

Nilima Kishore Mhaske Vs. Kishore A. Mhaske

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Court : Mumbai

Decided On : Apr-26-2002

Reported in : 2002(5)BomCR152; II(2002)DMC536; 2002(3)MhLj872

Judge : H.L. Gokhale and ;V.C. Daga, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1) and 28

Appeal No. : Family Court Appeal No. 146 of 1991

Appellant : Nilima Kishore Mhaske

Respondent : Kishore A. Mhaske

Advocate for Def. : S.S. Hardikar, Adv.

Advocate for Pet/Ap. : Venkatesh Shastri and ;A.V. Anturkar, Advs.

Disposition : Appeal dismissed

Judgement :

H.L. Gokhale, J.

1. This appeal is filed by a wife seeking to challenge the judgment and decree dated 10th November 1990 passed by the , Judge, Family Court, Pune, on a petition moved by the respondent-husband under Section 13(l)(ia) of the [Hindu Marriage Act, 1955](#), allowing the said petition. Shri Shastri appears for the

appellant and Shri Hardikar appears for the respondent. We would like to record at the outset, that before proceeding with final hearing, we made good efforts to see if the controversy could be resolved amicably, but our efforts failed.

2. The parties were married on 10th March, 1985 and a son named Vivek was born out of this marriage on 25th August 1986. Subsequently, the above referred petition for divorce bearing petition No. A-405 of 1989 was filed by the respondent-husband which has led to the impugned judgment and decree. In this petition, he alleged that the appellant was insisting on separate residence and that she did not behave properly with the elders in the family. Thereafter it is alleged that the appellant-wife attempted to commit suicide on a number of occasions, causing mental agony and cruelty to the respondent. Ultimately, she went away from the matrimonial home on 5th September, 1985 only to return 3 months thereafter on 12th December, 1985. That was in pursuance and intervention of the elders in the family and after executing a writing on stamp paper on 8th December, 1985 (Exhibit 27 in the Family Court) that henceforth such situation will not recur. Parties had lived together thereafter. In fact, the son - Vivek is born thereafter on 25th August, 1986. It is however, stated in the petition filed before the Family Court that subsequently also, the appellant wife continued to treat the respondent/husband with cruelty. She used to make false allegations and went to the extent of lodging a false complaint to the police station in November, 1987. All these facts led the petitioner to believe that it would not be possible to continue any further with the appellant-wife. Thereafter, he filed above referred petition seeking divorce.

3. The appellant-wife filed written statement. She denied various allegations made in the petition. Thereafter issues were framed and evidence was led. From the side of the respondent/husband he examined himself, his father and one Shri Chandrakant Pawar. From the side of the appellant-wife, she examined herself and her father. Thereafter, above referred decree was passed on 10th November, 1990. This appeal was filed on 28th January, 1991, though the last date for filing appeal was 20th January, 1991. The respondent got re-married in the meanwhile on 26th January, 1991. Inasmuch as there was delay of 8 days in filing appeal, the appellant filed an application for condonation of delay. A Division Bench of this

Court, which heard that application however disposed of the said Civil Application by order dated 4th April 1991, taking a view that there was no delay in filing the appeal. Respondent filed Civil Application for review of that order but the Division Bench rejected it by, another order dated 13th September, 1991. It is also material to note that this appeal was not diligently followed up by the appellant and the appeal came to be dismissed for not removing office objections. It was restored later on after complying with the requirements on 25th December, 1995.

4. As far as the financial circumstances of the parties are concerned, the appellant-wife is having an employment in the State Government, whereas the respondent-husband is an industrial workman in Bajaj Auto Ltd. From the information with respect to salary made available by both the parties, it would be seen that take-home salary of the appellant was over Rs. 7500/- p.m. whereas the take-home salary of the respondent is about Rs. 5500/- p.m. After contracting second marriage, the respondent has another son born from this second marriage, whereas his son from the earlier marriage has continued to stay with the appellant-wife.

5. At the outset, learned Counsel for the respondent raised an objection to the maintainability of the appeal on the ground that it was barred by limitation by 8 days on the day of presentation thereof as such appeal should be dismissed holding it to be barred by limitation. He further submits that the question leading to the maintainability of appeal on the ground of limitation can be gone into at the stage of final hearing afresh even though earlier orders hold that the appeal was well within limitation.

6. In reply, Shri Shastri, learned Counsel for the appellant submits that the question sought to be raised with regard to the maintainability of appeal on the ground of limitation cannot be gone into at this stage of appeal on the face of the earlier orders holding appeal to be in limitation. The said orders, in his submission, would operate as res judicata between the parties for want of further challenge in the superior or Higher Court. Shri Shastri relied upon decision of this Court in case of Bhagwan Godsay v. Kachrual Bastimal Samdariya, : 1987(2)BomCR153 , in support of his submission that once delay is condoned that order is final.

7. Having heard the parties on this issue, considering the fact of remarriage by the respondent after the expiry of period of limitation in presenting appeal giving rise to the rights in favour of wife from remarriage and a son from this marriage compelled us to examine this question, without prejudice to the contentions of either of the parties. We have for our satisfaction recalculated limitation to find out whether the presentation of appeal was barred by limitation. We are satisfied that the appeal was barred by limitation as observed by us in para 3 (supra). However, at the same time, the order dated 4th April 1991 taking view that there was no delay in filing appeal and the subsequent order dated 13th September 1991 having become final, in our opinion, cannot be reopened at this stage of the appeal. At the same time, we are of the view that no party should be made to suffer due to some earlier mistake in calculating the period of limitation. In such a case, there can be no doubt that the litigant deserves to be protected against default committed by the Court, if any. The act of the Court cannot prejudice to the party to a litigation. In somewhat similar circumstances the Apex Court dealing with similar unfortunate circumstance in the case of Jagat Dhish v. Jawahar Lal, : [1961]2SCR918 observed as under :--

'..... In such a case there can be no doubt that the litigant deserves to be protected against the default committed or negligence shown by the Court or its officers in the discharge of their duties. As observed by Cairns, L.C., in Rodger v. Comptoir d'escompte de Paris (1871) 3 PC 465 as early as 1871 'One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors'; that is why we think that in view of the subsequent event which has happened in this case, namely the filing of the certified copy of the decree in the High Court, the question raised by the appellant has become technical and academic.'

Keeping in view the above observation of the Apex Court we do not propose to consider and dismiss this appeal on the short issue or technical challenge based on the ground of limitation. We propose to consider this appeal on its own merits but hold that the remarriage contracted by the respondent shall not be affected by the present proceedings.

8. Shri Shastri, learned Counsel for the appellant-wife submitted that there is no sufficient material on record to come to the conclusion that the appellant-wife had committed acts of cruelty to justify decree of divorce. He laid emphasis on the fact that on 8th December, 1995, parties had settled their controversy and appellant had given a writing that such acts will not recur. He also pointed out that a son from the marriage was born thereafter on 25th August, 1996. He submitted that some of the acts of cruelty which are being emphasised are prior to the above writing. He pointed out that only two allegations are subsequent thereto. The first one was that the appellant made false allegation that she was required to hand over 2 golden bangles to the respondent and that the relationship between the parties got strained because of the alleged loan of Rs. 10,000/-demanded by the respondent from the parents of the appellant. The other allegation was about lodging of complaint with the police.

9. Shri Hardikar for the respondent-husband on the other hand, submitted that what we have to see is all the factors in totality. He pointed out that although appellant had given a writing as stated above, she had attempted to commit suicide on five different occasions earlier by adopting different methods. The writing executed by her was signed by her parents as witnesses. There is no evidence on record to show condonation of such act committed by wife. However, she was given fair chance to improve and develop cordial relations, atmosphere and improve her conduct. However, these attempts on her part cannot be ignored if one looks to what happened subsequently. It was submitted that the other two allegations against the husband were totally false namely that appellant was required to hand over 2 golden bangles to the respondent and that the relationship between the parties got strained because of loan of Rs. 10,000/-which was taken by the respondent from the father of the appellant. It was pointed out that the respondent and his father were in good financial condition. He had constructed house and there was no reason for the respondent to demand Rs. 10,000/- from the father of the appellant. That apart, there was continuous bickering between the parties all throughout and ultimately the respondent was dragged to the police station. It was, in these circumstances, that the respondent was entitled to a decree for divorce and these factors have rightly weighed with the learned Judge.

10. Shri Shastri appearing for the appellant relied upon a few judgments in support of his submission. Firstly, he relied upon judgment of the Apex Court in the case of V. Bhagat v. D. Bhagat reported in : AIR 1994 SC710 . In that matter the Apex Court has held that under Section 13(l)(ia) of the Hindu Marriage Act, to constitute cruelty, the conduct must be such which inflicts upon other party such mental pain and suffering as would make it impossible for that party to live with the other. The submission of Shri Shastri was that in the present case, factors which were placed before the Court could not be said to have led to any such mental cruelty to the respondent. He placed reliance on another judgment of the Apex Court in the case of S. Hanumantha Rao v. S. Ramani, : [1999]2SCR296 , and particularly para 11 thereof. In that matter, it was alleged that the respondent had lodged a complaint with the Women Protection Cell and this was one of the acts of cruelty. Respondent had led evidence and stated that she never lodged any such complaint. In fact there was no evidence to show that either appellant or anybody from his family were harassed by the respondent. This was the aspect which was pressed by Shri Shastri in the facts and circumstances of the case. However, in the present case what we see is that undoubtedly a police complaint was lodged by the appellant-wife against the respondent husband and they were called to the police station which had its own effect on their prestige in the society. Looked from this angle, the facts are quite distinguishable. He then relied upon judgment of this Court in the case of Madanlal Sharma v. Smt. Santosh Sharma, 1980 Mh.L. J. 391 wherein it was held that as far as making allegations and using abusive language are concerned, what is material to note is the effect of such accusation on the complaining spouse.

11. In this connection, it is necessary to rely upon a recent judgment of the Apex Court in the case of G.V.N. Kameswara Rao v. G. Jabilli reported in 2002 AIR SC W 162 . In that matter, the Apex Court held that to constitute cruelty it need not be of such nature as causing reasonable apprehension that it would be harmful to the party to live with other party. The Apex Court held that having regard to the sanctity and importance of marriage in a community life, the Court should consider whether the conduct of the counter petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the Court can find that there is a cruelty of the counter petitioner. In this view

of the matter, it is relevant to note that in the present case, the respondent wife had filed criminal complaint against the husband which was pressed in service as aspect of cruelty.

12. Another judgment of the Apex Court relied upon is in the case of Chetan Das v. Kamala Devi : [2001]3SCR20 , wherein Apex Court has taken a view that to constitute cruelty there must be evidence in support of the averments made in the petition.

13. At this stage, one is reminded of the judgment of the Apex Court in the case of Madhusudandas v. Narayanibai, : [1983]1SCR851 , wherein the Apex Court laid down the principles to be followed while reversing the findings of fact recorded by the trial Court in the following words :--

'.....in an appeal against a trial Court decree, when the appellate Court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court to prevail unless it clearly appears that some special features about the evidence of a particular witness has escaped the notice of the trial Court there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In this connection, reference may be usefully made to W.C. Macdonald v. Fred Latimer, where the Privy Council laid down that when there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial Court's findings as to the truth of the oral evidence, the appellate Court can interfere only on very clear proof of mistake by the trial Court.'

14. In the facts and circumstances of the cases, keeping in view the law laid down by the Apex Court, we have again taken survey of the peculiar facts of the present case and we having seen the material on record, are of the opinion that the respondent had reached to a mental position that it was not possible for him to

continue to live any further with the appellant. It is true that she had given a writing after earlier incidents. However, as the bickerings continued which led to lodging of a police complaint, the respondent thought that the same was enough and he would not continue with the appellant. It was submitted that the giving of the writing and birth of the child thereafter meant condonation of earlier acts. Even so, prima facie false allegations were made against the respondent thereafter and then a police complaint was lodged. In these circumstances, one cannot blame him when there were a number of circumstances, may be prior to giving of a writing by the appellant. The impact of cumulative events and circumstances needs to be taken into account to consider total impact on the mind of person alleging cruelty. The Family Court was thus right in coming to the conclusion that the respondent has made out a case for divorce on the ground of cruelty and therefore, he is entitled to decree of divorce.

15. As already said hereinabove, the Respondent has remarried and has a son born from this remarriage. Yet, in spite of the fact that the appellant is having an employment in the State Government, but considering the fact that she is looking after his son, the respondent filed an affidavit wherein he has stated that he has been paying Rs. 500/- p.m. to her for the son and he will continue to pay the same hereinafter also. He has further stated that he will make arrangement of an amount of Rs. 75,000/- for him and he enclosed a demand draft of Rs. 10,000/-. We accept the said statements made in the affidavit and direct the respondent to act accordingly. The custody of son Vivek shall continue with the appellant, though the respondent will have a right of access, the details of which will be worked out by the parties with mutual convenience.

16. Shri Haridkar has taken out the demand draft of Rs. 10,000/- and passed it over to the learned Counsel for the appellant Shri Shastri for handing over to the appellant. He shall pay the remaining amount as stated in the affidavit. He has undertaken to pay remaining amount of Rs. 65,000/- in four months. The undertaking is accepted. He is directed to act accordingly. In case there is any difficulty and non-compliance, the appellant will have liberty to apply and to take necessary steps. The appellant is directed to keep this amount of Rs. 10,000/- and further amount of Rs. 65,000/- when received, in Fixed Deposit until the son Vivek

completes the age of 21 years. The said Fixed deposit will be in the joint names of Vivek and the appellant, as his mother. After completing age of 21, the said amount will be passed over to son Vivek. The appellant will have liberty to utilise the amount of interest for the education and other requirements of Vivek.

17. Shri Shastri, for the appellant criticised respondent for entering into second marriage just before this appeal was filed. However, for the reasons which we have stated above, we are of the view that no fault can be found with the respondent entering into second marriage when there was no stay and a party can not be made to suffer by an order of the Court.

18. For the reasons stated above, appeal is dismissed, though there will be no order as to costs.

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