

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BHAVNA KUMAR

APPELLANT

VS.

NO. 2006-CA-01140

ARVIND M. KUMAR

APPELLEE

BRIEF OF APPELLEE

APPEAL FROM THE CHANCERY COURT OF

LOWNDES COUNTY, MISSISSIPPI

(Kumar v. Kumar, Cause No. 2004-0795)

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate disqualification or recusal.

Chancellor: Honorable Robert Lancaster (Retired), Lowndes County, Mississippi

Appellant: Bhavna Kumar

Counsel for Appellant:

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SO CERTIFIED, this the 17 day of June, 2007.

Respectfully submitted,



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RESTATEMENT OF THE ISSUES

Whether the Chancery Court's finding that the Plaintiff/Appellant failed to establish her divorce upon the grounds of habitual cruel and inhuman treatment, the denial of Plaintiff's/Appellant's Motion for New Trial and/or to Alter or Amend the Judgment, and the Court's allowance of Defendant/Appellee to file an Answer to Plaintiff's/Appellant's Complaint were all manifestly wrong, clearly erroneous, or applications of an erroneous legal standard.

STATEMENT OF THE CASE

This action commenced when Plaintiff Bhavna Kumar (“Bhavna”) filed a divorce complaint against her husband, Arvind Kumar (“Arvind”), on July 30, 2004 in the Lowndes County Chancery Court. Her complaint sought a divorce on the ground of habitual cruel and inhuman treatment, or, in the alternative, irreconcilable differences.

Arvind Kumar was served with process and summons in August 2004. That same month, Arvind was served with discovery requests¹, a temporary restraining order, and on August 9, 2004 he entered upon an Agreed Order that continued the hearing on preliminary injunction and temporary relief. It was also in August that Bhavna Kumar moved back into the marital home and the parties reconciled. Later in October 2004, Bhavna Kumar withdrew her request for temporary relief but did not formally dismiss her divorce complaint.

On August 12, 2005, almost a year later, Bhavna Kumar abandoned the marital home and then filed an application to the Clerk for Entry of Default on the divorce complaint she had filed back in July 2004.² On August 17, 2005, Arvind, through newly retained counsel, requested the Court to deny entry of default, and to grant him leave to file an answer to the original Complaint. The Court granted him both requests.

After the filing of Arvind’s answer, Bhavna was granted temporary support by the Court³ and after a Motion to Compel, the Court ordered Arvind to produce discovery responses. Due to Arvind not providing timely discovery responses pursuant to the

¹ Bhavna’s discovery requests included requests for admissions.

² Neither party had filed any pleadings from October 11, 2004 to August 12, 2005 as they reconciled their marriage and lived together as husband and wife.

³ Bhavna requested and was granted \$10,000/month temporary support from Arvind by the Court although she was not paying any expenses for their minor daughter that was away in college, and was admittedly living with her sister for free.

Order, Arvind was sanctioned by the court and was prohibited from having any witnesses testify on his behalf, to admit any documents, or present any rebuttal witnesses at the upcoming trial. He was only permitted to cross-examine the witnesses presented by Bhavna. Bhavna had no such sanctions by the Court and was free to call all witnesses and present all evidence as necessary to prove her case.

The trial of this matter was held on May 31, 2006. The first document admitted into evidence by Bhavna was her unanswered request for admissions. During the trial, Bhavna only offered the testimony of her sister and herself. After hearing all testimony and duly considering all evidence presented, the Court ultimately dismissed Bhavna's Divorce and entered an Order on June 5, 2006 finding that she did not prove her grounds for a divorce based on cruel and inhuman treatment.⁴ Bhavna filed a Motion for a new trial and/or to alter or amend the judgment which was denied by the Court on June 28, 2006.⁵ Bhavna appealed the Court's findings to the Mississippi Supreme Court on July 13, 2006.

STATEMENT OF THE FACTS

Arvind and Bhavna Kumar were married on March 31, 1979 in the United Kingdom and are of Indian descent.

In 1980, they moved to the United States and lived in various cities before becoming naturalized citizens circa 1988 while living in West Point, Mississippi. (Tr. 26-28) After moving to America, they worked in the hotel industry and eventually became

⁴ Bhavna chose not to argue for a divorce based on irreconcilable differences during the trial and such grounds were not considered by the Court.

⁵ Bhavna had filed a Petition for Contempt with the Court alleging that Arvind had not paid her temporary support as ordered by the Court and it was originally scheduled to be heard the same day as the trial. But because the trial ended at the end of the day, it was continued to an undetermined date. Bhavna then voluntarily dismissed her petition after Arvind filed a vigorous opposition to her petition and asked the Court for relief if forced to defend.

owners or part owners of numerous hotels in Mississippi worth millions of dollars. (Tr 70-71). At the time of the trial, the parties had one minor daughter, Sarika Kumar, a twenty (20) year old college student in Oxford, Mississippi and Mitun Kumar, aged twenty two (22) years old⁶. (Tr. 26)

On July 30, 2004, Bhavna separated from Arvind, left their home to live with her sister in Atlanta, Georgia, and filed for divorce alleging cruel and inhuman treatment from Arvind.⁷ Less than a month later, Bhavna decided to reconcile her marriage and of her own free will, returned to their marital home in Columbus, Mississippi. (Tr. 129)

The parties lived together as husband and wife from August 2004 until July 2005, whereas allegedly due to a fight they had in May, Bhavna left the home again and attempted to get the court to grant her a default judgment on the divorce complaint she first filed back in July 2004. At the eventual trial of this matter, Bhavna sought a divorce judgment on the ground of habitual cruel and inhuman treatment only, but her divorce was dismissed.

SUMMARY OF THE ARGUMENT

None of the Court's rulings hereby appealed by Bhavna were manifestly wrong, clearly erroneous, or applied an erroneous legal standard. As such, the rulings by the Court should be affirmed in their entirety.

ARGUMENT

- I. There was no manifest error, clearly erroneous finding, or an erroneous legal standard applied when the Chancery Court found that plaintiff failed to establish her divorce upon the grounds of habitual cruel and inhuman treatment**

⁶ Mitun Kumar lived in Columbus, MS with his father Arvind and managed the Holiday Inn property. He died soon after the divorce trial in a car accident.

⁷ Arvind denied her allegations in the filed pleadings. During the trial, Bhavna admitted to participating in verbal abuse & initiating physical confrontations throughout their marriage. (Tr. 134, 135)

Bhavna had the burden of proving habitual cruel and inhuman treatment by Arvind with a preponderance of the evidence in order to be granted with a fault divorce on that ground. The Court correctly stated that a divorce cannot be granted except upon corroborated proof of the statutory grounds. (R. 274, *Judgment*, June 5, 2006, citing *Anderson v. Anderson*, 190 Miss. 508, 200 So. 726 (1941); *Rawson v. Buta*, 609 So.2d 426 (Miss. 1992))

Bhavna only called two witnesses, her sister and herself.⁸ ***Bhavna's sister***, Kusum Patel, admitted she in fact, ***never witnessed any abuse***. Kusum testified:

- Q. Okay. And how often would you get to see them during the year?
- A. At least, you know, three to four times a year, we got to each other, you know.
- Q. Okay. Three to four times a year. During the time that you would visit with them either here or they there or whenever, did you ever ***OBSERVE*** Mr. Kumar hitting his wife?
- A. ***No.***
- Q. Okay. In terms of him physically abusing her, is it true that you only know what your sister has told you?
- A. That's right.

(Tr. 22, Lines 11-22)(*emphasis added*)

- Q. Okay. So you're testifying that ***you've never actually seen them argue, fuss, fight in person?***
- A. No.

(Tr. 24, Lines 3-5)(*emphasis added*)

⁸ Bhavna's two children were in the courtroom during the trial and as the Court pointed out in the Judgment, she did not call either her adult male child or college age daughter to corroborate any of the events she alleged.

The court found that Bhavna's main complaint was of being unhappy, embarrassed and desirous of a change in affection by Arvind. (R. 279, *Judgment*, June 5, 2006) Even though Bhavna gave uncorroborated testimony of instances of physical abuse by Arvind over the years of her marriage, she also admitted that she would hit and push Arvind as she started physical fights as "play fights" that would provoke him.⁹ (*id*)

Bhavna testified:

Q. Had you ever been the first person to initiate physical contact in any of these fights that y'all had? You mentioned when he came towards you or whatnot. Have there been times when you were the first one to hit him?

A. No. I didn't hit him. It was —first, I would start, like—maybe like, going up to him. Like, I would want to try to calm the situation down before it escalated maybe by getting into a ***play fight*** instead of a fight-fight, but I would never, like, just slap him and hit. If I stood in front of him, he would try to tell me, get out of my way, and if I didn't, he would push me. I didn't actually start punching him and hitting him first.

Q. Ms. Kumar, isn't it true that the both of you were verbally abusive to each other?

A. No. I didn't use obscene language like he did, but if he called me something, then I would call him back something.

(Tr. 34, Lines 26-29; Tr. 135, Lines 1-13)

Q. Okay. And in regards to the altercations that you unfortunately did have during your marriage, when these started out as just arguments or verbal altercations that would lead to the physical incidents, would you say that ***you were the one that provoked it into the physical altercation?***

A. No, not all of the time.

Q. Some of the time?

⁹ Bhavna also alleged incidents of adultery in her testimony and appellant brief, because she did not plead uncondoned adultery as a ground in her divorce complaint. Further, she testified she continued in the marriage after knowledge of these alleged affairs.

A. *Sometimes.*

(Tr.139, Lines 15-23)(*emphasis added*)

The Court found that on three occasions during the marriage, Arvind may have threatened Bhavna during an argument¹⁰, but nothing further happened after she left the room. (R. 279, *Judgment*, June 5, 2006) Bhavna Kumar on cross examination testified:

Q. Okay. You also testified that he at times had – you said that he had threatened to kill you?

A. Yes.

Q. And these were with verbal comments?

A. In our language.

Q. Okay. And how many times did he say this to you?

A. During the whole 25 years of the marriage, maybe three times.

Q. Maybe three times. Did you take these threats seriously?

A. At the time, with his—seeing the anger at that moment, yes.

Q. Did you call the police?

A. No. I just backed off and walked out of the room if I could or walked away if I could.

(Tr. 132, Lines 13-27)

Most importantly, Bhavna forgave Arvind for any past acts under the Doctrine of Condonation when she returned to the marriage after filing for divorce. Bhavna testified:

Q. And when you came back in August 2004, is it your testimony that you came back on your own free will?

¹⁰ The exact timeframes of these alleged threats are unknown from Bhavna's testimony as to when exactly they occurred throughout their 25 years of marriage.

- A. After discussion with my children present in front of me, my husband and my two children and the promise of his brother, then I came back of my own free will.

(Tr. 129, Lines 7-11)

- Q. So with the conditions that you had asked of him and what he had asked of you, you felt that if the two of you were able to get those two things worked out, you could have a happy marriage and move on?

- A. Right, because he promised me he would do those things.

(Tr. 139, Lines 9-14)

Bhavna had to prove that Arvind continuously and habitually subjected her to cruel and inhuman treatment or that an extreme isolated act occurred that fulfilled the legal requirement. However, the only incident that occurred after the couple reconciled their marriage in August 2004 was in May 2005 where they hit each other one time each with a belt after a verbal argument. After this incident, Bhavna stayed in the marital home for another two months before abandoning the home again. She testified:

- Q. The time period you came back, the last time that you were living here, the period from August 2004 to July 2005, you did testify about the one incident where two got into an altercation with the belt. That was in May 2005; is that correct?

- A. Yes.

- Q. And that's the only one incident that you spoke of?

- A. Yes.

(Tr. 137, Lines 14-22)

- Q. Have you ever hit your husband with an item other than your hands?

- A. The day he hit me with the belt and it started stinging and I started crying, he threw it on the bed, and I picked it up, and I hit him in the back.

(Tr. 134, Lines 21-25)

Q. Okay. So you didn't call the police, or you didn't call your own relatives, you called your husband's brother to tell him about the incident?

A. Right, because he had told me to call him when this happened or anything happened like this again the prior year.

Q. And after this incident in May, you stayed with your husband for another two months before leaving; is that correct?

A. Yes.

Q. And you testified that the reason why you eventually decided to leave again was because you hadn't heard back from his brother?

A. That was mainly a reason that I found that nothing was going to change, nobody was going to help me. So I had to do something for myself, and then when I decided that, to leave.¹¹

(Tr. 133, Lines 17-29; Tr. 134, Lines 1-4)

There wasn't another incident between May and July 2005. After the belt incident, Bhavna continued to live in the marital home with Arvind, which clearly shows she did not fear for her life, limb or danger that rendered the marriage relationship unsafe for her. Further, because she came back to the marriage of her own free will in August 2004, Bhavna obviously did not possess any reasonable apprehension of any such danger from any of the alleged acts that had occurred in the past. Simply put, if her allegations regarding abuse in the past were all true, then she would not have come back to Arvind from her sister's out of fear for her life. Any reasonable belief in danger to her life would

¹¹ Bhavna suggests that if she had heard from Arvind's brother then she would have stayed in the marriage which by itself negates the required establishment that the conduct alleged must make it revolting to her and **impossible** for her to discharge the duties of the marriage.

have moved Bhavna to immediately leave the home after the May 2005 belt incident and not remain in the home for an additional two months.

The Court ultimately and correctly found that Bhavna failed to prove her grounds for divorce that met the requirements of law for a divorce for habitual cruel and inhuman treatment. (R. 279, *Judgment*, June 5, 2006) Bhavna failed to prove any manifest error, a clearly erroneous finding, or an erroneous legal standard applied by Court when the Court derived its conclusion.

II. There was no manifest error, clearly erroneous finding or erroneous legal standard applied when the Chancery Court denied plaintiff's motion for new trial and/or to alter or amend the judgment

Bhavna argues that her unanswered requests for admission from Arvind “conclusively established” that Arvind subjected her to habitual cruel and inhuman treatment. The Court however stated that a divorce cannot be taken as confessed / admitted and must be established by proof satisfactory to the Court as the representative of the State of Mississippi, the third party to the marriage contract. (R. 274-275, *Judgment*, June 5, 2006)

The Court further stated that discovery admissions may corroborate facts established by a party's proof or even provide proof of additional facts but they cannot rise to the level of a confession/admission. (*Id.*) The Court held that the admissions have weight and evidentiary effect but that the weight is limited by the statutory requirement of proof as opposed to confession/admission and with due consideration of any implicit collusion to secure a divorce. (*Id.* at 275, 276).¹²

¹² Bhavna argues that due to her unanswered requests for admissions being admitted, she was without any further burden to prove her case. For this court to agree, would mean that any couple desiring a divorce can simply allow unanswered requests for admissions to be admitted into evidence to circumvent the requirement of providing corroborated evidence in order to prove alleged grounds for divorce.

Bhavna argued in her Motion for new trial and/or to alter or amend judgment that the Court “did not have the discretion to ignore the admissions or to find that the admitted facts were not sufficiently proven”.

In response, Arvind points out that the Court did *not* ignore the admissions. The Court specifically stated that in the instant case, the admission had “weight and evidentiary effect and can not be rebutted unless withdrawn”. (R. 304, Order, June 28, 2006) The Court considered the admissions with the other proof and found Bhavna’s proof insufficient to establish cruel and inhuman treatment. (id at 308) Consequently, the court referenced the admissions throughout the entered Order denying her motion.

Bhavna’s Motion basically suggests that because Arvind’s admissions were entered into evidence against him, that her burden was met and that there was, in fact, no need for a trial.

The Court found that Bhavna failed to establish her grounds for divorce by conduct which meets the requirements of law for a divorce for habitual cruel and inhuman treatment, **despite** the admissions.

III. Bhavna failed to prove the Court committed manifest error in setting aside a default entry and allowing Arvind to file an out of time Answer to her Complaint following a joint reconciliation attempt that lasted approximately a year

Bhavna appeals the Order of the Court to set aside an entry of default and grant leave to Arvind to file an out of time Answer to her complaint.

First, Bhavna argues extensively that Arvind failed to answer within the 30-day period allowed under Rule 12(a), *M.R.C.P.* She states that Arvind was served with the summons on or about July 30, 2004 and that his reasons stated in his affidavit submitted in support of his *Motion to Set Aside Default* were not adequate justification.¹³

The Court in its order stated that no prejudice was shown to Bhavna by setting aside the default and that public policy favors marriage and requires that grounds be proven to the Court and that the case be fully presented on all relevant facts. (R. 79, *Judgment*, September 15, 2005)

Bhavna did not just tell Arvind that she was going to call her attorneys and tell them to “drop the divorce”, she told him that her attorneys had continued in the divorce proceeding without her permission. (R. 59) She had moved back home and reconciled her marriage less than a month after filing her divorce complaint. It was perfectly reasonable and logical for Arvind to believe it was moot to answer the divorce complaint.¹⁴ Bhavna was not pursuing her divorce action as shown by her withdrawal of her request for Temporary Relief on October 8, 2004.¹⁵ The Court found that good cause or excusable neglect for failing to timely file an answer was found because Arvind wanted to attempt reconciliation and Bhavna acquiesced in the attempt. (R. 78, *Judgment*, September 15, 2005) Nevertheless, Bhavna fails to prove manifest error by the

¹³ Bhavna never moved the Court to reconsider its judgment on this matter nor brought it up again until this appeal was filed after the trial.

¹⁴ Arvind was not represented by counsel at this point.

¹⁵ Ironically, Bhavna now argues that her withdrawal of her request for temporary relief after reconciling her marriage was “notice” to Arvind that the divorce action was still pending.

Court by setting aside the entry of default and allowing Arvind to file an answer to her complaint.¹⁶

CONCLUSION

There were no findings by the Chancellor that were either manifestly wrong, clearly erroneous, or applied an erroneous legal standard and Defendant/Appellee Arvind M. Kumar respectfully submits that the orders entered by the Lowndes County Chancery Court should be affirmed, with costs taxed to Plaintiff/Appellant.

This, the 15 day of June, 2007.

RESPECTFULLY SUBMITTED,
ARVIND M. KUMAR, Appellee

By: _____

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¹⁶ Bhavna does not even specify in her brief where the Court committed manifest error in her argument regarding Arvind's answer filing. In fact, the only place the term "manifest error" is mentioned is in the heading.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent via the United States Mail, properly addressed and first class postage prepaid, to the following:

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