Jagdish Singh vs Madhuri Devi on 28 April, 2008

Equivalent citations: AIR 2008 SUPREME COURT 2296, 2008 AIR SCW 3824, 2008 (5) ALL LJ 137, (2009) 2 CLR 117 (SC), (2009) 1 MARRILJ 164, 2008 (10) SCC 497, (2008) 6 ALLMR 64 (SC), (2008) 3 CTC 528 (SC), 2009 (1) MARR LJ 164, 2008 (6) ALL MR 64 NOC, (2008) 2 DMC 8, (2009) 2 CIVILCOURTC 240, (2008) 2 GUJ LH 460, (2008) 6 MAD LJ 842, (2009) 2 MAH LJ 98, (2008) MATLR 547, (2009) 1 MPLJ 482, (2008) 2 WLC(SC)CVL 140, (2008) 3 ANDH LT 49, (2008) 4 BOM CR 830

Author: C.K Thakker

Bench: C.K. Thakker, D.K. Jain

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           CASE NO.:
Appeal (civil)  2997 of 2008

PETITIONER:
JAGDISH SINGH

RESPONDENT:
MADHURI DEVI

DATE OF JUDGMENT: 28/04/2008

BENCH:
C.K. THAKKER & D.K. JAIN

JUDGMENT:
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J U D G M E N T REPORTABLE CIVIL APPEAL NO. 2997 OF 2008 ARISING OUT OF SPECIAL LEAVE PETITION (C) No. 3358 OF 2005 C.K Thakker, J.

1. Leave granted.

2. This appeal is filed against the judgment and order passed by the High Court of Judicature at Allahabad on September 29, 2004 in First Appeal No. 1008 of 1999. By the said judgment, the High Court reversed the decree of divorce passed in favour of the appellant- husband by the Family Court, Allahabad on September 13, 1999 in Case No. 209 of 1992.

3. Short facts of the case are that the marriage between appellant and respondent was solemnized on May 27, 1974 as per Hindu rites and ceremonies. For some time the relations between the parties went on well. A female child Seema was born from the said wedlock in 1980. It is the allegation of the husband that the wife did not co-operate with him and his family members. She started

pressurising the husband to live separately from his parents, brothers and sisters. According to the husband, however, he was the eldest son of his parents and was not in a position to oblige the wife by living with her. He had to support his old parents and also to look after future of his brothers and sisters who were dependent on him. Since the husband did not accede to the demand of the wife, her behaviour towards the husband and his family members became rude. She started threatening the husband that if he would not concede to her demand of living only with her, he had to suffer consequences. The husband, however, was hopeful that in course of time, the wife will get settled and there would be no problem. Unfortunately, however, with the passage of time, the situation turned from bad to worse and she started deliberately mis-behaving not only with the husband but also with his old parents. She was violent on petty issues and small matters. She used to insult them on one pretext or the other and made the situation intolerable.

4. The appellant-husband, is a teacher and belongs to a respectable family. The above acts of the respondent-wife lowered down and tarnished the image of the appellant and his family in the society. It had also caused mental and physical agony to him. The respondent did not mend her ways. In or about January, 1984, she left matrimonial home with her brother in absence of the appellant without just or reasonable cause leaving her minor daughter Seema and taking all ornaments and jewelleries. The appellant and his family members made several efforts to bring respondent to the matrimonial home, but she did not return. The appellant persuaded her that she should at least consider the interest and well-being of Seema who needed love and affection of the mother, but it had no effect whatsoever on the respondent. The appellant was deprived of conjugal rights. Her conduct and behaviour towards appellant, his family members and a minor daughter resulted in physical and mental cruelty to the appellant.

5. The matter did not end there. With a view to harass and humiliate the appellant in the society, the respondent-wife filed a civil suit on April 17, 1992 (Smt. Madhuri Devi v. Jagdish Singh) in the Court of learned Munsif Sadar, Pratapgarh for permanent injunction alleging therein that the appellant-husband was likely to enter into second marriage and since the first marriage with the plaintiff (wife) was subsisting, the defendant (husband) had no right to perform second marriage. She also prayed for interim injunction. Ex parte injunction was granted by the Court, but after hearing the parties, the application was dismissed and injunction was vacated. Against the said order, the respondent had preferred an appeal which is pending.

6. In spite of all this, the appellant tried to persuade the respondent to come back to matrimonial home. But the respondent refused to stay with the appellant. So much so that when the appellant arranged Seema's marriage and informed her, she did not attend it. In view of all the circumstances, the appellant filed a divorce petition being Case No. 209 of 1992 in the Family Court, Allahabad under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') on two grounds, (i) Desertion; and (ii) Cruelty. The Family Court, after considering the evidence led by the parties, decided both the issues in favour of the appellant and passed a decree of divorce granting dissolution of marriage.

7. Being aggrieved by the decree passed by the trial Court, the respondent-wife preferred an appeal in the High Court of Judicature at Allahabad which was allowed. It reversed the decree of the Family

Court and dismissed the divorce petition instituted by the appellant-husband. It is this order which is challenged in the present appeal by the husband.

8. Notice was issued by this Court pursuant to which the parties appeared. After hearing the counsel, an order was passed on November 10, 2006 that if possible, the matter be settled through mediation. The learned counsel for the parties stated to the Court that they would try for settlement with an open mind. The parties were, therefore, directed to approach Mediation Centre, Tis Hazari Court at Delhi. Parties then approached the Mediation Centre. All attempts of settlement, however, failed. It was stated by the counsel that it was not possible to arrive at a settlement and requested the Court to decide the case on merits. In view of the nature of dispute, the Registry was directed to place the matter for final disposal on a non-miscellaneous day and that is how the matter has been placed before us.

9. We have heard the learned counsel for the parties.

10. The learned counsel for the appellant submitted that the High Court was wholly wrong in allowing the appeal and in reversing the well-considered judgment of the Family Court. It was submitted that on the basis of evidence adduced by the parties and considering it in proper perspective in the light of surrounding circumstances, the Family Court recorded a finding that the plaintiff-husband was entitled to a decree of divorce on both the grounds, namely, desertion and cruelty. The Family Court considered the evidence of the parties and held that it was the wife who had left matrimonial home without just or reasonable cause and thus desertion was proved. It also came to the conclusion that the conduct and behaviour of the wife was 'hostile' towards the husband as well as his family members. The husband was deprived of conjugal rights which was a case of cruelty. Her conduct of leaving minor daughter Seema was also highly improper. On both the grounds, therefore, the plaintiff-husband was entitled to dissolution of marriage.

11. It was submitted by the learned counsel that being aggrieved by the above decree, the wife filed an appeal. The High Court persuaded the parties to settle the matter. The husband tried his best to arrive at an amicable settlement, but because of attitude of the wife, the dispute could not be resolved. The husband was not responsible for the situation and yet the High Court blamed him. The High Court without considering the evidence properly and ignoring the conclusions of the Family Court and reasons recorded for coming to such conclusions, interfered with findings of fact and held that it was neither a case of desertion nor a case of cruelty and the Family Court was wrong in passing a decree of divorce. The order of the High Court, therefore, deserves to be set aside by restoring the decree passed by the Family Court.

12. The learned counsel for the wife, on the other hand, supported the decree of the High Court which set aside the decree of the Family Court. The counsel submitted that an appeal by the wife before the High Court was 'first appeal' and the High Court had jurisdiction to enter into questions of fact as well as questions of law. The High Court held that the Family Court was wrong in relying upon the evidence of the husband and in granting a decree of divorce. According to the High Court, there was neither desertion nor cruelty on the part of the wife and the Family Court was wrong in granting relief to the husband. In the alternative, the learned counsel submitted that if this Court is

of the view that the High Court has not recorded reasons and the order is 'cryptic', it can remit the case to the High Court for passing an appropriate order in accordance with law.

13. Having heard the learned counsel for the parties, in our considered opinion, the order passed by the High Court deserves to be set aside.

14. So far as the Family Court is concerned, it considered the evidence in detail of three witnesses; PW 1 Jagdish Singh, husband, PW 2 Lal Pratap Singh, brother of PW 1 and PW 3 Nandlal. It also considered the depositions of DW1-wife and her witnesses. It observed that the parties married in 1974 and Seema was born in 1980. Nothing was shown which compelled or obliged the wife to leave matrimonial home. On the contrary, the evidence went to show that it was the wife who was responsible for creation of unpleasant situation which would amount to cruelty towards the husband and his family members. She insisted her husband to stay separately from his parents and other family members, but the plaintiff did not accept the demand as he was the eldest member of the family and had to look after old parents and other family members. The Family Court noted that it was the wife who left matrimonial home. The trial Court also stated that at the time of leaving matrimonial home, the wife was aware that she had a minor child (Seema) who was about 4-5 years of age and yet she did not care to consider as to what will happen to her in absence of love and affection of mother. Even thereafter she neither took care of her husband nor of her daughter Seema. When she was informed that Seema was to marry, her motherhood and love and affection did not attract her to attend the marriage of Seema and the marriage was performed by the father in absence of the mother.

15. The Family Court observed that the grievance of the wife was against her husband and not against her daughter Seema. She was, therefore, expected to behave properly with Seema, but she failed to do so.

16. The Family Court also considered the evidence of defence witnesses and held by recording reasons that the evidence was not reliable. So far as the evidence of DW 1 Madhuri Devi- wife is concerned, the Family Court noted that what was deposed by her did not inspire confidence. On the other hand, the husband appeared to be 'simple' and of 'gentle nature' and his evidence was natural. In the light of the above facts and circumstances, the Family Court did not rely upon the evidence of the wife and believed the deposition of husband and his witnesses. Regarding the allegation of the wife that the husband wanted to perform second marriage with one Poonam Singh and her filing of suit and getting ad-interim relief which was subsequently vacated, the Family Court noted that from the circumstances in their entirety, it was clear that the wife had levelled false allegations against the husband and a 'fake' case was filed by her. The Family Court referred to an effort of settlement between the parties in Lok Adalat and noted that it was the wife who refused to come and live with the husband. According to the Family Court, the fact had been clearly mentioned on the Order-sheet on the file of the case. In the light of all the facts and circumstances, the Family Court recorded a finding that it was the wife who continuously acted with cruelty with the husband after marriage and in January, 1984, it was she who abandoned matrimonial home without any cogent and justifiable reason and the husband was entitled to divorce.

17. So far as High Court is concerned, it noted in the judgment in first para that the Family Court framed necessary issues and recorded a finding that the wife was guilty of cruelty as also desertion and accordingly a decree of divorce was passed. In paragraph 2 of the judgment, the High Court stated that attempts were made to get the matter settled, but no settlement could be arrived at. The High Court then noted that witnesses were examined by the husband as also by the wife. In the next para, submissions of the learned counsel for the wife were recorded.

18. In para 5, the High Court said;

> "We have seen the plaint and evidence adduced by the Respondent. In the plaint no specific instance of cruelty has been mentioned. Same is the case in the evidence of the respondent. No specific instance has been narrated. The allegations as well as evidence on behalf of the respondent are vague and general in nature."

19. In subsequent para, the High Court opined that the statement of the wife was 'natural'. According to the High Court, the husband did not like the wife because she could not bear a male child. It, however, noted that the parties were very young at the time of marriage. It then speculated that the husband was a teacher in an Intermediate college and stated;

> "The appellant (wife) is not very educated and has studied up to class 7th only. It is possible that the respondent (husband) 'may not like' her as she is not highly educated".

(emphasis supplied)

20. The High Court also observed;

> "There is nothing in the evidence to disbelieve the statement of the appellant (wife) and her brother DW 3. It is not disputed that Durga Singh, DW 2 resident of the same village as that of the respondent (husband) and is his relation. He has also supported the case of the appellant (wife). It is correct that the respondent (husband) had brought up only daughter of the parties. However, this does not mean that the appellant (wife) was cruel or deserted the respondent (husband)".

21. In view of above, according to the High Court, the Family Court was wrong in holding that there was cruelty on the part of the wife or that she deserted the matrimonial home. The findings recorded by the Family Court were not well-founded and the appeal was required to be allowed. Accordingly, the appeal was allowed and the decree passed by the Family Court was set aside.

22. From what is stated above, it is clear that the order passed by the High Court is 'cryptic' in nature. The Family Court considered the evidence in detail. It also considered the circumstances why the case of the husband was believed that there was desertion on the part of the wife and that her conduct and behaviour towards the husband, his family members and daughter Seema was cruel. It was a case of physical and mental cruelty. In the pleadings as well as in the evidence, the

appellant-husband has given details how the wife behaved with him and his family members; how she deserted him and deprived him of conjugal rights; how 'fake' case was filed against him alleging that he wanted to perform second marriage during the subsistence of first marriage; how she left matrimonial home leaving not only the husband and his family members, but her own daughter who was of a tender age of 4-5 years and never took care thereafter; how she did not attend the marriage of Seema, why the evidence of plaintiff was believed and evidence of defendant and her witnesses was not reliable. In the light of all the facts, the Family Court came to the conclusion that the case was covered by Section 13 of the Act and the petition was liable to be allowed and a decree for divorce was passed.

23. The High Court, on the other hand, did not consider the evidence at all. In fact, the High Court was wrong in observing that there were no specific instances of cruelty or desertion. The High Court also relied upon the defence evidence without considering the fact that the Family Court recorded reasons for not relying upon such evidence.

24. It is no doubt true that the High Court was exercising power as first appellate court and hence it was open to the Court to enter into not only questions of law but questions of fact as well. It is settled law that an appeal is a continuation of suit. An appeal thus is a re-hearing of the main matter and the appellate court can re-appraise, re- appreciate and review the entire evidence oral as well as documentary and can come to its own conclusion.

25. At the same time, however, the appellate court is expected, nay bound, to bear in mind a finding recorded by the trial court on oral evidence. It should not forget that the trial court had an advantage and opportunity of seeing the demeanour of witnesses and, hence, the trial court's conclusions should not normally be disturbed. No doubt, the appellate court possesses the same powers as that of the original court, but they have to be exercised with proper care, caution and circumspection. When a finding of fact has been recorded by the trial court mainly on appreciation of oral evidence, it should not be lightly disturbed unless the approach of the trial court in appraisal of evidence is erroneous, contrary to well- established principles of law or unreasonable.

26. Before more than a century, in Coghlan v. Cumberland, (1898) 1 Ch 704, Lindley, M.R. pronounced the principle thus;

> "Even where the appeal turns on a question of fact, the Court of appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions and when the question arises which witness is to be believed rather than another; and

> that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

[see also observations of Lord Thankerton in Watt v. Thomas, (1947) 1 All ER 582]

27. In Sara Veeraswami v. Talluri Narayya, AIR 1949 PC 32 : 75 IA 252, the Judicial Committee of the Privy Council, after referring to relevant decisions on the point, stated;

> "But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

28. This Court also, before more than half a century in Sarju Pershad v. Jwaleshwari, 1950 SCR 781, stated;

> "The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact.

29. Referring to several cases on the point, the Court concluded;

> "The duty of the appellate court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the court, outweighs such finding."

(emphasis supplied)

30. After about a decade, in Radha Prasad v. Gajadhar Singh, (1960) 1 SCR 663, this Court reiterated;

> "The position in law, in our opinion, is that when an appeal lies on facts it is the right and the duty of the Appeal Court to consider what its decision on the question of facts should be; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the Trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of Appeal is in as good a position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified".

31. In T.D. Gopalan v. Commissioner of Hindu Religious & Charitable Endowments, Madras, (1973) 1 SCR 584, this Court said;

> "The High Court next proceeded to reproduce a summary of the statement of each of the witnesses produced by the defendants. No attempt whatsoever was made to discuss the reasons which the learned District Judge had given for not accepting their evidence except for a general observation here and there that nothing had been suggested in the cross-examination of a particular witness as to why he should have made a false statement. We apprehend that the uniform practice in the matter of appreciation of evidence has been that if the trial court has given cogent and detailed reasons for not accepting the testimony of a witness the appellate court in all fairness to it ought to deal with those reasons before proceeding to form a contrary opinion about accepting the testimony which has been rejected by the trial court. We are,

> therefore, not in a position to know on what grounds the High Court disagreed with the reasons which prevailed with the learned District Judge for not relying on the evidence of the witnesses produced by the defendants".

32. Yet in another decision in Madhusudan Das v. Narayanibai, (1983) 1 SCR 851, this Court said;

> "At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. . . The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact.
>
> (emphasis supplied)

33. Three requisites should normally be present before an appellate court reverses a finding of the trial court;

(i) it applies its mind to reasons given by the trial court;

(ii) it has no advantage of seeing and hearing the witnesses; and

(iii) it records cogent and convincing reasons for disagreeing with the trial court.

34. If the above principles are kept in mind, in our judgment, the decision of the High Court falls short of the grounds which would allow the first appellate court to reverse a finding of fact recorded by the trial court. As already adverted earlier, the High Court has 'virtually' reached a conclusion without recording reasons in support of such conclusion. When the Court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial Court or conclusions arrived at were not in consonance with law.

35. Unfortunately, in the instant case, the said exercise has not been undertaken by the High Court. So-called conclusions reached by the High Court, therefore, cannot be endorsed and the decree passed in favour of the wife setting aside the decree of divorce in favour of the husband cannot be upheld. The order, therefore, deserves to be quashed and set aside and is hereby set aside.

36. Since, there is non-consideration of the principles laid down by this Court in various cases, some of them have been referred to hereinabove, the only course available to this Court is to remit the matter to the High Court so as to enable it to pass an appropriate order afresh.

37. We may observe at this stage that the learned counsel for the husband submitted that this is a matrimonial matter and the parties [husband and wife] are staying separately since more than two decades. Hence, instead of remitting the matter to the High Court, this Court may on the basis of the evidence led by the parties, come to a conclusion one way or the other. In our considered opinion, however, when the law has conferred the power of re-appreciation of evidence on facts and on law on the first appellate court [in the instant case on the High Court], it would not be appropriate for this Court to undertake that task. It would be better if we allow the appellate court to exercise the power, discharge the duty and perform the function under the Code. We are, however, conscious and mindful that since about a quarter century, the parties are staying separately. We, therefore, request the High Court to give priority to the case and decide it as expeditiously as possible.

38. For the foregoing reasons, the appeal is allowed, the judgment and decree passed by the High Court in First Appeal No. 1008 of 1999 is set aside and the matter is remanded to the said Court for fresh disposal in accordance with law. The High Court will decide it as expeditiously as possible.

39. Before parting with the matter, we may clarify that all the observations made by us in this judgment are only for the limited purpose to show that the High Court was not right in setting aside finding of facts recorded by the Family Court without recording reasons for such reversal and without keeping in view the scope of powers of first appellate Court. But we may not be understood to have expressed any opinion finally one way or the other on the merits of the matter. As and when the matter will be placed before the High Court it will be decided on its own merits without being influenced by any observations made by us.

40. On the facts and in the circumstances of the case, the parties shall bear their own costs.