

A. Vs. B.

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Court : Gujarat

Decided On : Apr-23-1984

Reported in : AIR1985Guj121; (1985)1GLR119

Judge : D.C. Gheewala, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13 and 13(l); [Evidence Act, 1872](#) - Sections 3 and 101-104

Appeal No. : Second Appeal No. 44 of 1983

Appellant : A.

Respondent : B.

Advocate for Def. : K.G. Vakharia, Adv.

Advocate for Pet/Ap. : M.C. Bhatt, Adv.

Judgement :

1. The present appeal is directed against the judgment and decree passed by the learned Extra Assistant Judge, at Bhavnagar in Regular Civil Appeal No. 37 of 1981, which in turn was directed against the judgment and decree passed by the learned Civil Judge, Senior Division, Bhavnagar in Hindu Marriage Petition No. 1/76. The appellant-wife had filed a petition against the respondent-husband for obtaining divorce on the ground of physical and mental cruelty. She alleged that

the parties were married according to the Hindu rites on 24-1-1971 at Bhavnagar; that after the marriage she stayed with the respondent at his residence in Bombay up to 6-12-1973. Thereafter she returned to her parental home at Bhavnagar, where she gave birth to a male child on 8-7-1974. She had inter alia contended that the respondent husband was behaving towards her in a cruel and wanton way; that she was subjected to great harassment and insult and that the respondent-husband had also inflicted mental cruelty by alleging that the appellant-wife was unchaste. She had further contended that the respondent-husband was not only sexually a deviant but a pervert and she was subjected to indecent indignities such as fellatio and cunnilingus, as also sodomy; that on account of the perverted sexual instincts of the husband she had suffered from physical and mental harm and that the marriage be dissolved.

2. The Respondent-husband resisted the petition and denied the allegations of physical as well as mental, allegations regarding his alleged sexual perversity and further alleged that the appellant-wife was of unchaste character and was maintaining extra marital relations with one Jitu Gandhi who was the respondent's friend. He, however, contended that the appellant had without any reasonable cause withdrawn herself from the society of the respondent-husband- though the respondent was still ready and willing to keep her and maintain her wife provided she discharged her duty as a dutiful wife.

3. Though the pleadings are quite lengthy, the above is a short summary of the main points on which parties joined issue and the learned trial Judge after raising issues from the above pleading came to the conclusion that the appellant-wife had successfully proved that the respondent-husband had treated her with cruelty; that she was not taking advantage of her own wrong; that she had not in any manner condoned the cruelty of the respondent-husband. He, therefore, decreed the petition and granted divorce.

4. The respondent-husband being aggrieved by the same carried the matter before the learned Extra Assistant Judge, Bhavnagar by way of an appeal, who came to the conclusion that the allegations of unchastity made by the husband were as a counterblast to reckless allegations made by the wife regarding the

sexual perversity of the husband; that there was justification as evinced from the evidence of the appellant's father herself; that she was in toe with the said Jitubhai Gandhi and the husband had in his evidence on oath stated that he was neither suspecting the chastity of the appellant-wife, nor was he doubting the paternity of the only child born of the wed- lock. He, therefore, allowed the appeal and the appellant-wife being aggrieved by the said order has carried the matter before this court by way of the present appeal.

5. At the time of the admission of the appeal the learned Judge framed the following substantial question of law :

'Whether the allegation of unchastity made by the husband against the wife amounts to mental cruelty to a degree which would entitle the appellant to get a decree for divorce?'

6. Before advertng to the evidence adduced by the parties, at the out-set it may be stated that there is no dispute regarding certain dates. The marriage between the parties was according to the Hindu rites at Bhavnagar on 24-1-71. After the marriage the spouses stayed at the residence of the respondent-husband situated at C. P. Tank road, Bombay for some time and thereafter the appellant's father had purchased a flat in her name at Pedder Road, where they stayed till 6-12-1973 on which date the appellant returned to Bhavnagar and since then she had never returned to the marital home. The son was born on 8-7-74 at Bhavnagar and petition was filed by her on 5-1-76 before the learned Civil Judge, Senior Division, at Bhavnagar. The main allegations on which the appellant-wife has prayed for a decree of divorce are fold, namely, physical cruelty perpetrated by the- husband on the wife by way of beating and perverted sexual practices as also mental cruelty as a result of the allegations of the respondent-husband regarding the appellant wife being unchaste. So far as the aspect of physical cruelty is concerned, there are concurrent finding of both the courts below that the appellant-wife was not able to establish that the husband had subjected the wife to the physical cruelty, though I will have an occasion little later on to refer to the said findings as these are concurrent finding on this issue by both the courts, there is hardly any scope for disturbing the same in this second appeal.

7. The learned trial Judge had come to the conclusion that as the husband had in his written statement in para .7 specifically averred that the wife was of an unchaste character which amounted to wild and reckless allegations made without any justification they amounted to mental cruelty which would entitle the appellant-wife to divorce. On this aspect the first appellate Judge differed from the view of the learned trial Judge and he came to the conclusion that there was justification for those allegation and they were springing from a sense of exasperation experienced by the husband on account of the irresponsible allegations made by the wife, in her petition regarding the sexual perversity of the husband. The learned first appellate Judge also came to the conclusion that the husband in his deposition has categorically stated, that he never suspected the fidelity of the wife and simultaneously also came to the conclusion that the evidence on record indicated that there was justification for the said allegations made by the respondent husband. In short he came to the conclusion that granting divorce to the wife as prayed for by her, would tantamount to allowing her to take advantage of her own wrong and in that view of the matter, he differed from the learned trial Judge and dislodged his finding.

8. Mr. A C. Bhatt, the learned advocate appearing for the appellant-wife raised the following few contentions for my consideration :

(1) When in the written statement the husband had made allegations regarding unchastity of the wife and thereafter has adduced evidence through other witnesses for substantiating the said allegations regarding unchastity, merely because he himself deposes to the contrary would not exonerate him from the charge of he having inflicted mental cruelty on the wife by making those wild and reckless allegations.

(2) The question of justification would not arise in view of his own admission that he does not doubt the character of the wife, nor does he doubt the paternity of the child.

(3) Mr. Bhatt also urged that the finding of the lower appellate court that as the appellant wife had not filed any cross-objections in the first appeal she cannot challenge the finding of the trial Court on the point of physical cruelty, is distinctly

erroneous and in view of O. 41, R. 22 of C.P.C. the wife can by merely stating that she challenges the said finding would be entitled to. Controvert that finding without filing cross-objections.

(4) From the evidence on record and from the written statement as well is the evidence adduced by the husband through other witnesses, the wife has been able to establish mental cruelty and by her own evidence she has been able to establish physical cruelty.

9. In order to appreciate M. Bhatt contentions it would be necessary to refer to the written statement filed by the husband before the trial Court at Exh. 33. In para 5 of the written statement Exh. 33 the respondent husband has made detailed reference to one Jitu Gandhi who was the respondent's friend and he has also made specific deference to Diwali days of 1973 when said Jitu Gandhi stayed at the Peddar Road residence of the spouses. The respondent has alleged that, he had found the petitioner-wife and the said Jitu Gandhi in an objectionable pose. He has further reiterated that the petitioner-wife after leaving the marital home has continued her unholy alliance with the said Shri Jitu Gandhi. The respondent-husband, however, when he deposed on oath before court categorically stated that he has no inhibitions regarding the chastity of his wife, that he does not doubt her Character and that he do not doubt the paternity of the child. However, in the same breath lie has tried to adduce evidence of certain witnesses for proving that the wife is of unchaste character. For example through one Narendra who has been examined at Exh. 167as well as the appellant's father Nautamlal examined at Exh. 111 he as tried to adduce evidence regarding unchastity of the wife. The learned trial Judge had come to an emphatic conclusion that these were wild allegations made by the husband in his written statement, which amounted to mental cruelty. For this reasoning the learned trial Judge had given very cogent reasons and he had found as a matter of fact that if during Diwali days of 1973 when said Jitu Gandhi was staying with the spouses at Peddar Road, if he had found the appellant-wife and the said Jitu Gandhi in a compromising position and had asked the appellant- wife to discontinue all relations with Jitu Gandhi and which instructions were decoyed, according to him, then this would be clearly falsified by the fact that in the year 1974 when said Jitu Gandhi met with an

accident, the respondent-husband had gone to inquire about the health of Jitu Gandhi. If he had found the appellant-wife and said Jitu Gandhi in such an objectionable posture as he has alleged in the written statement and pursuant thereto had asked the appellant-wife to sever her connection with said Jitubhai Gandhi then he himself would not have cared about the health of Jitu Gandhi when he met with an accident in 1974. Merely because the husband after making there wild and reckless allegations regarding the chastity of the wife, tried to resole from the same by deposing on oath that he did not suspect the fidelity of his wife cannot exonerate the husband from the charge of mental cruelty. To allege that the wife was unchaste by it would amount to gravest of mental cruelty, which would entitle the wife to get the marriage dissolved. If the wife had left the matrimonial home in the year 1973 and the son was born to her at Bhavnagar in 1974 and if the husband was not suspecting the fidelity of the wife nor the paternity of the child then in all probability he would have either cared to call back the wife and the son who, according to him, was flesh of his flesh and bone of his bone, but nothing of the sort seems to have been done by him. On the contrary, letters were exchanged between the respondent and the appellant's father Nautamal Shah which clearly go to indicate that not only the husband suspected the fidelity of the wife, but even Nautamlal Shah a well meaning old gentleman but a little orthodox in his views, was also finding justification for the conduct of the husband. The appellant-wife, therefore, was placed in a peculiar predicament. At her parental home the mainstay of the family, namely, the father was siding with the respondent-husband. She was compelled to stay under the paternal roof, where she was more tolerated than welcome and if she were to go back to her husband's house then her character was doubted by the husband and in all probability she would have been subjected to further mental torture by countless repetitions of the same allegations.

10. It may also be noted that though it is of no great consequence for deciding the vital issues involved in the case that pending the proceeding she had never prayed for interim alimony nor for any maintenance amount for the child and the husband all throughout and is till today residing in a posh flat purchased by the wherewithal provided by the appellant's father, His deposition to the effect that he is even today prepared to call back the wife seems to be springing more from the apprehension

that he might be deprived of his residence if the wife were to start proceedings against him in that behalf, rather than genuine desire to call back the wife regarding whose chastity he harbored no doubt as per his evidence on oath. However, the same husband who has made reckless allegations in his written statement against the wife and who had the temerity to withdraw the said allegations when he deposed on oath has once again by a devious route tried to plead justification for the said allegations by adducing evidence of witnesses for establishing that the appellant was maintaining illicit relations with said Jitubhai Gandhi. Can this shifting of stand and stance when it suits him, be considered to be a factor exonerating him from the charge of mental cruelty? The learned Appellate Judge seems to have fallen in an error while coming to the conclusion that the husband has made these reckless allegations only out of exasperation and as a counter-blast to the wife's irresponsible allegations regarding perverted and deviant sexual practices and fetishes of the husband. Can such a husband be permitted to plead justification for his allegations regarding the unchastity, which while deposing on oath has categorically stated that he does not doubt the chastity of his wife? I, therefore, feel that this type of reckless allegations made by the husband in his written statement would tantamount to mental cruelty and would, therefore, entitle the wife to obtain a decree of divorce.

11. Mr. Vakharia, the learned Advocate appearing for the respondent-husband urged that the husband's allegation in the written statement cannot be made a ground by the appellant-wife to allege that the same amounts to mental cruelty, when pursuant to the said allegations in the written statement she has never thought it fit to amend her plaint and take up this as a ground establishing the mental cruelty on the part of the husband. This contention of Mr. Vakharia requires only to be stated for being rejected. Such a contention would be a valid one if the wife in the plaint had never alleged that the husband had alleged unchastity against her, which amounted to mental cruelty. On the contrary it is to be found from her plaint in para 7(i) that in Oct. 1973 at the time of her second pregnancy, the respondent alleged unchastity and wanted that the pregnancy should be terminated. What the husband has stated in his written statement by way of allegations against the chastity was never to be made by the wife to be a new ground necessitating amendment of the plaint by her, but she had already taken a

ground in her plaint, alleging that the husband was imputing unchastity to her and the same was made one of the grounds for obtaining divorce on the ground of mental cruelty. What the husband has alleged in the written statement tantamount to an admission on his part regarding allegations made by the wife in the plaint referred to above. His subsequent deposition on oath would no doubt be substantive evidence and if he had ousted by adducing his evidence alone and had not further tried to justify his allegations through other witness, then perhaps it could have been said with some semblance of justification that the said allegation made in the written statement made by him were as a result of exasperation and righteous indignation because the wife had made some irresponsible averments in the plaint. However, after deposing on oath, the respondent-husband tried to reiterate the same allegations through the evidence of other witnesses which he had blatantly and brazen-facedly made in his written statement.

12. In view of the above discussion, point Nos. 1, 2 and 4 raised by Mr. Bhatt require to be answered in favour of the appellant.

13. That brings me to the third contention raised by Mr. Bhatt which is to the effect that even without filing cross-objections, the appellant would be entitled to challenge the finding of the trial Court on the point of physical cruelty, by merely stating that the said findings erroneous and that on evidence said finding should have been in favour of the wife.

14. By a curious process of reasoning the learned appellate Judge has come to a conclusion that as the available space for the spouses in the residence of C. P. 'rank Road was most insufficient and inadequate, the husband could not have indulged in perverted practices alleged by the wife. He has also come to the conclusion that because the husband had to leave his place early in the morning and because there were certain other inmates in the house, such practices in all probability could not have been indulged in by the husband. He has also found that as the husband had a meager income of about Rs. 1000/- p.m. he could not have indulged in purchasing pornographic magazines, could not have afforded to go to posh restaurants for witnessing cabarate dances or blue films and lastly he has come to a conclusion that regarding wife's allegation about the husband

bringing liquor, as the husband is a strict adherent of the Vaishnav sect he would not indulge in taking strong liquor. As there are concurrent findings of both the courts below on this particular point of physical cruelty, this court even if it were to come to a different conclusion on appreciation of evidence would be chagrined to do so, yet I think that at least it should be stated here that all the reasoning of the learned Appellate Judge briefly summarized above, is not all convincing. For purchasing cheap pornographic literature a man need not be in affluent circumstances. Lack of availability of place and presence of other inmates in the house would not necessarily prevent a sexually deviant husband from doing what he is alleged to have done and there is no presumption that the persons belonging to the Vaishnav sect would be averse to taking liquor and would in no case touch the same. The perverted sexual practices which the wife has alleged and which she herself did not approve would definitely amount to physical cruelty. If between the two spouses one spouse wants healthy and normal sexual relations and the other is desirous of having perverted sexual relations, such as cunnilingus and fellatio as alleged by the wife in the present case, then normal sexual relation between the spouses which forms basis of a happy marital life, would be floundered on the bed-rocks of sexual aversion on the part of the spouse who is normal and not deviant, and the insistence of the other spouse who is psychologically so disturbed as not to enjoy normal sexual relations, would tantamount to physical cruelty. Some innocuous sado-masochistic practices may at times form an integral part of marital relations but if they degenerate, into practices which may cause physical harm or psychological trauma to one of the partners, or if they tend to verge on the pathological (sic) they would undoubtedly amount to physical and mental cruelty. However, as stated above, as the appellant-wife is entitled to, succeed on the ground of husband having perpetrated mental cruelty on her, it is not necessary to dwell at length on this concurrent finding of both the courts below regarding the absence of proof of physical cruelty. The third contention of Mr. Bhatt, therefore, is of only academic importance.

15. It appears from the judgment of the learned Appellate Judge that regarding allegations made by the wife on the point of physical cruelty, the only evidence was her bare word uncorroborated by any other piece of evidence. Matters of a civil nature are always decided on a preponderance of probabilities and the burden

of proof in such case is not to be discharged as conclusively as would be expected in a criminal trial. To seek corroboration to a fact alleged by a spouse to a marriage, regarding the healthy or unhealthy character of their intimate relations which belong to the sacred and secret precincts of marital life, and which are known only to the spouses and which are not supposed to be known to any other living soul on the surface of the planet, would amount to shutting one's eyes towards the facts of life and reality. Corroboration, therefore, with the say of the wife; in the present case regarding the perversity of the husband can hardly be expected to come from any other independent source. On broad probabilities it can only be said that such allegations would be beyond the pale of imagination of the wife, who though holds a master's degree from the S.N.D.T. University does not come from permissive or promiscuous society and to think that they might be a figment of her imagination would amount to paying compliments to her for being by far the best fiction writer. I, for one, am not prepared to hold that these allegations made by her might have been invented by her with an ulterior motive to impute acts of physical cruelty to the husband. However, as stated above, as there are concurrent findings of both the courts on this point, while I do not agree for a moment with the said finding I am reluctant and unable to disturb the same.

16. Mr. Vakharia, the learned Advocate for the respondent-husband drew my attention to certain observations in the Text Book of Hindu Law by Mulla at p. 791, where the learned Author has observed as under:

'Unfounded accusations of infidelity by one spouse against another will not be regarded as by themselves amounting to cruelty. These at times proceed from turbulent passions or passions of jealousy. The general rule in a matrimonial cause that the whole of the relations between the parties and all the relevant circumstances must be considered is of special value when cruelty consists, not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Willful accusations of adultery may be made which are not true and for which there are no probable grounds, and yet they may not amount to cruelty -- for example they may have been provoked by the cruel conduct of the other spouse.'

If the accusation made by the respondent husband in the present case, would have proceeded from the turbulent passions or were provoked by the cruel conduct of the wife, then I would have no hesitation in coming to the conclusion that these allegations were of little consequence and they would not tantamount to cruelty. However, as stated above, the husband has persisted in the same by adducing evidence for justification. The learned Author in the same paragraph observed 'The criterion to be applied in all such cases is not the effect produced in the minds of others but their consequences actual or apprehended on the complaining spouse.'

17. Mr. Vakharia drew my attention to a case reported at AIR 1982 Delhi 240 (Maya v. Brij Nath) wherein in para 9 of the judgment, the learned single Judge observed:

'In a petition for divorce on ground of cruelty, acts of cruelty have to be specifically pleaded. No amount of evidence can be looked into on a plea which was never pleaded.'

In the said case the respondent-wife's Counsel in ii petition filed by the husband u/s. 13(I)(IA) of the Hindu Marriage Act, asked the husband whether he was having illicit relation with a certain widow and whether respondent was given poison by her mother-in-law to kill her and the petitioner-denied the same. Though, the petitioner has never pleaded these acts of cruelty, the trial court concluded that the allegations made in cross-examination amounted, to acts. of cruelty and, therefore, passed decree for divorce on their basis. The learned single Judge held that the trial Court was wrong in taking note of the said question and granting decree of divorce to the husband on their basis. Mr. Vakharia, therefore, urged that as the wife has not amended her plaint, basing her allegation of mental cruelty on the averments made by the husband in the written statement, no finding could be arrived at on the basis of the said averments in the written statement that they amounted to a mental cruelty. As stated above, finding of mental cruelty in the present case does not depend solely upon the averments made in the written statement but even in the plaint as stated above, she has specifically averred that the husband was, imputing unchastity to her. The said decision, therefore, can be

of a little avail to the respondent-husband.

18. Similarly, in a case reported at AIR 1982 All 52, it was held that a fact in order to afford a cause of action for any relief, must precede the initiation of the action. Consequently, any allegation made by the wife in her written statement could afford no cause of action for any relief on the husband's petition for divorce. The said observations in the present case would be open to the same comment as above.

19. For propounding the same proposition Mr. Vakharia also relied upon a case reported at AIR 1978 All 255 and AIR 1981 All 78. As they propound the same proposition meriting the same answer they are not discussed in extenso.

20. Similarly Mr. Vakharia drew my attention to certain observations made in the case reported at (1980) 21 Guj LR 887. However, they are not germane to the issues involved in the present case.

21. The net result of the above discussion is that the appellant wife in the instant case has been able to establish that the respondent husband had subjected her to mental cruelty and torture of such a nature which would entitle her to get the decree of divorce as prayed for by her.

22. The substantial question of law is answered accordingly and the appeal is, therefore, allowed. The judgment and decree passed by the learned Extra Assistant Judge, Bhavnagar in First Appeal No. 37/81 is set aside and that passed by the trial Court is hereby restored. The respondent shall pay the costs of the appellant throughout and bear his own.

23. Appeal allowed.