

CASE NO.:
Appeal (civil) 4969 of 1998

PETITIONER:
YAMANAJI H. JADHAV

Vs.

RESPONDENT:
NIRMALA

DATE OF JUDGMENT: 01/02/2002

BENCH:
N. Santosh Hegde & Doraiswamy Raju

JUDGMENT:

SANTOSH HEGDE, J.

The appellant in this appeal was the defendant in O.S.No.156 of 1982 before the Principle Munsif Bijapur, which suit was filed by the respondent plaintiff praying for a declaration that a divorce deed dated 26th of June, 1982 executed by her was obtained by coercion and threat and for cancellation of the same. The said suit came to be dismissed by the trial court and an appeal against the said judgment being dismissed, the respondent plaintiff appealed to the High Court. The High Court in a second appeal has reversed the finding of the courts below and has decreed the suit with a further direction that the concerned District Judge should file a complaint against the plaintiff for an offence committed by him against his wife within three months from the date of the receipt of the said judgment. As noted above, the appellant plaintiff is before us in this appeal.

We will refer to the parties in their status in which they were arrayed in the trial court.

The case of the plaintiff in the trial court was that her marriage with the defendant was solemnized on 26th of May, 1978 and though they lived as husband and wife for some time, she was constantly ill-treated by her husband consequent to which she was hospitalized. Subsequently the defendant had filed a matrimonial suit for divorce in the year 1979 and the said suit came to be compromised. However, the relationship between the two did not improve and husband was continuing to demand a divorce from her. Ultimately, she was sent back to her parental home because of which she was constrained to file a petition for maintenance. It is further claimed that the defendant forcibly took her and wrongly confined her which led her father to make an application under Section 97 of Cr.P.C. It is also stated that subsequently under threat and coercion she was taken to the office of the Sub-Registrar on the 26th of June, 1982 and signed a document which has turned out to be a deed of divorce. It is also stated that unable to bear the suffering, she even tried to commit the suicide, but, however, she was saved by the neighbours. Subsequently when she realised that the document executed by her was a divorce deed she filed a suit

for a declaration that the said deed was obtained by fraud and coercion as also for the cancellation of the deed.

The defendant in his written statement contended that the allegations of the plaintiff was false and mischievous but admitted that he was married to the plaintiff on the 26th of May, 1978. He denied that he ever ill-treated and forced the plaintiff to grant him a divorce but she, as a matter of fact, deserted him and ultimately she decided to grant him a divorce and the divorce deed in question was executed by her in the office of the Sub-Registrar of her own free will.

On the basis of the averments in the plaint, the trial court framed the following issues:

1. Whether the suit divorce deed dated 26.6.1982 is the outcome of undue influence and coercion by the defendant ?
2. If so, is it void and deserves for cancellation ?
3. Whether Court fee paid is proper ?
4. Whether this Court has jurisdiction to try and to entertain the suit ?

On consideration of the evidence on record, the trial court came to the conclusion the allegations that the divorce deed of 26th June, 1982 was obtained by undue influence was not established by the plaintiff. As stated above, this finding of the trial court was affirmed by the First Appellate Court which, however, came to be reversed by the High Court. Shri P.R.Ramasesh, learned counsel appearing for the defendant strenuously contended that the High Court erred in interfering with the concurrent finding of the facts arrived at by the two courts without framing a question of law in this regard, hence, on this ground alone, the judgment of the High Court was liable to be dismissed. He also contended that the approach of the High Court in regard to appreciation of facts involved in the case was rather one sided and for reasons wholly outside the judicial scrutiny. While Ms.Sarda Devi learned counsel for the plaintiff supported the judgment of the High Court.

In the view that we are inclined to take in this appeal, we do not think it is necessary for us to go into the contentions advanced by the learned counsel for the parties in this case, because we find that the courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable for divorce in the community to which the parties to this litigation belong to. As per the Hindu Law administered by courts in India divorce was not recognised as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such

customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court. In the instant case, we have perused the pleadings of the parties before the trial court and we do not find any material to show that prevalence of any such customary divorce in the community, based on which the document of divorce was brought into existence was ever pleaded by the defendant as required by law or any evidence was led in this case to substantiate the same. It is true in the courts below that the parties did not specifically join issue in regard to this question and the lawyers appearing for the parties did orally agree that the document in question was in fact in accordance with the customary divorce prevailing in the community to which the parties belonged but this consensus on the part of the counsel or lack of sufficient pleading in the plaint or in the written statement would not, in our opinion, permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of law. In our opinion, even though the plaintiff might not have questioned the validity of the customary divorce, the court ought to have appreciated the consequences of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognisable by a court unless specifically permitted by law. Therefore, we are of the opinion to do complete justice in this case. It is necessary that the trial court be directed to frame a specific issue in regard to customary divorce based on which the divorce deed dated 26th of June, 1982 has come into existence and which is the subject matter of the suit in question. In this regard, we permit the parties to amend the pleadings, if they so desire and also to lead evidence to the limited extent of proving the existence of a provision for customary divorce (otherwise through the process of or outside court) in their community and then test the validity of the divorce deed dated 26.6.1982 based on the finding arrived at in deciding the new issue.

With the above directions, we set aside the judgment and decree of the courts below and remand the matter back to the trial court to frame an appropriate issue in regard to the existence of a provision for customary divorce in the community of the parties to these proceedings to get a marriage dissolved except through the process of or outside the court. The trial court will consider afresh the case of the parties set up in the suit after deciding the issue now directed to be framed by us, without any manner, being influenced by the earlier finding given by the court below including the High Court.

For the reasons stated above, this appeal is allowed and the matter now remanded back to the trial for fresh disposal in accordance with the law and in the light of the observations made in this appeal.

.....J.
(N.Santosh Hegde)

.....J.
February 1, 2002. (Doraiswamy Raju)

JUDIS