollins*, 1964 AC 644, 670, 688,689. Is it necessary to enquire into motives and causes of the wife's insensitiveness to husband's pain and suffering? I think not. Sir William Scott, that great Judge, in (1810) 1 Hag Con 453, said: 'If bitter waters are flowing, it is not necessary to enquire from what source they spring'.

35. Applying this test, it is clear that the 1st respondent is guilty of cruelty. However, in spite of that there is no evidence at all, not a single word in the evidence that the conduct of the 1st respondent has caused any danger to the health of the petitioner or has given rise to any apprehension of such danger. Such an allegation is made in the petition but there is no evidence to the effect given in examination-in-chief. Mr. Shah has relied on Cross-examination of the petitioner in which he stated that it is not true that he had neither suffered in health or reputation as was alleged. This denial, in my view, is no evidence to establish the danger or apprehension of danger. In any view, looking to the circumstances of the case though it is unjust to compel the petitioner to continue his marriage with the 1st respondent, it is unfortunate that, the law being what it is, I have no alternative but to dismiss the appeal.

36. In the facts and circumstances of the case, I make no order as to costs on the appeal. In my view the respondents should not be allowed the costs of the petition and I accordingly set aside the order of costs passed by the learned trial Judge against the petitioner.

37. Appeal dismissed.