

Rajee Vs. Baburao

Rajee Vs. Baburao

SooperKanoon Citation : sooperkanoon.com/778075

Court : Chennai

Decided On : Aug-11-1995

Reported in : AIR1996Mad262; 1996(2)CTC22; (1995)IIMLJ492

Judge : S.S. Subramani, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13 and 23; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 35 and 100; [Constitution of India](#) - Article 136

Appeal No. : C.M.S.A. No. 55 of 1991

Appellant : Rajee

Respondent : Baburao

Advocate for Def. : Messers Sarvabhuman Associates, Adv.

Advocate for Pet/Ap. : S. Doraisamy, Adv.

Judgement :

1. This Second appeal is by the wife who was the respondent in H.M.O.P. No. 4 of 1988, on the file-of Sub Court, Nagapattinam.
2. The husband, the respondent herein, filed the above application for divorce on the ground that the appellant is leading an adulterous life.

3. The marriage between the parties took place on 2-9-1960, and out of the wedlock, three children were born, a son and two daughters. Both the daughters are married and the son is also self-employed. It is at that time, the respondent (husband) has filed the petition for divorce, alleging adultery on the part of his wife.

4. The material averments regarding adultery as stated in the application are as follows :

'The petitioner was having acquaintance with one Vairakkannu, a teacher working in a school at Kariakattu Street, Tiruvarur. He used to visit the sweet stall and look after the business of the petitioner as a friend. In course of time, he gained confidence with the petitioner. The petitioner possessed of Nanja lands, in Puhivalam Village, near Tiruvarur, and they were cultivated in Pannai. The said Vairakkannu was some time sent by the petitioner to look after the cultivation. During that time, he used to get to the house of the petitioner and take the materials from the house for cultivation, and return it back in the evening. In such way he got acquaintance also with the respondent. In course of time, the above said Vairakkannu frequently visited the house of the petitioner without the knowledge of the petitioner and had his stay in the house. The petitioner came to know of it through the neighbours. Particularly in the middle of the year 1980 when the petitioner went to the house from the shop, in the evening, he found to his surprise that the above said Vairakkannu was inside the house talking closely with the respondent. When he was questioned, he went out of the house. He was asked by the petitioner not to come to the shop and also not to do anything for the family of the petitioner. The respondent was also warned. Then he stopped coming to the shop, but he was frequently visiting the respondent in the house, during the absence of the petitioner. In spite of warning the respondent and Vairakkannu were having illicit intimacy with each other. The respondent did not prevent the above said Vairakkannu from visiting her.....'

The petition for divorce was filed on 4-1-1988. The acts of adultery are alleged to have taken place during the year 1980, i.e., about a lapse of nearly either years before the filing of the petition for divorce. The reason mentioned is that the two daughters had to be married and the younger daughter got married only by the

end of 1987, and till then, the husband thought that, to maintain the status and prestige of the family, he should not move the petition for divorce.

5. To prove the acts of adultery, the husband examined himself as P.W. 1. His close relations were examined as P.Ws. 2 to 6. The wife examined herself as D. W. 1.

6. The trial Court which had the opportunity of seeing the witnesses and appreciating their demeanour, held that the allegation by the husband is a cock and bull story, and that the witnesses examined on the side of the husband can never be believed. It also found that the explanation for the long delay in filing the petition for divorce is not proper, and accordingly the trial Court dismissed the petition.

7. When the matter was taken in appeal, the lower appellate Court reversed the same. The lower appellate Court presumed that what all the husband has stated must be true, and under that presumption, held that grounds have been made out for granting a divorce. It is against the conflicting findings, the wife has come to this Court to get her grievances redressed.

8. At the time of admitting the Appeal, the following substantial question of law was framed :--

'Whether the judgment of the lower appellate Court is vitiated by its failure to consider the entire evidence on record and apply the correct principles of law?

9. Before considering the evidence in this case, it is better to look into the section of the Hindu Marriage Act which enables one of the parties to the marriage for getting divorce on the ground of adultery. S. 13(1) of Hindu Marriage Act says thus :--

'Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

(1) has, after the solemnization of the marriage, and voluntary sexual intercourse with any person other than his or her spouse :

In this connection, S. 23 of the Hindu Marriage Act also gains importance. It says : 'In any proceeding under this Act, whether defended or not, if the Court is satisfied that there has not been any unnecessary or improper delay in instituting the proceeding, and there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the Court shall decree such relief accordingly'.

9A. This Court has framed Rules to regulate proceedings under Hindu Marriage Act.

10. Rule 4(a)(vi) says thus:--

'4. Contents of petitions,. -- (a) Every petition shall state-

(i) to (v) x x x x x x x x

(vi) if the petition is for divorce, the matrimonial offence alleged or other grounds upon which the relief is sought together with the full particulars thereof so far as such particulars are shown to the petitioner, e.g.,

(1) in the case of adultery, the specific act of adultery and the occasion when and the place where such acts were committed together with the name and address of the person with whom such adultery was committed :.....'

11. I have already extracted the relevant portion in the petition regarding the allegation of adultery.

12. Before going further on the evidence in this case, I have to consider the burden of proof, nature of pleadings and the powers of the first appellate Court while dealing with the judgment of the trial Court.

13. In so far as the burden of proof and nature of pleadings are concerned, the law in India is as follows :

'.....There must be clear proof of adultery. The mere fact that husband considers the conduct of the wife open to suspicion is not sufficient. The mere fact that a panchayat of the community condemned the wife's conduct is not a ground for the Judge to base his finding on the evidence before him, whether the wife was living in adultery. Though direct evidence of adultery may not be possible from the nature of the offence, there must be some evidence showing opportunity and desire to commit the offence or access. Mere hole-and-corner tattle or bazar gossip will not prove adultery. In general, we require corroboration to confirm the testimony of the applicant regarding the material facts in issue and corroboration is, as a rule, demanded in regard to alleged admission and confessions. A decree for dissolution of marriage cannot be granted merely on the ground that the respondent does not oppose the petition.....'...It has been recognised in a catena of decisions that do not require separate analysis here, since the matter is beyond doubt, that adultery can very rarely, if ever, be proved by the direct evidence of witnesses who saw the parties in FLAGRANTE DEUCTO and witnessed the act. In most cases, the evidence must be circumstantial in character and must depend upon the situation spoken to in regard to which the act is alleged, and the probabilities relating to that situation. But they (the circumstances) must satisfy the test that, regarded together, they lead to an irresistible inference that adultery must have been committed.

Another refinement is that noted by Denning, LL.M. in *Miller v. Minister of Pensions*, that proof beyond reasonable doubt does not mean, 'proof beyond shadow of doubt'.

The finding of adultery has necessarily to be based on some sort of positive evidence superior to suspicion.

Paragraph 109 of Raydon on Divorce is as follows :

'The burden of proof is throughout on the person alleging adultery, there being a presumption of innocence. Reference to the statute shows that the standard of proof is that the Court must be satisfied on the evidence. The act makes no distinction between the standards of proof of adultery and that of any other ground of divorce but this has not in the past been reflected in the cases, which have

required the same strict standard of proof in respect of adultery as is required in a criminal case before an accused person is found guilty, that is, that the tribunal must be satisfied beyond all reasonable doubt. But it has been held that a suit for divorce is a civil and not a criminal proceeding and that the analogies and precedents of criminal law have no authority in the Divorce Court which is a civil tribunal. It is wrong, therefore, to apply an analogy of criminal law and to say that adultery must be proved with same strictness as is required in a criminal case. As far as the standard of proof is concerned, adultery like any other ground for divorce, may be proved by a preponderance of probability.....'

Taking into consideration the rule extracted above, it has to be specifically pleaded, since the charge of adultery is of very serious nature.

14. In , Smt. Parvati v. Shiv Ram, it was held thus (at page 32) :

'Quite apart the rule, the judicial opinion in the country also points to the view that the pleadings should be clear and specific. In the case of adultery, which is a charge of a very serious nature, the pleadings should be specific. In Emmanuel Simon Peters v. Mrs. Alice Peters, 1977 HLR 672 it was observed by the Delhi High Court that 'the particulars of the time, the date, the place of commission of acts of adultery must be specific so that the opponent can defend the case..... How can the spouse defend the petition when she does not know the charge which she is to meet.' It has further been observed that 'if no particulars are given in the petition and evidence is brought to establish adultery, a Court of law is entitled to show that it will not place reliance on the words of witnesses.'

The reason is obvious. The charge of adultery is a serious charge and casts aspersion on the character of the spouse which affects the reputation of the spouse in the society. It is to be established beyond doubt though it may be difficult to find direct evidence for establishing it. The spouse against whom the charge is made should be aware of the precise allegation so as to be able to effectively answer the same. In case the charge is vaguely made, without furnishing the particulars, it would not be possible for the spouse to do so.'

15. In : AIR1967 Mad254 (Patlayee Ammal v. Manickam Gounder), this Court had occasion to consider the standard of proof necessary in the case where adultery is pleaded. It was held thus :

'Adultery, from its nature, is a secret act. Direct evidence of an act of adultery is extremely difficult. It is very rarely indeed that the parties are surprised in the direct act of adultery. Direct evidence, even when produced, the Court will tend to look upon it with disfavour, as it is highly improbable that any person can that any person can be a witness to such acts, as such acts are generally performed with utmost secrecy.'

16. In , it was held thus (at page 100) :

'There is a presumption of innocence to a charge of adultery. The burden of dispelling this presumption lies on the party alleging adultery. This burden can be discharged by proof which need not reach certainty but must carry a high degree of probability.'

17. In 1983 (1) MLJ 395 (V. S. Ramanathan v. Subbulakshmi), it was held thus :

'Incest is so abhorrent to mankind that one should expect the strictest proof for concluding that it exists in any given case.....'

18. There is no pleading in this case that the wife had sexual intercourse with a stranger. The allegations in the petition are only that the husband saw his wife talking with his friend named therein.

19. The trial Court, while appreciating the evidence, rightly took note of the pleadings in the case and held that there is no foundation for coming to the conclusion that the wife is having an adulterous life or had any sexual relationship with Vairakkannu. The evidence of the husband was discarded. I will discuss the evidence in the later portion of the judgment. The lower Appellate Court, as stated earlier, assumed that what the husband says must be correct otherwise, a father of three children who is aged more than 48, at time of filing the petition, would not have filed the petition. The lower appellate Court also presumes that the husband is a responsible father, because even after separation between the parties, he

performed the marriage of his two daughters, and he waited till the marriage of the second daughter was conducted, and thereafter filed the petition for divorce. The lower appellate Court took it for granted that the husband's family with a good reputation in the locality, under normal circumstances, would not make a detailed allegation about the character of the wife. I Merely because the family of the husband has reputation, it does not follow that a mere allegation without details is sufficient to prove adultery. It is a serious charge against the wife. Her reputation is affected. She becomes a laughing stock among the members of the public, and she is considered as an outcast in the locality, and under such circumstances, an allegation by a member of a reputable family alone will not raise a presumption as assumed by the lower appellate Court.

20. In this connection, it is also worthwhile to note the powers of the first appellate Court while considering the judgment of the trial Court.

21. In : AIR 1975 SC1670 (The Dollar Company, Madras v. Collector of Madras), their Lordships held thus (at page 1671; of AIR) :

'..... Moreover, there is a prudent condition to which the appellate power, generally speaking, subject. A Court of appeal interferes not when the judgment under attack is not right but only when it is shown to be wrong.'

22. The same was followed in : [1995]3SCR312 (S.V.R. Mudaliar v. Rjabu F. Buhari). The relevant portion in paragraph 14 and paragraph 15 of the said decision read thus (at page 2532; of AIR SCW) :

'Shri Parasaran had submitted that though the appellate Court is within its right to take a different view on a question of fact, that should be done after adverting to the reasons given by the trial Judge in arriving at the finding in question. Indeed, according to Shri Parasaran an Appellate Court should interfere with the judgment under appeal not because it is not right, but when it is shown to be wrong, as observed by a three Judge Bench of this Court in Dollar Co. v. Collector of Madras : AIR 1975 SC1670 . As to this observation, the contention of Shri Vaidyanathan is that what was stated therein was meant to apply when this Court examined a matter under Art. 136. We do not, however, think if this meaning can be ascribed

to what was observed.

There is no need to pursue the Legal Principle, as we have no doubt in our mind that before reversing a finding of fact, the appellate Court has to bear in mind the reasons ascribed by the trial Court. This view of ours finds support from what was stated by the Privy Council in *Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur* wherein, while regarding the appellate judgment of the High Court of judicature of Fort William as 'careful and able', it was stated that it did not 'come to close quarters with the judgment which it reviews, and indeed never discusses or even alludes to the reasoning of the Subordinate Judge.'

23. According to me, the lower Appellate Court has not followed the above principle of law, while setting aside the judgment of the trial Court.

24. Now I give the reasons for setting aside the judgment of the lower appellate Court.

25. I have already said that in the Application, no details are given. On the allegations made in the petition, it cannot be said that any case of adultery has been made out. The only allegation is that he saw his wife talking with Vairakkannu on three occasions. All these are during day-time and at a time when all the three grown-up children were in the house.

26. P.W. 1, while he was examined, said that he saw his wife talking with Vairakkannu in the year 1979 and not in 1980 as alleged in the petition. All the three occasions, according to him, were in 1979. He also says that on the last occasion, his wife was not properly dressed. This allegation is stated only at the time of evidence and not in the petition.

27. Before going further, it is better to consider who this Vairakkannu, is and how is his relationship with the husband. Vairakkannu is not a stranger to the husband. He was a close associate of the petitioner's father, and a dependent even at that time. On the father's death, at the request of the husband himself, he was helping the petitioner (husband) both in his business and also in his agricultural operations. It is not an acquaintance newly started. A reading of the petition will show that this

Vairakkanmu came to the family only during the year 1977 and thereafter he started having acquaintance with the petitioner's wife. The evidence discloses that he was more or less treated as a member of that family. It is with such a person the appellant was talking. Therefore, it is too much to accuse the appellant of leading an adulterous life with him.

28. The husband has also a case that during 1980, there was a panchayat in which this matter was brought to notice, and, on the basis of the decision of the Panchayat, they began to reside separately. No member of the Panchayat has been examined in this case. To a specific question put to him, the husband has accepted that the panchayat was convened on the request of the wife. According to the wife, the husband was behaving improperly after consuming alcoholic drinks and that he was now become more or less a womaniser. According to her, the complaint made by her was taken by the Panchayat, and the Panchayat directed the husband to pay a monthly maintenance of Rs. 600/- to the appellant (wife). In this connection, it is also to be noted that even the two grown-up daughters were allowed to live with the mother, and they continued to live with the mother till they got married. If the character of the appellant was not up to the expectation of her husband, the first thing he should have done is to take into consideration the future of the daughters. The very allegation of adulterous life on the part of the wife becomes unbelievable when we see that the grown-up daughters have been permitted to reside with the mother. In this connection, it must also be noted that the eldest of the three children is the son, and he is also..... not in good terms with the father. Why the mother and all the three children take one side against the father, is a matter to be explained by the husband alone. On that aspect, there is no explanation forthcoming from his side.

29. It is also alleged in the petition that on the third occasion, when the petitioner saw his wife in the company of Vairakkannu, he questioned her and she reiterated that she wanted to live only with Vairakkannu. Immediately the petitioner (husband) brought her parents, and even in their presence, it is alleged that the appellant (wife) said that she will be happy to live with Vairakkannu. It is also stated in the petition that most of the neighbours also know about the adulterous life led by the appellant. But none of them has been examined.

30. In this connection, it is also worthwhile to note that Vairakkannu has his own family, having two or three children. It is also admitted that Vairakkannu is leading a happy marital life. That is also a circumstance which goes against the allegation made by the husband.

31. The other evidence consists of certain depositions by person who are closely related to the petitioner. They speak according to their own convenience, and a reading of their evidence shows that they are more loyal than the king. P.W. 2 says that on a day when he went to the petitioner's house, in 1978, he saw the appellant taking hot water for the use of Vairakkannu, It was admitted by him in the later portion of his deposition that till the end of 1980, the petitioner and himself were at loggerheads and he never used to visit their house till then. He also says that during 1980, he saw some talk going on between Vairakkannu and the appellant. But he never cared to interfere with the same. The trial Court disbelieved the evidence of P.W. 2 on the ground that he himself had admitted that till 1980, he was never in the habit of visiting the petitioner's house in view of a misunderstanding between them. Such a finding rendered by the trial Court cannot be said to be incorrect. The witness (P.W. 2) also does not give any other details about the relationship of the appellant and Virakkannu.

32. P.W. 3 is a sister of the petitioner. She says that on one occasion, when she went to the petitioner's house, in the bedroom she saw some stranger, and on making enquiry with the appellant, she came to know that it was Vairakkanu who was lying in the bed, because he was ill. She also said that in the morning when she woke up, she could not see Vairakkannu in the bed. She admits that she did not say anything about this incident to any one and for the first time only before the Court she was deposing about the incident. In the later portion of her deposition, she ways that two or three years after the incident, she spoke about the same to the petitioner and that even thereafter, the petitioner was maintaining his wife and children as before, and they were leading a happy marital life. She also says that at that time, herself the appellant and their grown-up, daughters were laying in the same room, and Vairakkannu was sleeping in a separate room. From this, it is clear that her evidence also will not disclose any adulterous life as alleged by the husband.

33. P.W. 4 Mangala Bai is another sister of the petitioner. She says that when she went to see the petitioner on one day, he was not there in the house. But Vairakkannu had come to the house of the petitioner, and the appellant (wife) was preparing some food for Vairakkannu, and she (P.W. 4) did not like the same. At that time, when she questioned, the appellant is alleged to have admitted before her that she had Vairakkannu are in good terms. She also says that during her stay in that house, when she looked in the bedroom, she saw Vairakkannu and the appellant talking together. She also says that she did not say anything about this to the petitioner. Her evidence is also of no use. She also admits that whenever she went to the petitioner's house, the grown-up daughters were also there, and when Vairakkannu is alleged to have talked to the appellant, the daughters were also in the same house. She also is not in a position to speak anything about the details of the talk or nature of the talk, the date, month or year when this happened. The trial Court rightly discarded her evidence.

34. P.W. 5 is one Natarajan. He says that some time in 1980 Vairakkannu came to his shop and he also took P.W. 5 in his motorcycle and he got down before the petitioner's house. He also says that he knows Vairakkannu, his wife and his brother-in-law. He further says that the wife of Vairakkannu and her brother reported to them about the illicit connection that Vairakkannu had with the petitioner's wife (appellant herein), but he did not do anything in the matter. He also does not give any details about any sexual relationship between Vairakkannu and the appellant herein. His evidence only shows that Vairakkannu gave him a lift in his motorcycle and that the witness got down from the motorcycle near the appellant's house.

35. P.W. 6 is one Jayakkumar. According to him, on a day when he went to Thanjavur, he could not see the petitioner, but he met the respondent, and, at that time, the respondent told him that she and Vairakkannu are in good terms and that she would like to live with him. The witness also alleges that the respondent (wife) admitted before him that because of her relationship with Vairakkannu, the petitioner (husband) did not want her to reside with him, and therefore, she is residing separately. At the time when he went to the respondent's house, he did not see Vairakkannu, or he knew about the close relationship between the

appellant and Vairakkannu. He also says that even thereafter he has seen the appellant on many occasions. But he is not aware of the details of the same. He is also not in a position to give the year, date or month when the appellant made such an admission about her relationship with Vairakkannu. Under normal circumstances, a lady, even if she has any illicit relationship with others, will not make an admission about the same to a relative of her husband. Even if the separation was on the basis of a decision of panchayat, the alleged disclosure by the wife was unnecessary, for, that will become a talk in the locality. Even without her admission, the witnesses would have known about it. This is the type of evidence that was let in by the petitioner to prove adultery. No one speaks about the physical contact or the circumstances under which the Court can infer that the appellant and Vairakkannu would have had physical contact. We have got only the evidence of witnesses who say that either Vairakkannu was in the house, or that the appellant and Vairakkannu were talking with each other. Even suspicious circumstances have not been spoken to by any one of them. It is on the above evidence, the lower appellate Court has held that the charge of adultery is proved and granted a decree for divorce, for the reasons stated earlier.

36. When this is brought to the notice of the learned counsel for the respondent, he only said that the lower appellate Court is a final Court of fact, and this Court, under S. 100 of the Code of Civil Procedure, shall not interfere with the same.

37. It is true that the lower appellate Court is final Court of fact. If that Court has patently gone wrong in casting the burden of proof and has misread the evidence and has also not considered the basic requirements to substantiate the case of adultery, it cannot be said that this Court is not competent to re-appreciate the same, to correct the mistake committed by the lower appellate Court.

38. The decision of the lower appellate Court is vitiated by its failure to consider the evidence in this case and it has also not applied the correct principles of law. If only it had understood the pleadings correctly and appreciated the evidence in its proper perspective, this would not have happened.

39. The lower appellate Court has considered the long delay in filing the petition as a word of appreciation on the part of the petitioner. According to the lower

appellate Court, as a responsible husband, he has moved the petition only after discharging his responsibility towards his family, and it justified the eight years delay in filing the petition as proper. According to it, there is no delay at all in filing the petition.

40. This Court would have appreciated such a stand if only the charge of adultery was kept as a secret and the same came to be known to the public only at the time of filing the petition. It is admitted even in the petition that in 1980 itself, a panchayat was convened, and the charge of adultery against the wife was brought to the notice of the entire locality. When it is admitted that the entire public know about it, what prevented him from filing a petition immediately thereafter. The petitioner has stated that ever since 1980 he is living separately only because the panchayat had decided so. If that be so, the proper course would have been to file a petition for divorce immediately thereafter and put an end to the entire matter in the year 1980 itself. The explanation offered by the husband that he wanted to perform the marriage of his two daughters and hence he delayed the filing of the petition, cannot be accepted. We must understand that both the daughters were brought up only by the mother, and he never took up the responsibility of maintaining them. He only obeyed the orders of the Court and paid monthly maintenance of Rs. 100/-. According to the appellant, even that was not paid, and after the filing of the petition the entire amount has been defaulted. As per S. 23 of the Hindu Marriage Act, this Court has to be satisfied that there is no improper delay in filing the petition.

41. On the basis of the available evidence, the finding of the lower appellate Court cannot be supported. It is based on evidence, and the entire decision is based on surmises, and on the assumption that the petitioner's husband has proved the same. When there is no foundation for entering such a finding, it is patently illegal, and this Court has to set right the same. I do so accordingly.

42. In this case, the appellant has been insulted. Her character has been assassinated without any reason. The appellant had to stay away while her husband behaved in the way spoken to by her. On going through the evidence in this case, this Court feels that the doubt expressed by the appellant is genuine.

When a dependant and obedient servant has been falsely implicated and witnesses have been brought to Court to ruin the entire family, the conduct of the respondent can never be justified to vindicate her conduct, I award the appellant exemplary costs, and I allow her to recover the same from her husband or from his assets. I quantify the same at Rs.10,000/-.

43. This Court wanted even the witnesses also to be proceeded against for giving false evidence. From a reading of their evidence, this Court feels that by ousting all the members of the family, they wanted to gain control over the husband. But since the petition was filed only in 1988, I do not want to proceed against them for the present.

44. In the result, the appeal is allowed with costs throughout. I also award an exemplary costs of Rs. 10,000/- to the appellant (wife), as stated above.

45. Appeal allowed.

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