

Adhyaatmam Bhaamini

Vs

Jagdish Ambalal Shah

Civil Appeal No. 13141 of 1996

(G. B. Pattanaik, S. C. Agarwal JJ)

05.02.1997

JUDGMENT

AGRAWAL, J.

1. This appeal by the wife arises out of a petition filed by the respondent in the Family Court at Bandra in Bombay seeking divorce on the ground of cruelty and desertion under Sections 13(1)(ia) and 13(1)(ib) of the Hindu Marriage Act, 1955. The parties were married on 15-11-1959. They have two children. The divorce petition was filed on 26-2-1990. It appears that during the period from 1990 to 1993 there was not much progress in the said petition. The Bombay High Court, while disposing of the Writ Petition No. 37 of 1993 filed by the appellant, gave the following direction in its order dated 5-2-1993 :

"The Family Court, Bandra, is however directed to hear and dispose of MO Petition No. A-272 of 1990 as expeditiously as possible and preferably, by the end of June 1993."

2. The appellant was not being represented by any advocate before the Family Court at that time. The date fixed before the Family Court in the divorce petition was 9-3-1993 but since the Presiding Officer was on leave on that date, the matter was adjourned to 28-4-1993 on which date the case was adjourned to 5-5-1993 as the appellant was absent. On 5-5-1993 the appellant appeared before the Family Court and prayed for time and the matter was adjourned to 21-5-1993. On 21-5-1993 when the case was taken up the appellant was absent and in her absence the statement (examination-in-chief of the respondent, who was the petitioner in the divorce petition, was recorded. It appears that the appellant reached the Court while the statement of the respondent was being recorded. The matter was adjourned to 27-5-1993 for further examination of the respondent. On 27-5-1993 the respondent was cross-examined by the appellant and the matter was adjourned for further cross-examination to 31-5-1993 on which date it was adjourned on the request of the appellant to 2-6-1993. On 2-6-1993 the appellant cross-examined the respondent but the cross-examination was not complete and the matter was adjourned to 4-6-1993. On 4-6-1993 an application for adjournment signed by the appellant was submitted in the Family Court by Ms Madhu Shetty, an advocate, who was not representing the appellant in the case. On the said application the Court, on 4-6-1993, passed an order taking note of the fact that the appellant had personally come to the Court and she got the application typed by the typist on the first floor of the Court building and that the application had been presented by one advocate, Ms Madhu Shetty, who was not an advocate-on-record and was not representing the appellant in the case. In the said order it is recorded that since the said advocate had stated that she did not personally know the appellant, the typist was called and he gave a copy of the application to the counsel for the respondent. In the said application for adjournment the

appellant had sought adjournment on the ground that a friend of hers had died. Though the Family Court felt that there was an attempt of the appellant to prolong the matter and to protract the trial, the Court adjourned the matter for further cross-examination of the respondent to 5-6-1993. But in the order it was made clear that if the appellant fails to appear, necessary orders would be passed and further evidence would be recorded. On 5-6-1993 the appellant did not appear in the Court and the Family Court passed an order closing the cross-examination of the respondent. Thereafter, he recorded the statement of Nirvan Shah, the younger son of both the parties, and also passed orders on the application submitted by the respondent for summoning a witness from the Income Tax Office along with the records. The matter was adjourned to 9-6-1993 on which date it was adjourned to 14-6-1993 in view of the letter that was received from the Income Tax Office. On 14-6-1993, the necessary records produced from the Income Tax Office were taken on record and the matter was adjourned to 18-6-1993 on which date the Family Court delivered the judgment allowing the divorce petition filed by the respondent and passed the decree for dissolution of marriage on both the grounds, viz., cruelty and desertion. The appellant did not appear on any of the dates on which the case was taken up by the Family Court from 5-6-1993 to 18-6-1993.

3. The appellant filed an appeal against the said decree of the Family Court before the Bombay High Court which has been dismissed by the High Court by the impugned judgment dated 17-8-1995. The High Court has taken note of the absence of the appellant before the Family Court on 4-6-1993 and 5-6-1993 and the subsequent dates on which the case was taken up by the Family Court till its judgment on 18-6-1993 and found merit in the submission urged on behalf of the respondent that the appellant allowed the proceedings to go ex parte against her by deliberately remaining absent and also with a view to protracting the same. The High Court, taking note of the stand of the appellant in the pleadings and her conduct in the proceedings, has expressed the view that no useful purpose would be served in remanding the proceedings to the Family Court and that way prolong the agonies of the parties. Having regard to the stands adopted by both the parties, the High Court felt convinced that the position reached is of no return. The High Court has, therefore, upheld the decree for divorce passed by the Family Court. Hence this appeal.

4. The appellant has argued the matter in person. She has submitted that on 4-6-1993 she suddenly fell ill she was not in a position to attend the court and that she left the court after requesting one advocate, Ms Madhu Shetty, to submit the application for adjournment on her behalf. The appellant has submitted that on 4-6-1993 she got herself medically examined by Dr. (Mrs.) Premila A. Gandhi who advised her to take complete rest for two weeks and that on 5-6-1993 she was absent as she was not in a position to attend the Court and that on 6-6-1993 she went to Goa from where she sent an application for adjournment to the Family Court by speed post on 8-6-1993. The appellant has further submitted that along with the said application she had enclosed a copy of the certificate issued by Dr. (Mrs.) Premila A. Gandhi dated 4-6-1993 regarding her illness as well as the prescription of Dr. (Mrs.) Premila A. Gandhi for her treatment. The case of the appellant is that the envelope containing the application for adjournment that was sent by the appellant to the Judge, Family Court, was received at Santa Cruz (East) Post Office and it was sent to the Bandra (East) Post Office on 10-6-1993 and that the same was delivered at the Family Court much prior to 18-6-1993 and that in spite of submission of the said application the Family Court, without considering the said application, proceeded with the case and decided the divorce petition filed by the respondent against the appellant ex parte without affording an opportunity to the appellant to contest the said proceedings.

5. We have perused the original record in connection with the application for adjournment that is said to have been sent by the appellant from Goa on 8-6-1993. The record does contain the

application for adjournment but it does not indicate the date on which it was received and the date when it was placed before the Judge, Family Court for order. Even if we proceed on the basis that the said application had been sent by post by the appellant from Goa on 8-6-1993, the question still remains whether there was sufficient justification for the failure on the part of the appellant not to appear before the Family Court on 4-6-1993 and 5-6-1993. The order dated 4-6-1993 passed by the Family Court on the application that was submitted by the appellant for the adjournment on 4-6-1993 records that the appellant had come to the Court on 4-6-1993. This shows that on 4-6-1993 her condition was not such that she was not in a position to move on that date. The application for adjournment which was moved by the appellant on 4-6-1993 also does not seek adjournment on the ground of illness. In the said application adjournment was sought on the ground of the death of a friend. Her suddenly falling ill subsequent to the submission of the application for adjournment on 4-6-1993 is not borne out by the certificate issued by Dr. (Mrs.) Premila A. Gandhi after examining the appellant on 4-6-1993. Moreover, the fact that the appellant proceeded to Goa on 6-6-1993 also shows that she was in Bombay on 5-6-1993. There was, therefore, no reason why the said certificate along with an application could not be submitted before the Family Court on 5-6-1993. In the application for adjournment that was sent by the appellant from Goa, it is stated that "she has been suffering from various ailments for the last one year", and due to financial difficulty it has been impossible for her to investigate the same. Moreover, the list of dates appended to the special leave petition filed in this Court shows that the appellant was in Bombay on 17-6-1993, i.e., before the passing of the order dated 18-6-1993 by the Family Court. In her written statement the appellant has stated that she had been doing honorary counselling at the Legal Aid and Conciliation Cell at the Old Administrative Building, Bandra, Talav which would indicate that the appellant is familiar with the functioning of the legal proceedings in the Family Court. It was, therefore, expected that the appellant should have ascertained about further proceedings in the case when she was absent. If she had made such an effort she would have found out the orders that were passed during this period and she could have moved the Family Court for appropriate orders by explaining the circumstances in which she could not be present in the Court on the various dates and, if she had so moved, the Family Court, after considering the same, could have passed appropriate orders. She did not choose to do so.

6. In the circumstances, we are unable to uphold the contention of the appellant that the Family Court was in error in proceeding with the case in the absence of the appellant and in passing the order dated 18-6-1993 allowing the divorce petition filed by the respondent. We do not find any reason to disagree with the view of the High Court that the appellant allowed the proceedings to go ex parte against her before the Family Court by deliberately remaining absent with a view to protract the said proceedings.

7. The Family Court has awarded alimony at the rate of Rs. 1000 per month to the appellant. While the matter was pending before the High Court, the appellant had approached this Court by filing Special Leave Petition No. 25859 of 1995 against the interim order passed by the High Court in the appeal. The said special leave petition was disposed of by this Court by order dated 15-1-1996 whereby it was directed that the appellant should be paid a sum of Rs. 4000 per month in addition to the alimony of Rs. 1000 per month. The appellant was being paid the said amount during the pendency of the appeal in the High Court. As a result of the impugned judgment of the High Court, the appellant will be entitled to alimony at the rate of Rs. 1000 per month in future. Having regard to the facts and circumstances of the case, we are of the view that the alimony payable to the appellant by the respondent should be fixed at Rs. 5000 per month. As regards the claim of the appellant in the joint properties, we have been informed that the same is under consideration in matters pending before the Family Court. The said Court will deal with the same in accordance with

law.

8. The impugned judgment of the High Court is upheld with the modification that the appellant will be entitled to payment of alimony at the rate of Rs. 5000 per month. The appeal is disposed of accordingly. No costs.