

Rajiv Dinesh Gadkari vs Smt. Nilangi Rajiv Gadkari on 16 October, 2009

Equivalent citations: AIR 2010 (NOC) 538 (BOM.), 2010 (1) AIR BOM R 45 2010 A I H C 1555, 2010 A I H C 1555, 2010 A I H C 1555 2010 (1) AIR BOM R 45, 2010 (1) AIR BOM R 45

Author: P.B. Majmudar

Bench: P.B. Majmudar, R.V. More

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.67 OF 2009

Rajiv Dinesh Gadkari, aged about 36,

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occupation Service, working at Charles and Helen
Sohwab Foundation, 1650, S. Amphelett Bldg.,
Suit 300, San Mateo, California-94402, USA
through P.A. Depamala Gadkari, Plot No. 25,

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Ashwin Co-op. Hsg. Society, Jai Bhavani Road,
Nasik Road, Nasik-422 401

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versus

Smt. Nilangi Rajiv Gadkari, aged about 32,

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Occupation temporary service, residing at
C/o. Avinash Bendrey, B-7 R. B. Mehta Road,
Ghatkopar, Mumbai-400 077

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)..Re

Mr. P.M. Pradhan for the appellant.

Mr. Swapnil S. Ovalekar for the respondent.

CORAM: P.B. MAJMUDAR
R.V. MO

Judgment reserved on : 12
October,
th

Judgment pronounced on: 16
October,
th

JUDGMENT:

(Per P.B. Majmudar, J.) This resent appeal is directed against the judgment and order dated 23rd January, 2009, passed by the learned Judge of the Family Court No. 6 at Bandra, Mumbai, by which the learned trial Judge has allowed the petition filed by the respondent herein and the marriage between the appellant and the respondent-husband has been dissolved by a decree of divorce under Section 13 (1) (ia) of the Hindu Marriage Act, 1955.

2. The respondent-wife preferred Petition No. A-693 of 2004 for a decree of dissolution of marriage on the ground of cruelty. The marriage of the appellant-husband and the respondent-wife was solemnized on 26th June, 2002 at Nasik as per Hindu Vedic Rites. After the marriage, the respondent went to U.S.A. along with the appellant. It is the case of the respondent that after reaching U.S., the appellant insisted the respondent that the respondent should change her life style and follow the American life style. He insisted her to cut her hair and compelled her to eat beef and pork and also compelled her to prepare it at home and if she refused, he used to shout at her. He showed no respect for God and Hindu deities and did not give money to her to buy Indian food. The appellant was even compelled her to have alcohol and he always criticized and scolded her as Indian and also forced her to wear short and vulgar clothes which she disliked and was compelled her to

mix with boys. It is also the case of the appellant that even after the arrival of appellant's mother at U.S., there was no change in the situation and she was also insisting her to change her life style as expected by the appellant. It is the case of the respondent that her husband and her mother-in-law were calling her conservative and backward and ultimately when she got an opportunity to come back to India for the purpose of appearing in M.A. Examination, she came back to India on 5th February, 2003, she returned to India. It is her case that since she had come to India for examination, she did not bring her jewellery articles and valuables along with her. It is also the case of the respondent that when she wrote a letter to the appellant expressing her desire to dissolve the marriage and seeking his consent, the appellant refused and made false allegations including stealing of his valuables and was blaming the respondent.

It is also her case that she learnt that the appellant was medically unfit on the basis of ECG scan of his brain and this fact was concealed from her at the time of marriage. It is also her case that lastly she had received a letter from the appellant seeking divorce by consent but still he continued to harass her by uploading the vulgar photographs, text image on the website and had accordingly defamed her for which she filed a defamation complaint under Cyber Crime and the offence is already registered against the appellant. The respondent wife accordingly filed the said petition on the aforesaid grounds. She also prayed for return of articles and prayed maintenance at the rate of Rs.

75,000/- per month.

3. The appellant, who was the respondent before the trial Court, filed written statement at Exh. 7 and denied the allegations made in the petition. It is the case of the appellant in his written statement that the respondent had entered into marriage with the appellant with an intention to enjoy life and privileges in America and at the cost of the appellant she enjoyed American life for seven months and came back to India abruptly. It is his case in the written statement that the respondent and her family never showed any interest or inclination towards finding a feasible solution to save the marriage or solve her so-called imaginary problems. It is the case of the appellant that he is well educated, hard working and soft spoken and a humble person and believe in individual freedom and mutual respect to each other. It is his case that the respondent used to consume wines and that she was not doing any household work. It is also the case of the appellant that at the time of coming to India, she had taken all her jewellery with her. On these and such other grounds, the petition was resisted by the appellant.

4. The learned Judge of the Family Court framed various issues at Exh.

26 and after considering the evidence led by the wife came to the conclusion that the respondent-wife has proved that the appellant has treated her with cruelty. The respondent had given up her claim for maintenance as well as claim for jewellery and, therefore, no order regarding the same was passed. The petition was allowed by passing a decree for divorce. The aforesaid order of the Family Court is impugned in this First Appeal at the instance of the appellant-

husband.

5. Mr. Pradhan, learned counsel appearing for the appellant, submitted that the Family Court has not permitted the Advocate engaged by the appellant to cross-examine the respondent wife. Mr. Pradhan submitted that the Vakalatnama filed by the appellant was doubted and the appellant was not given an opportunity to defend the case, as appellant's Advocate was not permitted to cross-examine the respondent. Mr. Pradhan submitted that the Family Court has decided the case against the appellant only on the basis of the written statement of the appellant which cannot be said to be a substantive piece of evidence. Mr. Pradhan further submitted that in the proceedings before the Family Court, initially power of attorney was given by the appellant to the father of the appellant who subsequently died. Mr. Pradhan submitted that even as per evidence of the wife, even if she was asked to prepare such food, it cannot be said that she was treated with cruelty. The respondent married with the appellant with the full knowledge that she is required to settle in America and subsequently she cannot make any complaint regarding the life style which she was required to follow. The learned counsel further submitted that asking the wife to wear a particular dress itself may not amount to cruelty. He has submitted that in the interest of justice, the matter may be remanded to the trial Court by which the appellant may be allowed to cross-examine the wife through his lawyer.

6. The learned counsel for the respondent, on the other hand, supported the order passed by the learned trial Judge and submitted that the Family Court has rightly granted decree for divorce after considering the evidence on record.

7. We have heard the learned counsel for the parties at great length and have also gone through the record and proceedings.

8. During the pendency of this appeal, it was suggested by the learned counsel for the appellant that in order to put an end to the dispute, the appellant is willing to settle the dispute by withdrawing the present appeal and accepting the decree for divorce, provided the respondent-wife withdraws all criminal cases filed against the appellant by her under the Cyber Law.

9. In this behalf it is required to be noted that the appellant has also submitted a proposal at Exh. 23 before the Family Court through his advocate, stating that the consent terms should include an undertaking of the respondent-

wife that she would not raise any objection and would give her consent for quashing all criminal pending proceedings.

10. So far as the suggestion of the appellant to withdraw the cases are concerned, learned advocate for the respondent, after taking instructions from his client, submitted that the respondent is not going to withdraw the criminal case under the Cyber Law as, according to the respondent, her life is spoiled by the appellant by publishing defamatory articles on the website thereby tarnishing her image in the society and her prospectus for future marriage has completely been diminished. In view of the above, we leave the suggestion as it is and we proceed to decide the appeal on its own merits.

11. In her application for divorce, the respondent has in paras 10 to 13 stated thus:

"10. The respondent started insisting upon the petitioner to eat beef and pork which did not fit in her Hindu culture and the Respondent retaliated by threatening the petitioner that he would not spend money on the food she was ready to consume. The respondent used to bring beef and pork in the house and prepare it at home and started forcing the petitioner to eat the beef and pork, which she declined to do.

11. Whenever the petitioner was fasting according to Hindu religion the Respondent intentionally brought chicken, beef and pork and not only he used to consume it himself but he also used to force, every time, the petitioner to consume it which she stoutly denied. The respondent showed no respect for God and Hindu deities and he did not give money to the Petitioner to buy Indian food. The petitioner used to eat as her meal only bread jam and fruit which the Respondent used to bring and ultimately sometimes the petitioner prepared rice and dal at home.

12. Everyone at home in the household of the petitioner, is a tee-totallar and the petitioner had never consumed alcohol before her marriage. The respondent however started forcing her to consume alcohol, which used to make her ill. The respondent did not care for such dislikes of the petitioner. The respondent however showed scant respect for petitioner's likes and dislikes and indulge in abusing the petitioner and treating her as his slave.

13. In the month of November, 2002, the petitioner had accompanied the respondent to Hawaii Island where he forced her to wear shorts and vulgar clothes which he had bought earlier for her and insisted on taking photographs in such dresses, through the photographer on the ship. The Respondent was insisting on the petitioner to wear such clothes while moving in the public and at parties and he wanted the petitioner to mix up with boys and girls wearing such clothes at parties which she declined to do."

12. After coming to India, she wrote a letter to her husband dated May 17, 2003, by which she has informed her husband to agree for consent divorce.

The said letter was replied by the appellant by his letter dated June 12, 2003 wherein he denied the grounds of cruelty mentioned in the letter. In his reply he has stated that he had given her all comforts in U.S. and gave her all financial freedom. In the written statement also, allegations of the respondent have been denied by the appellant. Regarding putting the photographs of the respondent on the website, it is averred in the written statement that the appellant can never do such vulgar things in respect of any woman. It is his case in the written statement that the respondent had taken away all her single photographs while leaving U.S. and it is possible that one of her own admirers might have put it on website. It is his case that he has not done these acts. In lieu of examination-in-chief, the respondent had tendered the affidavit at Exh.

29. She has narrated the instances of cruelty in the same lines in which it is stated in the petition. In paragraph 25 of her affidavit, she has stated that the appellant fabricated vulgar text of her profiles on different web sites and that he uploaded the photographs taken at the time of her visit to Hawaii

Island which he possessed and that he used to visit these web sites frequently. In view of the above, she had to inform the web hosting companies on whose web sites vulgar profiles, text, image, photos were uploaded and as a result of which the same was pulled down by the web hosting companies. She has stated in her affidavit that on account of the websites appearing, her family members started receiving obscene calls and on making further enquiries, the family members came to know different websites and in view of the same she has filed a complaint with the Cyber Crime Investigation Cell, Mumbai and the FIR is registered on 20th September, 2003 under Section 67 of the Information Technology Act, 2000.

13. During the course of hearing, learned counsel for the respondent has fairly submitted that she has no interest towards maintenance or any relief regarding articles but she is interested only in the dissolution of the marriage.

The special power of attorney given by the appellant to his father is placed on record by which he permitted his father to defend his case on the ground that he is unable to come to Mumbai to defend the case. The vakalatnama of the appellant filed before the Family Court was challenged by the respondent on the ground that the signature appearing on the said vakalatnama is not of the appellant. On behalf of the respondent, an application at Exh. 10 was filed objecting to admit the written statement, power of attorney and vakalatnama filed on behalf of the appellant on the ground that the authenticity of the same is doubtful. In paragraph 6 of the reply to the said application, on behalf of the appellant it is averred by the power of attorney holder that the power of attorney, written statement and vakalatnama filed by him before the Court are legally valid and in case the Court comes to the conclusion that any of the documents are not valid, he may be given permission to rectify the error.

14. The appellant also filed an application at Exh. 37 wherein he has stated that earlier he had given power of attorney to his father. However, since he has expired in December, 2007, he has not given any fresh power of attorney, as talks of settlement were going on and now he has executed power of attorney in favour of his mother. However, the attestation of the same from the Indian Consulate may require some time. He had prayed for exemption of himself from appearing in the Court and requested that his Advocate may be permitted to cross-examine the respondent in his absence. The learned trial Judge while disposing of the said application at Exh. 37 found that the appellant who was the original respondent has never appeared in the matter and his father, power of attorney, was attending the matter and thereafter no power of attorney has been given to anyone. The learned Judge of the Family Court found that as per the provisions of the Family Court Act, no advocate is allowed to appear or represent the party in the Family Court except with the permission of the Court and vakalatnama is filed without seeking any permission from the Court. The Court was of the opinion that the appellant should bring some material on record to show that it is the signature of the appellant and when the appellant is in U.S., it is necessary that the signature on the vakalatnama or application shall be made in front of Consulate General so as to give authenticity to the signature. The learned trial Judge also noted the following in para 6, while rejecting the application at Exh. 37.

"6. One more aspect of the matter which is also required to be taken note of is that while arguing application for exemption from appearing before the Court it was

submitted on behalf of the respondent that criminal cases are pending against the respondent and the moment he lands in India he will be arrested in such circumstances it was submitted that therefore it is not possible for the respondent to appear before the Court and on that ground and with such oral submissions exemption for personal appearance is sought. But then with due respect to the learned advocate appearing in the matter that cannot be a legal and valid ground for seeking or granting exemption from personal appearance particularly in the light of the fact that a specific provision is there in the Family Court's Act that parties are to remain present in person, they are to be referred for counselling and all efforts for amicable settlement be made. Even it is an admitted fact that there are criminal cases pending against the respondent and the respondent appear to be avoiding arrest by not coming back to India and in such circumstances also the application for exemption from personal appearance in the peculiar facts and circumstances of the case cannot be said to be sustainable. Even in the light of the fact that no permission for appointing advocate so far granted and even in view of my finding that since the respondent has never remained present in the petition and has been avoiding to come and appear before the Court for not a very legal and sound reason, no such permission to appear through advocate can be granted. In such circumstances, the prayer for exempting from personal appearance and allowing the advocate to cross-examine the petitioner in absence of the respondent also cannot be granted. The application is, therefore, rejected."

The learned Judge accordingly rejected the said application regarding exemption sought by the appellant for appearing in the matter and permitting his advocate to take cross-examination in his absence.

15. The point which arises for our consideration is as to whether the Family Court was justified in proceeding with the matter *ex parte* and as to whether the exemption was rightly refused by the Family Court.

16. It is required to be noted that on the vakalatnama which is produced at Exh. 4, except the signature of the appellant, there are no other details to show that the signature on the said vakalatnama has been made before any authorised officer or before the Notary. After the death of the father of the appellant, no other power of attorney was produced on record by the appellant though sufficient time was given in this behalf. Considering the nature of the dispute, there are certain things which are within the knowledge of the appellant as the Advocate may only argue the case on behalf of the appellant, but the Advocate cannot have any personal knowledge about the factual aspects regarding cruelty and other allegations during the matrimonial life between the appellant and the respondent. As per provisions of Section 13 of the Family Courts Act, 1984 is concerned, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner though normally Court may give permission in the interest of justice for taking assistance of a legal expert. In the instant case, the appellant has asked for exemption from attending the Court as his earlier power of attorney had expired. In our view, the appellant cannot be permitted to give his evidence through his power of attorney. During the course

of hearing, we pointedly asked the learned counsel for the appellant as to whether his client is willing to come to India to give evidence so that the Court may consider the question of remanding the matter to the trial court and allow him to lead evidence. He, however, frankly submitted that his client is not willing to come to India at all.

Considering the said aspect, in our view, no useful purpose will be served even if the matter is remanded to the trial Court permitting him to lead his evidence.

The appellant must adduce his evidence which are within his personal knowledge. In our view, in a matrimonial matter, the presence of spouses before the Court is a vital as there are certain aspects which are only within the personal knowledge of the spouse. In fact, it is the duty of the Family Court under Section 9 of the Act to make efforts for settlement. The power of attorney cannot give evidence regarding the facts which are only within the personal knowledge of either of the husband or wife. Since Mr. Pradhan has fairly submitted that the appellant is not willing to come to India at all and to lead evidence before the Family Court, in our view it is not necessary to interfere with the order of the Family Court by remanding the matter back to the trial Court. As stated earlier, even the Advocate cannot give any evidence on behalf of the appellant as there are certain facts which can be within the knowledge of the appellant. Considering the said fact, the learned Judge of the Family Court, after considering the evidence of the wife has reached the conclusion about cruelty and passed a decree which decree, in our view, is not required to be interfered with as the Court after considering the averments in the petition and considering the affidavit of the respondent has rightly come to the conclusion that she was subjected to cruelty. In this behalf, reference is required to be made to the decision of the Supreme Court in the case of Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd. And others, (2005) 2 SCC 217, wherein it has been held by the Supreme Court in para 13 as under:

"Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some acts in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

In our view, there are certain factual aspects which are within the personal knowledge of the appellant for which power of attorney holder can have any knowledge regarding the actual act of cruelty, etc. alleged by the wife.

17. Mr. Pradhan for the appellant has submitted that the facts narrated by the wife in her evidence cannot constitute cruelty as, according to him, the respondent has married the appellant with the hope that she is required to go to U.S. and adjust with the environment of the said country. It is,

however, required to be noted that it is not expected from the respondent to sacrifice her own culture and to adopt such an atmosphere which may not suit to a lady having a different Indian culture altogether. To ask a wife to wear a particular type of cloth or compelling her to take wine or alcohol, in our view, can be said to be an act of cruelty to the wife. Even if the husband compels the wife that she should mix up with friends etc. and if she is not willing for the same, it would also amount to cruelty to the wife. Various instances have been narrated by the wife in her evidence and considering the same, the learned Judge of the Family Court has rightly come to the conclusion that she was subjected to cruelty by the husband while she was in U.S. In her complaint before the Sub Inspector, Cyber Crime Cell, which is also part of the record, she has stated that when she was having religious fasting, the appellant used to bring chicken, beef, pork and force her to eat the same which she denied and that she was not given money to buy Indian food. When she had gone with the husband at Hawaii Island for their honeymoon in November, 2002, the appellant forced her to wear shorts and vulgar clothes which he had bought for her. He took her photograph in such dress against her wish and uploaded the photographs in different websites. According to her, the appellant insisted her that she should mix up with boys and girls wearing such clothes at parties which she declined to do. It is required to be noted that normally no wife will tolerate the projection of her photographs on websites, as has been done in the instant case. On a perusal of the particulars given in this behalf in the petition and as per the evidence on record, in our view, the trial Court has rightly come to the conclusion that the respondent has proved her case about the cruelty.

18. As per record, a profile of respondent is given in one of the websites wherein the photograph of the respondent has been projected and description is given as under.

" I'm a 27 yr old beautiful, fair, smart girl living in Ghatkopar, Mumbai. I had been married for a short period (7 months) in US and got divorced due to ill-treatment by my ex-husband. I am a graphics designer and work for a well reputed bank in Bombay. I'm a friendly, outgoing kind of person and like to wear western dresses and hang out at parties, I do not smoke, though have liking for certain wines."

Under the caption of preferences and requirements, it is stated as under:

" I am looking for a person who is well settled in life, has a decent job and willing to allow me to have my independent career.

Wiling to have a longterm live-in relationship before deciding to get married again. In case you are interested, pls. Contact me.

Would like to know the following in your initial response.

1. Your picture. Would prefer if you could send your pic by normal mail, as I do not have access to internet. Your personal and professional details. Meet and see how it goes !"

19. There is another website wherein the following details were given.

" Hi, I'm a 27yr. Old divorced sexy, beautiful, classy girl having lived in US for 1 yr. I recently came back to Bombay due to ill- treatment by my ex-husband. Due to this I haven't had any sex for past 5 months and am desperate looking for a sexy, well-

built, clean guy who can fulfill my sexual desires for a whole night. I'm open to oral, anal and kinky sex and get turned on by watching x-rated movies..Also like to suck cock and dirty talk."

20. It is also required to be noted that on the basis of the above, e-mails were sent to the respondent, copies of which are produced on record. Relying upon the above, learned counsel for the respondent has argued that her life is now totally spoiled and she has been defamed in the society that she is a lady of easy virtue and that is why she is not willing to withdraw the criminal case. The photographs which are published on websites are produced on record. Whoever has done this act, same is extremely shocking. There are other websites publications which are produced on record, but looking to the contents of the said publication, we would not like to discuss the same in detail. But suffice it to say that the same is very disgusting and absolutely in bad taste. It is the case of the respondent that the appellant is a Computer Engineer and at his instance only these publications had been made on the websites. It is very unfortunate that a lady is required to undergo such a torture at the hands of her husband.

21. It is pertinent to note that in response to the publication made on the websites, someone had also approached the respondent-wife by way of E-

mail, a copy of which is at page 127 of the compilation. It reads as under : -

"hi, my name is Sajee and I am a 36 year old catholic living in Chennai. I AM AN AIRLINEMANAGER AND HAVE LIVED IN VARIOUS PARTS OF THE WORLD I am married and separated and am eagerly looking for a female partner to have a good time very discreetly. I cannot afford to be open hope you understand together I promise you we can have fun please responded should you be interested. Bye .

22. It is very unfortunate that the respondent-wife is required to face such type of torture and who has done this act, has acted in a very cruel manner with the respondent and has tried to spoil the life of the respondent. Since criminal case in this regard is pending, we would not like to express any opinion on this aspect of the matter. However, we are of the view that this is an eye-

opener for the parents whose daughter is going to marry with a person settled in foreign country and in such cases they are required to take appropriate care to find out the credentials of the person who has settled in other country. If matrimonial knot is tied without proper verification, it may result into serious difficulties as has happened in the present case.

23. It is the case of the respondent-wife that these websites photographs and other particulars have been given after she returned to India and her photographs have been misused by the appellant, as they were available with him at the time when she was residing with him in America. Though, as

pointed out earlier, the learned counsel for the appellant submitted that the particulars and photographs of the respondent wife might have been put on websites by some one else from the America, but as stated above, since proceedings in this behalf are pending before the competent court, we would not like to discuss the said aspect in detail.

24. Be that as it may, considering the facts and circumstances and considering the evidence on record produced by the respondent-wife, in our view, the respondent can be said to have made out her case of cruelty and, therefore, this is not a case in which this court would like to interfere with the order of the Family Court. As pointed out earlier, the counsel for the appellant has fairly submitted that the appellant is not going to come to India to give evidence but his mother may give evidence on his behalf. Considering the said aspect, in our view, no interference is called for so far as the order passed by the Family Court regarding granting decree for divorce is concerned.

22. In view of what is stated above, we do not find any substance in the appeal. The appeal is accordingly dismissed. Before parting with this order, we may clarify that our observations in this matter are to be treated only in connection with the present appeal and it will have no bearing in any other proceedings pending before the criminal Court in connection with cyber law.

P. B. MAJMUDAR, J.

R.V. MORE, J.