

P. Vs. P. and R.

P. Vs. P. and R.

SooperKanoon Citation : sooperkanoon.com/348748

Court : Mumbai

Decided On : Aug-06-1981

Reported in : AIR1982Bom498

Judge : A.N. Mody, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13 (1) (I); [Code of Civil Procedure \(CPC\), 1908](#) - Order 8, Rule 2; Evidence Act, 1972 - Sections 137 and 138

Appeal No. : First Appeal No. 599 of 1979

Appellant : P.

Respondent : P. and R.

Advocate for Def. : C.R. Dalvi,;P.N. Karlekar,;M.P. Kenia and;Premila Shah, Advs.

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

Judgement :

1. The appellant (original petitioner) is the husband of the 1st respondent (original respondent) she is alleged to have committed adultery with the 2nd respondent (original co-respondent). The petition was dismissed, hence, this appeal.

2. The petitioner and the 1st respondent were married on 14-2-1943 according to Hindu Vedic rites, both being Hindus. They have four issues: three sons and one

daughter. The First son is 27 years old, the daughter is 25 years old and the other two sons are respectively 17 and 15 years old, The allegations in the petition, which are not only vague but confusing, are, inter alia, that since about few years prior to the petition, the respondent had been cold and indifferent towards the petitioner; that her conduct aroused suspicion of the petitioner about the fidelity of the respondent. On or about 1969 the petitioner arranged un-obstructive watch on the movements of the respondent through investigative agencies. It is alleged that the respondent was seen moving out of the house almost every day in the absence of the petitioner and meeting various persons of opposite sex and was seen visiting platters in their company but would return home before the petitioner returned. In the beginning the petitioner pulled up the respondent and pointed out that the respondent should lead a chaste life. It is alleged that sometimes the respondent was seen entering a room in a hotel in the company of the co-respondent and coming out after a good length of time. In the following para it is alleged that on finding that his persuasion did not have any effect on the respondent, the petitioner sent a registered letter to the respondent through his advocate in May, 1969, recording the facts. The letter had some effect on the respondent, who improved in her behaviour for sometime but after a few months, the petitioner again found the respondent to be acting in the same manner and discovered that the respondent in the company of the co-respondent was visiting pictures and hotels and would remain with the co-respondent in rooms in hotels for quite sometime. The petitioner had the movements of the respondent kept under watch in the month of Nov., 1971 and found that on 2-11-1971, the respondent was seen going out with two ladies. The respondent was very well dressed at that time. In the company of those ladies she went to Hotel Buckley Court at Wodehouse Road in a taxi and one or the ladies (other than the respondent) went in the hotel to enquire anxiously for some person but had to come back disappointed. From there the three ladies visited a cinema and after the show again went to the said hotel and returned back. It is then alleged that on 3-11-1971, the respondent went in a building known as Sakar Bhavan at 6th Khetwadi and enquired about some person from a lady on the 2nd floor of the said building, and finding that, that person was not at home, the respondent went to Grant Road, entered a shop known as Simplex Readymade Store and after sometime went to

Shalimar Talkies at Grant Road, where co-respondent met her and they went inside the theatre at about 2.45 p.e. The respondent was already having tickets of the show. They came out of the theatre at about 3.15 p.e. hired a taxi bearing No. BMR 1454 and went inside Aroma Hotel near Chitra Cinema, Dadar, and came out after some enquiries. From there they proceeded by the same taxi to Preetam Hotel (which is an eating house and not a residential hotel) at Khodadad Circle, Dadar and were there till about 4.30 p.m. From there, they went by a taxi to Grant Road, entered Imperial Hotel behind Apsara Cinema at about 5 p.m. hired a room and were there in the hotel till about 6.30 p.m. and after coming out hired a taxi. The co-respondent dropped the respondent near Alankar Cinema and then went away. Then there is reference to what happened on 4-11-1971, Then comes reference to 6-11-1971, when one Dr. Kishorebhai, was espied hugging and kissing the respondent. Then is mentioned the most important incident of 30-11-1971, On 29-11-1971, the petitioner on a pretext of going out of Bombay, left the home and stayed in Modern Hindu Hotel near Excelsior Cinema. On 30-11-1971, a watch was kept by two of the operatives of the detective agency which was hired as also the Chief Executive d'Souza and the petitioner. The respondent left her home at about 1.30 p.m., and took a bus, got down at Hughes Road, walked along the footpath followed by one operative on the same footpath and the other one on the opposite footpath. She entered New York Stores and Restaurant and was there till about 2.30 p. M. When one of the operative on the same footpath. She entered New York Stores and Restaurant and was there till about 2.30 p.m. when one of the operatives of the detective agency, entered the cabin and saw that respondent's blouse and brassiere were unhooked and the co-respondent was holding her breasts in his hands. The respondent said operative immediately called the petitioner to the cabin and when the petitioner saw the respondent and the co-respondent in the said cabin, the petitioner informed the co-respondent that he was the husband of the respondent, the co-respondent got frightened and started apologising and at the instance of the petitioner disclosed his name. On the basis of this the petition is filed on the ground of adultery and cruelty. The written statement of the respondent consists of complete denials.

3. The petitioner's case mainly rests on his suspicion about the activities of the respondent and which were recorded by him in a letter dated 26-3-1967

addressed by him to the maternal uncle of the respondent, with a copy to one Jitendra, a brother of the respondent, to which there was no reply; a letter dated 16th May, 1969, addressed to the respondent by the petitioner through his advocate to which also there was no reply. The finding of an empty bottle bearing name Saraswati which was, as the petitioner alleges, on enquiry found to have contained some medicine for abortion; and incidents of 2nd and 6th Nov., 1971 and the final incident of 30-11-1971. As regards the general dent, they are absolutely vague and devoid of any particulars.

4. The evidence in the matter is most unsatisfactory. The evidence led on behalf of the petitioner consists of his own evidence and that of the employees of the detective agency employed and the contemporaneous reports sent to the petitioner by the said agency. As pointed out by Mr. Dalvi, there are many contradictions between the reports and the evidence and also between the evidence of the two operatives and that of the petitioner as to what happened on 30-11-1971. There is a set of the books of account of the Agency showing the expenses incurred on each particular case. However, these books are not very satisfactory. The evidence of the respondent and the co-respondent also is unsatisfactory. The respondent maintains throughout her evidence that her married life with the petitioner was happily till about 1975/76. That is, even after the date of the filing of the petition. She then says that their married life was happily till 1969/70. Which she changes to the married life being happy till about 1974/75 and then explains that the married life was happily till 1969/70 and good till 1974/75. Then she says that up to 1969/70, they had no complaints against each other and thereafter till 1974/75, she had not complaints against the petitioner and that the petitioner had no complaints against her, except as mentioned in the petition. I will refer to the other aspect of the evidence later on. The evidence of the co-respondent as is discussed hereinafter, is not reliable.

5. As contended by Mr. Kenia, the allegations of the petitioner as contained in the petition are most unsatisfactory, vague and contrary to the actual events that have taken place, as admitted by the petitioner in his evidence, Paras 3 and 4 of the petition give a clear impression that the case of the petitioner is that in or about the year 1969, the petitioner came to know that the respondent was carrying on with

the co-respondent and that were found in a hotel room more than once and that this was followed by the advocate's letter of May, 1969. Then it is alleged that even after the incident of 30-11-1971, the respondent is carrying on her adulterous and immoral connection with the co-respondent openly and more vigorously, than before and that there is not a word about this in the evidence of the petitioner. The attack of Mr. Kenia is justified. He also points out that it is not as if the petitioner does not understand the law or legal drafting, The petitioner is a sales tax practitioner, and is therefore, supposed to have a trained legal mind to some extent, and therefore, he should be presumed to have understood the effect of what is stated in the petition. Though, there is substance in the attack of Mr. Kenia, I do not propose to attach too much importance to the manner in which the petition is drafted as in my view, the petition contains exaggerated allegations and allegations are mentioned out of sequence. Though, I may therefore, treat the petition a little leniently, it must to some extent have an effect on appreciating the evidence of the petitioner.

6. To 11. (His Lordship considered the evidence and proceeded.)

12 to 17. Then comes the most important period of 2nd 6th Nov., 1971 and of 30th Nov., 1971, Mr. Dalvi and Mr. Kenia have strongly attacked the evidence led by the petitioner in this respect. The most important witness regarding these reports is one Chitnis, an operative of the Detection Service India Pvt. Ltd., the detective agency employed by the petitioner. (His Lordship after considering the evidence of witness Chitnis with regard to happenings of 2nd to 6th Nov., 1971 and holding that the same could not be accepted, proceeded.)

18. Then Comes the most important incident of 30-11-1971. The report says that an arrangement was made on 29-11-1971 by the petitioner and according to the arrangement, the senior executive of the agency and operative picked up the petitioner from Modern Hindu Hotel located near Excelsior Cinema, at about 10.15 a.m., in Car No. MRG 1866. From there they went to Khetwadi, where they posted themselves unconstructively near about Kanji Bhavan. At about 10.35 a.m. the respondent was seen coming out of the balcony thrice and looking out on the road in both the directions. She left her residence at about 1.30 p.m. stood at a bus stop

near her residence. Two of the operatives stood in the queue. At about 1.40 p.m. the respondent boarded a BEST bus No. RMQ 991 proceeding towards Babulnath. The operatives also boarded the bus. The petitioner and the senior executive followed them in the ear No. MRO 4866. The respondent left the bus at Hughes Road as also the operatives. The respondent started walking along the footpath and the operatives kept a watch at a short distance, followed by the ear. The respondent walked into the New York Stores & Restaurant, situated at the corner of the road and went up the left, where special family rooms are available. She entered one of the cabins, two of the operatives kept a watch on the ground floor and as the respondent did not come down till 2.30 p.m. One of the operatives went up and suddenly got into the cabin and noticed that the respondent had unhooked her blouse and brassiere was found to have been moved up, thereby exposing her breasts, which were held by a gentleman in both his hands, One seeing the operative, the respondent and her male companion suddenly got up. The male companion came out and asked the waiter as to why he had allowed some stranger to come into the cabin, whereupon the waiter as to why he had allowed some stranger to come into the cabin, whereupon the waiter replied that he had allowed the said stranger to meet his relative. In the meantime the operative came down quickly and apprised the petitioner as to what he had seen whereupon, the petitioner accompanied by the senior executive and another operative rushed in and found the respondent and her male companion seated side by side in the cabin. When the petitioner confronted the companion of the respondent, he gave his name as R., residing at Char and stated that he had come to the said restaurant to meet the respondent by previous arrangement on telephone. Thereafter, the petitioner told R that he was the husband of the respondent. Whereupon the said R offered his apologies and begged his pardon and bent down and touched his feet. On being further questioned, he stated that he in the past resided at Tara Bhuvan, near about the residence of the petitioner and that he knew the respondent for last about four years and that during that period till today he had been carrying on with the respondent. At this stage, the operative who had first found the respondent and R in the cabin stated that R was the same person who had met the respondent at Shalimar Talkies on 3-11-1971 from where R and the respondent had visited two hotels. Thereafter, R gave his

Visiting card, which showed him as a broker for the Empire Dyeing & Manufacturing Co. LTD. He was then asked his residential address by the petitioner who wrote out his address on the reverse of the visiting card as xxxxx. The said card was taken by the senior executive from R. R. Also handed over another card of one C. B. H. Which was taken over by the senior executive and they left the restaurant at 3.15p.m.

19. The evidence of the petitioner on this point is that on 29-11-1971 he approached the investigating agency and informed them that he wanted to catch the respondent red-handed, moving with some person, and accordingly he left the house and stayed in Modern Hindu Hotel. He pretended to the respondent that he was going to Poona. In the afternoon, he went to Maganlal Dresswala and took a mustache and wig on hire. The detective agency was to contact him in Modern Hindu Hotel. He stayed overnight and on 30-11-1971, he left with the personnel of the detective agency. They were D'Souza, Chitnis and Singbal. His evidence in chief follows by and large the report till he enters the family room. He then says that when he tried to enter the said family room, the co-respondent tried to leave the family room but was stopped by him from coming out. He enquired about his name which was given as R. And he told him that he resided at Khar. He also informed him that he had come there by previous appointment on telephone with the respondent. At that time the respondent was in the family room. Chitnis then told him that the co-respondent showing his address. He then made enquires with the co-respondent as to his occupation who told him that he was a broker. Then the petitioner enquired as to for which party he was working when he gave another card showing that he was working for the party. That is the card bearing the name of C. B. Hingorani. He then identified himself as the husband of the respondent whereupon the co-respondent begged his pardon and bent down to touch his feet. The petitioners then enquired of the co-respondent as to how he came in contact with the respondent and the reply is as stated in the report. In his cross-examination, he is again made to repeat what is stated in his examination-in-chief. He elaborated that there was no scuffle between him and the co-respondent, that no sound was created, that there was no hue and cry, that neither the manager of the hotel or the servants of the restaurant noticed the incident. He says that he went back to the hotel and not to his residence because he wanted to think over

the matter. After returning home he did not discuss the incident with the respondent, nor did he reprimand her. He took meals on the day at home and no quarrel or scene took place at their residence thereafter in respect of the New York Restaurant incident, but he did not like to speak to the respondent.

20. D'Souza being dead, obviously his evidence should not be led. The other operative. Singbal has also given evidence. Between the evidence of Chitnis and Singbal, there are certain discrepancies as to who went in first after the respondent and co-respondent were seen by Chitnis in compromising position in the cabin. There are some other discrepancies. The discrepancies, in my view, are not material, particularly, when the evidence is being given after a lapse of about 7 to 8 years.

21. As against this, as already pointed out the evidence of respondent is not such as can inspire confidence. Basically, her evidence consists of denials of the main events, coupled with positive evidence on certain other aspect of the matter which can be called peripheral material. Her evidence on this peripheral material, as already the evidence of the co-respondent, his evidence consists of denial of his carrying on with the respondent and complete denial of his meeting the respondent either on 3rd or 30th Nov., 1971. If he had stuck to his denials, it would possibly have been difficult for the co-respondent in cross-examination. However, the co-respondent has gone further and trolled out an alibi saying that on 30th Nov., 1971, for almost the whole day he had not gone out of the house at all because he was not present on the spot on 30th Nov., but that he was at home and very busy with any such ceremony. In my view, if the person is relying on an alibi, it is necessary that it should be pleaded. Order 8, Rule 2 of the Civil P. C. Provides, inter alia, that the defendant must raise in his pleading all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. In my view, the alibi of the co-respondent relied on, if not pleaded, is likely to take the opposite party by surprise and it ought to have been pleaded and not having been pleaded, apart from the question of whether he can lead evidence, the defence becomes difficult of belief. Another reason against believing the evidence is that according to him his mother died on 28th Nov., 1970, while the ceremonies for the first death anniversary which were to last for 4 to 5 days started on 29th Nov., 1971 as the co-

respondent says that 30th Nov., 1971 was the second day of the ceremony. The learned trial Judge in his judgment has pointed out that death ceremonies are always observed as per Hindu calendar and that he had ascertained the corresponding Hindu tithes on 29th Nov., 1971 and 30th Nov., 1971, He found that it was impossible that the first death anniversary of the person who died on 28th Nov., 1970 can fall anywhere within 4 days of 30th Nov., 1971. Mr. Kenia for the co-respondent has not been able to point out that these observations of the learned trial Judge are wrong, Moreover, the learned trial Judge has stated that he had given an opportunity to the co-respondent to examine any priest or astrologer to convince him that the first anniversary of his mother's death could have fallen on 30th Nov., 1971, which opportunity was not availed of by the co-respondent. Still another reason which raises suspicion about his evidence is that there must have been a number of persons present at the death ceremony and it would be conducted by a priest. Apart from the bare and uncorroborated words of the co-respondent, no other evidence had been led by the co-respondent to prove the ceremonies. He could have led the evidence of his father or brothers or their wives or of some independent outsider for this purpose but he had chosen not to do so. The evidence of the co-respondent also consists basically of denials with the only important positive evidence being of the alibi. If the co-respondent is disbelieved on the alibi, his denials will have to be viewed in the light thereof.

22. Whichever way one looks at the matter, the position emerges is that most of the evidence on either side is unreliable. The only evidence which can possibly be accepted and which has been accepted by the learned trial Judge is regarding the incident of 30th Nov., 1971. I do not propose to give any definite finding as regards whether that incident can be held to have been proved since, as I will presently point out,

in my view, even if that incident is held to be proved, it will not furnish to the petitioner a ground of divorce.

23. Before I come to the question as to whether the incident of 30th No., 1971 by itself can enable the court to draw presumption of adultery or can amount to

cruelty of the type required to furnish a ground for divorce. I must dispose of the contention of Mr. Shah that the learned trial judge has erroneously disallowed certain questions regarding the alibi. Three questions were disallowed by the learned trial Judge. They are :

'Q. Is it your case that because of the first anniversary rites connected with your mother's death, you could not be out of your home all the day and particularly about 3p.m. at New York Restaurant with the respondent on 30-11-1971?

Q. Have you given instructions to your Advocate while drafting the written statement regarding the incident of your mother's death and the 1st anniversary rites on or about 30-11-71?'

The reasons for disallowing the first question is not mentioned. I cannot understand why the question was disallowed. The question is absolutely relevant and though not very germane is only asked with a view to elicit the reason why the CO-respondent was relying on the performance of the ceremony of the first anniversary of his mother's death. The next question also is to the similar effect and is disallowed on some peculiar ground which reads as follows:

'Question disallowed. The reference was not volunteered by the witness. He gave it in answer to the questions put by his advocate in his examination-in-chief.'

The very purpose of the cross-examination is to ask the questions regarding what the witness has stated in the examination-in-chief. The answer in examination-in-chief are normally in reply to the questions put by the advocate, but whatever is stated is really the case of that witness and particularly when the witness is a party to the proceedings of that party. All the questions which are asked with a view to challenge the evidence-in-chief are permissible. There is no provision of law which says that cross-examination should be confined to what is volunteered by the witness and cannot be directed to challenge or clarify the answer given in reply to the question put by his own advocate in examination-in-chief. A party can always be asked the purpose behind his reliance on a particular incident even though the incident may have come out in reply to question put to him by his advocate in his examination-in-chief. The question was obviously wrongly disallowed. The third

question is asked as a preliminary question with a view to point out and ascertain the witness's explanation as to why this incident was not referred to in the written statement. The question was perfectly legitimate question and has been wrongly disallowed. Unfortunately the learned trial judge has not chosen to deal with the submissions of the learned advocate for the petitioner in support of his right to ask the question, hence, I am unable to know how the mind of the learned trial judge worked. But whatever may be the view of the matter, I cannot think of any reason for which any of these questions could have been disallowed. If the answers to those questions were found to be material by me I would have remanded the case or taken the evidence of CO-respondent in court but ultimately I did not find it necessary to adopt such course as the evidence of the co-respondent is found to be not worthy of any belief even otherwise.

24. This brings me to the questions referred to above. I am deciding those questions on the assumption that the incident of 30th Nov., 1971 is proved. Mr. Shah has relied on *Devyani v. Kantilal*, : AIR 1963 Bom 98 to contend that there can be ordinarily no direct evidence of adultery. It is difficult to produce evidence of the party being found in actual compromising position. The finding of adultery must necessarily rest on circumstantial evidence. The circumstantial evidence will consist not only of the two offending parties being found together in unusual circumstance or being together alone in a secluded place for a long period of time but also will consist of the social condition of the party and the manner in which the parties are accustomed to live. To put it differently, what can be said to be natural mingling of the opposite sexes in a jet set world will be alien to a person belonging to ordinary middle class and the unusual mingling of two persons of opposite sex in seclusion for any length of time amongst that class can justifiably lead to an inference of adultery. The contention is an acceptable one. However, in the present case this position cannot help Mr. Shah. As I have already stated the evidence on the incidents prior to 30th Nov., 1971 is not reliable. This leaves only the incident of 30th Nov., 1971, which by itself cannot permit any inference of adultery. It is possible that it was preliminary step to adultery and may be preliminary step to adultery and may ultimately have resulted in adultery but it cannot be said that the incident proved that adultery had taken place. Hence, the petitioner has been unable to prove adultery, As regards cruelty, it is not sufficient

to prove mere cruelty. What is required is that the conduct should be such as is willful or unjustifiable and of such a character as to cause danger to life, limb or health, bodily or mental or to give rise to a reasonable apprehension of such a danger. This is the position after the amendment of the Hindu Marriage Act in the year 1978, as held in *Madanlal sharma v. Santosh sharma*, L.P. Appeal No.28 of 1980 by Reg & kanade, JJ.dated 10th march, 1981. Therefore, one has to determine whether this incident is such as has caused danger to health, which in the present case may be mental health or give rise to reasonable apprehension of such danger. While determining this question the court cannot ignore what the condition of the petitioner's mental health was between the date of filing of the petition and the date when he has given evidence. The incident is such as may cause great disturbance to the petitioner, but can not be such as can cause any damage to the health. The evidence given also does not establish that the incident had in fact affected the health of the petitioner to any extent. The petitioner is a sales tax practitioner. There is no evidence to show that he was unable to attend to his matters or that his mental balance was upset or his nature had changed to any extent. The only evidence is of annoyance or mental disturbance. This cannot amount to legal cruelty required to form a ground for divorce.

25. Mr.Shah desired to contend that the legal position as laid down in he aforesaid judgment is not correct and that in amending the Act in 1978, the intention of the legislation was to introduce cruelty simplicities as a ground for divorce and that in the alternative the law was still the same as laid down by the supreme court in *Dastane v.Dastane*, : [1975]3SCR967 . However, it is not open to me to entertain any such contention in view of the binding judgment to the contrary and Mr.shah will have to take it up in the higher court.

26. Mr.Dalvi also contended that even if there is a matrimonial offense there was condemnation. He relied on several facts and circumstances and on case law to support his contention. I am not called upon to decide this question in view of what I have already held.

27.In the circumstances the appeal is dismissed. In view of the fact that I have disbelieved both the respondent and the corespondent, it will be just to make no

order as to the costs of the appeal.

28. Appeal dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com