

IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH

THE HON'BLE MR.JUSTICE ALOK ARADHE AND

THE HON'BLE MR.JUSTICE P.G.M. PATIL

M.F.A. NO. 23601 OF 2013 (FC) DATED 25-10-2019

SMT. K. C. SARITHA, W/ O. A.N.VIJAYAKUMAR VS. A. N. VIJAYAKUMAR, S/ O. LATE
NAGABHUSHANAM,

JUDGMENT

ALOK ARADHE, J.,

In this appeal under Section 19 (4) (1) of the Family Courts Act, 1984 (hereinafter referred to as ' Act ' for short), the appellant challenged the validity of the judgment dated 30th July 2013 passed by the Family Court, by which, decree of dissolution of marriage has been granted on the ground enumerated under Section 13 (1) (i) of the Hindu Marriage Act, 1955.

2. Facts giving rise to filing of this appeal briefly stated are that, the marriage between the parties was performed on 07.07.1991.The parties thereafter lived together and out of wedlock, two daughters namely Nagashree and Greeshma were born.The respondent filed a petition on 24.06.2008 seeking dissolution of marriage on the ground of cruelty and adultery.

It was averred in the petition that the appellant is an uncultured and ill-tempered woman and within six months of marriage, she started quarreling with the respondent and created ugly scenes within the locality.It was further alleged that the appellant created circumstances wherein the appellant had to separate from his mother and had to shift to another house.It was also pleaded that the appellant was rude to the respondent even in presence of the children and in the year 1997-98 against the wishes of the respondent, she joined college, when children of the parties parties were aged about 3 and 1 year respectively against the consent of the respondent.

3. It is also stated when the respondent questioned the appellant about her joining the college, she filed a complaint with regard to demand of dowry against the respondent and his family members. However, the aforesaid case was compromised on account of intervention by the elder members of the family and the police authorities.The respondent, thereafter, filed petition for judicial separation, whereas the appellant filed one petition namely M.C.No.3/2019 for restitution of conjugal rights.Again, aforesaid aforesaid cases were compromised and were settled amicably.

4. It was averred in the petition that, about two years prior to filing of the petition under Section 13 of the Hindu Act, the respondent heard rumors that some unknown male persons were visiting

respondent's house in his absence. It was further pleaded that once the respondent came to the house during banking hours and he found one male person in the house and on enquiry, he was apprised by the appellant that the aforesaid person had come in search of a pup.

Thereafter, the appellant joined pupil tree academy school as a teacher. It was also averred that the respondent saw the appellant on a motorbike of third person on several occasions and in particular near Kowl Bazar, Bellary. On enquiry, he learnt that the name of the aforesaid person is Janardhan. The respondent went to Bangalore and returned to Bellary on 09.06.2008. It is averred that in the absence of the respondent, the appellant indulged in sexual activities with aforesaid Janardhan in their house itself. The respondent, on 09.06.2008, found the appellant in the company of the aforesaid Janardhan. In the evening hours of the day. Thereafter, petition was filed seeking dissolution of the marriage on the ground of cruelty and adultery.

5. The appellant filed objections in which the averments made in the petition were denied, except the factum of marriage between the parties and the birth of the daughters from the wedlock. It was pleaded in the objections that the respondent is physically handicapped person and has only one eye and he trapped the appellant by showing love and affection without disclosing said disability. It was further averred that after six months of marriage, the respondent started ill-treating her and developed a hostile attitude and the appellant was beaten up and abused by the respondent. It was also pleaded that many Panchayaths were conducted and in view of the decision taken in panchayath, the respondent agreed to shift to another residence. However, on 26.06.2008, respondent gave some " Prasadam " to the appellant and after consuming the same, she started vomiting as he tried to administer poison to her, which which was contained in the " Prasadam ".

6. It was further pleaded that on 13.09.1998, the respondent picked up a quarrel with father of the appellant and took away the children and deserted the appellant. Thereafter on 13.10.1998 at about 11 a.m. the respondent came with a vehicle and took away all the household articles from the house and stated that he was shifting the house to Tilak Nagar, Bellary. It was also pleaded that the respondent used to watch pornographic material and insisted the appellant to see the aforesaid pornographic material. It was also pleaded that the respondent indulged in the business of pornographic materials and forced the appellant to see the same and to act in the films. It was also averred that the respondent used to bring unknown persons to the house and forced the appellant to have sex with them.

7. It is also pleaded that the respondent with the help of his henchmen created a film by morphing the DVD, which shows that the appellant indulged in sexual activities with unknown persons. It was

also denied that she knew any person by name Janardhan. On the other hand, it was pleaded that the aforesaid Janardhan was a friend of the respondent. It was also pointed out that the respondent abruptly left the company of the appellant and her children on 04.7.2008 and did not provide any maintenance to them.

8. The Family Court on the basis of the pleadings of the parties framed and issued and recorded the evidence of the parties. The appellant, in order to prove his case, examined as P.W.1 and examined one witness namely Umesh as P.W.2 and exhibited documents namely Ex.P. 1 to P. 17. The respondent, examined herself as R. W.1 and two witnesses namely K. Chalapathi and A. Nagashree as R.W.2 and R.W.3 and exhibited documents namely Ex.R.1 to R.22. The Family Court, thereafter, vide impugned judgment held that the respondent was unable to make out ground of cruelty. However, it was held that the ground of adultery was made out. In the aforesaid factual background, this appeal has been filed.

9. Learned counsel for the appellant herein while inviting the attention of this Court to the submission of R.W.3 namely A. Nagashree, the daughter of the parties to the proceeding, submitted that from her evidence, it is clear that she and her sister were with their mother between the period from 04.06.2008 to 09.06.2008 and therefore, the case set up by the respondent does not deserve acceptance. It is also submitted that the DVD which was produced by the respondent have been morphed and have only been obtained to secure a decree for divorce against the appellant.

10. It is further submitted that P.W.2 namely Umesh has entered the witness box only to support the respondent and he has not produced any invoice with regard to purchase of Digital Video Recorder by the respondent. On the other hand, the learned counsel for the respondent submitted that the stand of the respondent is duly proved by Ex.P1 to P.3 and Ex. P15, which are DVDs and the Trial Court has satisfied itself with the requirements contained in Section 65- B of the Evidence Act are fulfilled.

It is further submitted that in the state of evidence on record, findings recorded by the Family Court are just and proper and as same are based on meticulous appreciation of evidence on record. In support of his submission, the learned counsel for the respondent has referred to decision of the Hon'ble Supreme Court in Shafi Mohammad Vs. State of Himachal Pradesh, (2018) 2 Supreme Court 801.

11. We have considered the submissions made on both sides and have perused the records. It is well settled proposition of law that onus lies on the person who alleges the adultery and the

standard of proof is the same as in a civil case i.e. preponderance of probability and not beyond reasonable doubt.

It is equally well settled in law that adultery cannot be proved by way of direct evidence and an inference with regard to the same can even be drawn by circumstantial evidence. It is well settled in law that section 65- A and 65- B of the Evidence Act cannot be held to be a complete code on the subject and its authenticity and proceed for its admissibility depends on the fact situation, such as whether person producing the aforesaid evidence is in a position to furnish the certificate under Section 65- B (4) of the Evidence Act. It is equally well settled legal proposition that requirement of production of certificate under Section 65- B (4) of the Evidence Act is procedural in nature and can be relaxed by the Court wherever interest of justice so requires.

In this connection, reference may be made to the decision of the Hon'ble Supreme Court in *Mohemmad Ajmal Amir Kasab V. State of Maharashtra*, 2012 (9) SCC 1. It is equally well settled proposition of law that electronic evidence by way of primary evidence is covered under Section 62 of the Evidence Act to which procedure prescribed under Section 65 B of the Evidence Act is not applicable. However, in case case,, secondary evidence is adduced with regard to the electronic evidence, the requirement contained in Section 65- B of the Evidence Act is required to be complied with (see *Anvar P.V. v.P. K. Basheer and others* (2014) 10 SCC473).

12. The aforesaid decisions were referred to with approval in the case of *Shafi Mohammad* (supra) and it was held that if electronic evidence is authentic and relevant, the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depends on the fact situation as to whether the person producing such evidence is in a position to furnish certificate under Section 65- B (4) of the Evidence Act. However it has been held that the applicability of requirement of furnishing certificate being procedural in nature be relaxed by the Court wherever interest of justice so justifies.

13. In *R. vs. Maqsd Ali*, (1965) 2 All ER 464 and *R Vs. Robson* (1972) 2 ALL ER 699 and extracts from *American Law*, (*American Jurisprudence 2d* (Vol 29) Page 494), which was quoted with approval in *Ram Singh and others Vs. Col. Ram Singh*, 1985 (Supp) SCC 611 it was observed that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved.

It was further observed that such evidence should always be be regarded with some caution and assessed in the light of all the circumstances of each case. Similar view has been taken in *Tukaram S Dighole Vs. Manikrao Shivaji Kokate*, (2010) 4 SCC 329, wherein it has been held that new techniques

and devices are order of the day and though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged.

14. In the backdrop of aforesaid well settled legal proposition of law, we may advert to the evidence of respondent, who is examined himself as P.W. 1. The respondent in his evidence has stated that the appellant is his wife and their marriage was performed on 07.07.1991.

It is further been stated that appellant created such circumstances under which the respondent was required to separate from his mother and to shift to another residence. It is further been stated by him that respondent had had filed a proceeding seeking judicial separation, whereas the appellant had filed a petition seeking restitution of conjugal rights. However, both the aforesaid cases were settled. It has further been stated by him in paragraph 6 of his evidence that once he came to his house during banking hours and found that one male person was in the house along with the appellant and when he questioned the appellant, she stated that the aforesaid person had come up in search of pup. Thereafter, in paragraph 8 of his evidence he has stated that on 04.06.2008 in the night when he went to Bangalore and returned to Bellary in the morning on 09.06.2008 and while leaving the house on 04.06.2008 on account of suspicion, he had fixed moving camera in the bedroom and the aforesaid camera recorded sexual activities of the appellant and one Janardhan.

15. It was further stated by him that since he was unable to tolerate adulterous behavior of the appellant, he left the house on 10.06.2008. The P.W.1 has produced Ex.P1 to P.3 as well as Ex. P. 15 which are the DVDs. He has been subjected to extensive cross-examination by the appellant. In the cross-examination, P.W.1 has further admitted that he himself had fixed Digital Video Recorder between the period from 04.06.2008 till 09.06.2008. He has denied the suggestion that Ex.P. 15 is not a Digital Video Recorder and the contents of the DVR were not converted into DVD, which has been produced by him before the Family Court.

Further he has admitted that whenever such digital video recorder is issued, a voucher including the manual used to be issued by a dealer. It is further been stated that he has not obtained the voucher and the manual from the dealer.

16. He has specifically denied the suggestion that in the DVD morphing has been done. It is pertinent to mention here that the respondent in the instant case is the person who has fitted the Digital Video Recorder, which has recorded the proceeding which took place in his house in his absence between 04.06.2008 to 09.06.2008. The aforesaid digital Video Recorder is marked as Ex.P15 and has been produced. The respondent himself has transferred the contents of the recordings of said DVD

to the computer with the help of P.W.2 namely Umesh and the respondent has transferred the contents of the DVR to DVD through computer.

The respondent has stated SO in his affidavit. Therefore, in the fact situation of the case and taking into account the evidence of P.W.1, the requirement of certificate being procedural in nature is dispensed with in the interest of justice, specially taking into account the fact that no challenge to the testimony of P.W.1 with regard to aforesaid averments has been made in the cross-examination. At this stage, we may state that it is trite law that if a testimony of witness is challenged on particular point, the same is taken to be accepted. (see Muddasani Venkata Narsaiah Vs. Muddasani Sarojana, (2016) 12 SCC 288). In any case it is a fit case for relaxing the procedural requirements contained in Section 65- B (4) of the Evidence Act.

17. At this stage, it is pertinent to note here that the contents of Ex.P15 were exhibited in the presence of both counsels for the parties before the Family Family Court and in in-camera proceeding. The Family Court saw the contents of DVDs in the presence of the counsels of the parties recorded from a period from 04.06.2008 till 09.06.2008. The contents of DVDs have not been disputed before us by learned counsel for parties. The Family Court in paragraph 17 of the judgment has recorded a finding that the aforesaid recordings have been done without any interruption and events have happened naturally within the vicinity of the camera. It is further been held that Ex.P.15 is the original device through which contents of Ex.P.1 to P.3 namely DVDs were recorded. Therefore, Ex.P15 is primary evidence produced before the Court to prove the contents of Ex.P.1 to P.3.

The Family Court therefore, has held that the aforesaid recording shows that the appellant had sex with Janardhan not only on one occasion and she was in company of aforesaid Janardhan even on the day after the respondent returned to his house on 09.06.2008. The DVD also shows the pictures of the respondent in the morning hours on 09.06.2008 and again on the same day, the appellant was found in the company of the aforesaid Janardhan during the evening hours.

18. It is trite law that a burden to prove a fact lies on a party who asserts the same. In the instant case, the appellant has asserted that the DVDs are morphed. However, it is pertinent to mention here that the appellant herein has not led any evidence in rebuttal to show that the contents of the DVDs are morphed.

The appellant could have filed an application for referring the DVDs to any forensic laboratory to ascertain whether the images shown therein have been morphed or not. However, no such attempt has been made by the appellant. In other words, no rebuttal has been made by the appellant. So far as evidence of R.W.3 namely Nagashree, the daughter of the parties is concerned, she has only

stated in her evidence that she and her sister were stayed at Bellary along with their mother from 04.06.2008 to 09.06.2008. However, she has not stated that the respondent was also present in the house at Bellary during the aforesaid days. Therefore, the fact that the respondent, between 04.06.2008 to 09.06.2008 was away at Bangalore is established even from her evidence.

19. It is also pertinent to mention here that so far as the case of the appellant, that the respondent used to deal with pornographic material and had forced her to have sex with his friends or to act in pornographic films is concerned, suffice it to say that no such complaint was made by the appellant at any point of time to anyone. Therefore, the aforesaid version of the appellant cannot be believed.

20. At this stage, we deem it appropriate to mention that admittedly Hindu Marriage (Karnataka) Rules, 1956 have not been amended, which require an adulterer to be necessarily implead as co-respondent. Therefore, the non-impleadment of the alleged adulterer shall have no impact on the proceeding. The Division Bench of this Court in the case of Arun Kumar Agarwal v. Radha Arun and another, 2004 (1) KCCR 171 has held that alleged adulterer is an appropriate party.

However, as stated supra, the absence of the alleged adulterer would not have fatal impact on the proceeding. The Family Court, on the basis of meticulous appreciation of evidence on record has granted the decree for divorce.

21. In view of the preceding analysis, we agree with the view taken by the Family Court. In the result, the appeal fails and is hereby dismissed.