

Mr. M Vs. Mrs. M

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Court : Mumbai

Decided On : Feb-07-2014

Judge : A.S. Oka & S.C. Gupte

Appeal No. : Family Court Appeal No. 71 of 2006

Appellant : Mr. M

Respondent : Mrs. M

Judgement :

A.S. Oka, J.

1. By this Family Court Appeal, the Appellant husband has taken an exception to the judgment and decree dated 5th April 2006 passed by the learned Judge of the Family Court, Pune. We have blocked the names of the parties for the benefit of the parties considering the rival allegations.

2. The Appellant husband filed a Petition for seeking a decree of divorce under Clause (ia) of Sub-section (1) of Section 13 of the Hindu Marriage Act, 1955. The marriage was solemnized on 3rd July 1998. The divorce was sought on the ground of cruelty. The ground of cruelty is based on the allegation that a false prosecution was initiated at the instance of the Respondent against the Appellant and his family members for the offence punishable under Section 498A of the Indian Penal Code. In the Petition for divorce, the Appellant has set out various details and has alleged that the manner in which the prosecution was conducted caused

enormous mental cruelty to him and to his family members. It is pointed out that the prosecution resulted into the acquittal. The Respondent wife denied the allegations by filing a written statement. The Appellant examined himself. The Respondent examined herself. The Appellant examined two other witnesses. The Respondent also examined one witness. The learned Judge of the Family Court held that the Appellant failed to substantiate the allegations of cruelty.

3. The learned counsel appearing for the Appellant has taken us through the pleadings and the notes of evidence. He pointed out the consistent conduct of the Respondent as reflected from the evidence on record. He also invited our attention to the judgment and order of the Criminal Court by which the Appellant and his family members were acquitted in a case where allegations against the Appellant and his family members were of the commission of the offence punishable under Section 498A of the Indian Penal Code (for short 'IPC'). He submitted that filing of such a false case against the Appellant and his family members and the manner in which the case was conducted caused mental cruelty to the husband. He relied upon a decision of the Division Bench of this Court in the case of *Nitin Ramesh Dhiwar v. Sou. Roopali Nitin Dhiwar* (2012(7) ALL MR 315). He also relied upon an unreported decision of this Court in the case of *Nagesh Dhanapp Chikanti v. Sou. Manisha Nagesh Chilkanti* (FCA No.158 of 2008 decided on 6th May 2010). He relied upon a decision of the Apex Court in the case of *V. Bhagat Vs. Mrs. D. Bhagat* (AIR 1994 SC 710(1)). He pointed out that in the written statement, the wife has alleged that due to the mental and physical ill-treatment of the Appellant, she suffered from arthritis. He also pointed out that in the written statement, the wife has alleged that due to the ill treatment given to her by the Appellant and his family members, her father suffered a shock and due to shock, he expired on 22nd March 2003. The learned counsel urged that these unsubstantiated allegations of serious nature caused mental cruelty to the Appellant-husband.

4. The learned counsel appearing for the Respondent submitted that mere acquittal in the prosecution under Section 498A of the IPC by itself will not amount to cruelty. Inviting our attention to the judgment of the Criminal Court, he urged that there is no finding recorded by the Criminal Court that the allegations made by the Respondent wife were false. He submitted that the only finding recorded by the

learned Magistrate is that the prosecution could not establish the ingredients of the offence on the basis of evidence on record. He submitted that no other allegation of cruelty has been substantiated. The learned counsel appearing for the Respondent wife submitted that even if this Court is inclined to take a view that the allegations of cruelty are proved, this is a fit case to grant permanent alimony under Section 25 of the Hindu Marriage Act, 1955 (for short the said Act?).

5. As far as the plea of the Respondent for grant of permanent alimony under Section 25 of the said Act is concerned, the learned counsel for the Appellant relied upon a decision of the Division Bench of this Court in the case of Smt. Sudha Suhas Nandanvankar v. Suhas Ramrao Nandanvankar (AIR 2005 Bombay 62). He urged that when it is established that the wife has harassed the husband, the Court must decline to grant permanent alimony under Section 25 of the said Act. He also relied upon a decision of the Apex Court on this aspect in the case of Deb Narayan Halder v. Smt. Anushree Halder (AIR 2003 SC 3174). In the said decision, the Apex Court held that a wife who leaves matrimonial home without any justification is not entitled to maintenance under Section 125 of the Code of Criminal Procedure, 1973.

6. We have given careful consideration to the submissions. We have perused the pleadings, notes of evidence as well as the record of the case. It will be necessary to make a reference to the averments made in the Petition for divorce filed by the Appellant. The affidavit in-lieu of examination-in-chief of the Appellant is virtually a replica of the Petition. The marriage between the parties was solemnized on 3rd July 1998. It appears from his pleadings and evidence that the first dispute between the parties was during the Diwali of 1998. It is alleged that contrary to the wishes of the Appellant, the Respondent proceeded along with her brother to her parents' house at Solapur. A reference is made to certain petty quarrels between the Appellant and the Respondent.

7. It is alleged that in October 1998, the Respondent's father called up the Appellant in his office and abused him by making allegation against him that he is not properly looking after the Respondent. It is alleged that in September/October 1998, the Respondent accompanied by her father and his cousins Sudhir and

Pradeep visited the Appellant's office and fought with him. It is alleged that for a period of one year, the Respondent was away from her matrimonial home and she returned to the matrimonial home in the second week of June 2000. After she returned, there was a quarrel between the parents of the Appellant on one hand and the Respondent and her mother on the other hand. On 22nd June 2000, the Respondent and her family members lodged a complaint with the Women's Cell, Commissioner Office at Pune. It is stated that the Respondent was suffering from arthritis and therefore, the Appellant had taken the Respondent to their family doctor. Thereafter, the Appellant took her to a specialist. It is alleged that it is during this period, a complaint was lodged by the Respondent and her family members by approaching women's cell.

8. The next important incident alleged in the Petition for divorce is of 8th January 2001. It is alleged that on that day, the Respondent's father, her cousins Satish, Sudhir and Dilip visited the appellant's house in the afternoon. At that time, the Respondent was sleeping. Satish went in the room where she was sleeping and woke up the Respondent. It is alleged that the Respondent packed the ornaments and other articles given to her in a suitcase and she handed over the said suitcase to Satish who kept the same in his vehicle which was parked outside the house. It is alleged that Dilip uttered derogatory words to the Appellant's father describing him as a œbeggar?. It is stated that the Respondent on that day left the matrimonial home with the bag and baggage and on the very day, she lodged a complaint at Samarth Police Station alleging offence punishable under Section 498A of the IPC against the Appellant, his parents, his brothers and his sister. An order of acquittal was passed by the learned Magistrate on 16th September 2004. Material allegations based on the said prosecution are in Paragraphs 17, 18 and 22 of the affidavit in lieu of examination-in-chief, which read thus:

œ17. All the accused (I and my entire family) had appeared before the Ld. Judge and were granted bail on 29/3/2001. Since then I and my family members appeared before the Ld. Judge on 21/4, 25/5, 17/5, 13/6, 20/7, 10/8, 12/9, 25/10, 20/12 in the year 2001. Similarly I and my family members appeared before the Court, on 26/2, 30/3, 12/6, 2/7, 23/7, 16/8, 12/9, 4/1C, 23/10, 21/11, 4/12 in the year 2002. Similarly I and my family members appeared before the Court, on 3/1,

17/1, 11/2, 20/2, 11/3, 21/3, 9/4, 24/4, 6/5, 19/5, 18/6, 3/7, 16/7, 8/8/ 4/9, 25/9/ 17/10, 7/11, 21/11, 1/12, 19/12 in the year 2002. Similarly I and my family members appeared before the Court, on 8/1, 23/1, 11/2, 23/2, 11/3, 12/4, 27/4, 25/5, 3/6, 10/6, 21/6, 28/6, 2/7, 3/7, 9/7, 16/7, in the year 2004.

18. The Respondent, who was the complainant in the case, remained absent on numerous occasions and the matter was prolonged hence. My family members and I had to seek leave from our job and had to remain present in the Court. My parents and me who are suffering from health problems like B.P., Eyesight problem, Piles (Father) also had to remain present and sit for hours together waiting for the Respondent to come or for the Honourable Judge to give the next date. All this has affected me mentally and physically. I have not been able to concentrate on my work owing to the health problems of my parents and the court case. My unmarried sister also had to come to the court, for no faults of hers. My brothers were unnecessary involved in this trauma, which they too had to undergo, without the remotest connection with this case. I state that the entire ordeal which went on for 3 years, has caused immense mental cruelty upon me. Further, I was helpless as my family members also suffered because of this false case. For no fault of my family members, and me had to undergo the immense stress of fighting out a Court case.?

22. In such circumstances, filling of a false complaint, the trauma of facing the trial and victory of right over wrong, all amount to cruelty. By acquittal of all the accused i.e. my family, and I state that I have suffered irretrievable loss and irreparable damage and have cruelty of the highest nature.?

9. As stated earlier, the affidavit in-lieu of examination-in-chief is a replica of a Petition for divorce. The allegation is that filing of a false complaint and the trauma of facing the trial amounted to cruelty. It is alleged that the Appellant took good care of the Respondent but the Respondent inflicted cruelty upon the Appellant.

10. In her written statement, the Respondent contended that she became aware of the order of acquittal passed on 16th September 2004 from the averments in the Petition for divorce. With reference to the allegation that the Respondent left the matrimonial home on 8th January 2001, the contention raised in the written

statement is that in fact the Respondent was badly treated by the Appellant and his family members and that she was driven out from her matrimonial home. In Paragraph 17 of the written statement, various instances of ill-treatment given to the Respondent have been set out. It is stated that due to mental and physical ill-treatment by the Appellant and his relatives, the Respondent suffered from arthritis. It is contended by the Respondent that the Appellant deserted the Respondent from 4th June 1999 to 28th June 2000. She stated that on 5th November 1999, her father filed a Petition before the President of their Community. The Panchas of the Community had called upon the Appellant to attend meetings but he had refused to attend. It is alleged that the Appellant and his family members treated her with cruelty. Due to the shock, Respondent's father died on 22nd March 2003.

11. As regards what transpired from 22nd June 2000, in clauses (f) and (g) of Paragraph 17 of the written statement, the Respondent has stated thus:-

œ(f) On 22.6.2000 on the occasion of birthday of petitioner the respondent tried to contact him on phone but petitioner did not respond. So on 24.6.2000 the father of respondent was compelled to give complaint applicant to Mahila Police, Pune. During enquiry of this complaint application the petitioner was called for at that time to avoid the police case the petitioner showed his willingness and gave a guarantee of his good behavior with respondent and as such he took the respondent for cohabitation to his house on 28.6.2000. The respondent was residing there till 8th Jan. 2001. During this period also the behavior of the petitioner and his family members was not changed. On the contrary there was grudging in the mind of the petitioner and his family members that the respondent approached the police and so all of them were ill-treating her.

That the Petitioner was not allowing the matrimonial relations as husband and wife with the respondent without any reason. As such the cruel behavior of the petitioner and his family members were continued.

(g) On 7.1.2001 petitioner picked quarrel on flimsy ground with respondent and he insisted the respondent to go out of house. And in that quarrel he expressed that she should bring money from her father for Flat otherwise she is of no use. At that

time brother of petitioner Vijay rushed towards the respondent for assaulting her. That due to this incident the respondent called her father on phone. When the father and brother of respondent came to the house of petitioner at that time the petitioner and his family members insulted them and abused them and as such she was driven away from his house without any reason. As such the petitioner has deserted her since Jan 2001, That the petitioner and his family members treated her with cruelty. Due to this shock the father of respondent expired on 22.3.2003. The facts contrary to this real position, mentioned in petition of the petitioner are absolutely false and are denied by the respondent.?

12. From the pleadings, it appears that there are allegations and counter-allegations. The stand of the Respondent is that from 4th June 1999 till 28th June 2000, the Appellant deserted her. It is stated that the Respondent returned to her parent's home on 4th June 1999 for the purposes of attending the marriage of her brother which was to be solemnized on 29th June 1999. Thereafter, the Appellant deserted her till 28th June 2000. The Respondent claims that on 24th June 2000, her father was compelled to file a complaint to Mahila Police Station, Pune, where the Appellant was called who showed willingness to cohabit with the Respondent and accordingly on 28th June 2000, he resumed cohabitation with the Respondent which continued till 8th January 2001. Except for the bald statement that from 28th June 2000 to 8th January 2001, the Appellant and his family members ill-treated her, no particulars of alleged ill treatment have been set out except for stating that, on 7th January 2001, the Appellant picked up quarrel with on flimsy ground. It is alleged that the Appellant demanded money from the Respondent's father for acquiring a flat. There are two allegations of serious nature which are made in the written statement. The first is that due to mental and physical ill-treatment given by the Appellant to the Respondent and her relatives, the Respondent started suffering from arthritis since May 1999. The second allegation is that the Appellant and his family members treated the Respondent with cruelty and that due to shock, her father expired on 22nd March 2003. The learned counsel appearing for the Appellant submitted that such allegations of serious nature have remained unsubstantiated, which amount to causing mental cruelty to the Appellant.

13. Therefore, it will be necessary to make a reference to the deposition of the Respondent which is in the form of affidavit in lieu of examination-in-chief. The allegation regarding the Respondent suffering from arthritis finds place in Paragraph 8 of the affidavit in lieu of examination-in-chief. In Paragraph 10, it is alleged that her father died due to shock. In Paragraph 17, the Respondent has stated that she was ready and willing to cohabit with the Appellant even on the date of filing of the affidavit in lieu of the examination-in-chief.

14. It will be necessary to peruse the cross-examination of the Respondent. In Paragraph 15, she has stated that she has not produced any document to show that because of the harassment by the Appellant, she suffered from arthritis. She admitted that she had taken treatment from Dr. Bhagali, Dr. Salunke, Dr. Chopra, Dr. Jeurkar and Dr. Pai for arthritis. In Paragraphs 17 and 18, the Respondent was cross-examined on the incident of 8th January 2001. Paragraphs 17 and 18 of the deposition read thus:-

œ17. It is not correct to say that on 8/1/2001 after our lunch my parents came to the house of petitioner. It is not correct to say that at that time I served them with tea. I do not remember at the time when they came to the house of petitioner. But they might have come at 12.30 pm. In the evening of 7.1.2001 I gave phone call to my parents, from outside. My one relation Baddies staying at Karvenagar, Pune. It is true that sister of wife of my brother is also staying at Pune. My maternal uncle Katawe is staying in Gurwar Peth of Pune. When I gave phone call to my father on 7/1/2001 I was neither happy nor weeping. I did not tell my father on phone to start immediately.

18. It is true that whenever my parents requested the petitioner for visit to their house at Solapur, he told them that he could not as he had work in the office. I cannot tell whether petitioner is hard worker. It is true that sometime he worked full week of 7 days in the office and sometimes duty on out station. It is true that his brother Vijay and Devendra and his sister Rajashree were also employed. It is not correct to say that on 8/1/2001 except the parents of the petitioner nobody from his family was present in the house. It is true that on that day the petitioner and his sister Rajashree were not present in the house.?

15. In the cross-examination, she admitted that her father had made an application to the President of her Community for requesting them to persuade the Appellant to resume cohabitation. In Paragraph 25 of her cross-examination, she stated that even in the criminal case, she expressed a desire for cohabitation. She further stated that in the criminal case, the evidence of her father, uncle, cousins and two other witnesses was recorded. She admitted that she deposed in the criminal case and the Court did not prevent her from adducing oral and documentary evidence. She stated that the Public Prosecutor did not prevent her from adducing the evidence. Though she stated that an Appeal against acquittal was filed, she was not possessing the papers of that Appeal. In Paragraph 30 of the cross-examination, she admitted that she never thought of filing a complaint against the Appellant till her father gave a complaint to Woman's Cell. She stated that she had come with contact of P.I. Savita Turekar. She stated that she complained to the said PI that the Appellant was not keeping sexual relationship with her. She admitted that when she filed a complaint with the Police Station, her father and brother Satish were with her. She stated that she directly went to the Police Station from the house of the Appellant on 8th January 2001.

16. At this stage, it will be necessary to make a reference to the complaint filed by the Respondent's father with the Community. The said complaint is at Exhibit-74. In the said complaint, there is no allegation of cruelty made against the Appellant. It is alleged that the Appellant's mother and sisters have misguided the Appellant and have tried to instigate him to fight with the Respondent. In fact, the allegation made in the said letter is that no efforts were made by the Appellant and his relatives to ensure that the cohabitation is resumed. Therefore, a request was made by him to the President of the Community to make efforts for reconciliation. The date of the complaint is 5th November 1999. From various documents on record which include the minutes of the meeting of Panchas of the Community it appears that that till 30th January 2000, the Respondent and her father were attending the meetings of the Committee. Minutes of the meeting held on 30th January 2000 are at Exhibit-86. Even according to the case of the Respondent, on 28th June 2000, the parties resumed cohabitation.

17. The certified copy of the deposition of the Respondent in the criminal case is on record. The attention of the Respondent was invited to the said deposition in her cross-examination before the Family Court. In the cross-examination, she admitted that the Appellant used to accompany her when she was taking treatment from Dr. Chopra for arthritis.

18. Perusal of the judgment of the learned Magistrate which is at Exhibit-41 shows that the learned Magistrate has taken into consideration the evidence of the prosecution witnesses. The learned Magistrate has recorded a finding that the ingredients of the offence have not been established.

19. Careful perusal of the evidence of the Respondent in the criminal case shows that no allegation of any acts of cruelty on the part of the Appellant's parents, his brother and sisters have been alleged for the period subsequent to 28th June 2000 when the parties resumed to cohabitation. An allegation is made that the Appellant demanded that the Respondent's father should give him a flat worth Rs.3,00,000/- to Rs.4,00,000/- or at least give him the said amount. In her cross-examination before the learned Magistrate, she admitted that she never made any complaint about the demand of flat or money by the Appellant till December 2000. In the written statement before the Family Court, the Respondent has not stated that the Appellant demanded a flat worth Rs.3,00,000/- to Rs.4,00,000/-. It is alleged that he demanded money from her father for acquiring a flat. Hence, this allegation regarding the demand of money for a flat is not substantiated by the Respondent.

20. We have already adverted to the statements made in Paragraph 17 of the deposition of the Appellant as to how the criminal case proceeded. He has stated that he along with his family members appeared before the learned Magistrate on 9 dates in the year 2001, on 10 dates in the year 2002, on 21 dates in the year 2003 and on 16 dates in the year 2004. The trauma undergone by the Appellant and his family members have been set out in Paragraphs 17 and 18. On both the paragraphs, there is hardly any cross-examination. Though the Respondent came out with a case that she has preferred an appeal against the acquittal, she could not give any particulars and even could not produce a copy of the appeal preferred

either by her or by the State Government.

21. Thus, what can be concluded is that the Appellant could not substantiate her allegation of cruelty against the Appellant and his family members in the criminal prosecution. The case made out before the Family Court by the Respondent was that she was always interested in resuming cohabitation and she was willing to do so even when the cross-examination was being recorded in the criminal case. As stated earlier, in the criminal case, the Respondent did not make any specific allegation against the accused persons except the Appellant. The allegation against the Appellant regarding the demand of flat and money appears to be an afterthought. Till 30th January 2000, the Respondent and her father were attending meetings convened by the Community for the purposes of reconciliation. Thereafter, parties stayed together only from 28th June 2000 to 8th January 2001. Even before Family Court, the Respondent has not substantiated her case as regards ill treatment by the Appellant during this brief period of about six months. We have already stated that for a period of four years the Appellant and his family members were forced to attend the Court of the learned Magistrate. The agony, trauma and humiliation undergone by the Appellant and his family members due to the criminal prosecution has been narrated by the Appellant. The version of the Appellant on this aspect will have to be accepted.

22. The specific allegation made in the written statement that the Respondent started suffering from arthritis due to ill-treatment given to her by the Appellant is not at all established. The Respondent has admitted that for taking treatment for arthritis, she consulted several doctors. She did not examine any doctor to substantiate the said allegation regarding the cause of arthritis. Even the other allegation in the written statement that her father died due to shock on account of ill-treatment given to the Respondent has remained unsubstantiated. These are very serious allegations made in the written statement. From 8th January 2001, the parties admittedly resided separately. It not even an allegation made by the Respondent that after 8th January 2001, there was any harassment by the Appellant. The Respondent's father died on 22nd March 2003. Even a casual connection between the alleged acts of cruelty and the death of the father has not been established. We have no hesitation in holding that the both the defamatory

allegations are of very serious nature. The allegations could not be substantiated. The said allegations are reckless allegations made by the Respondent wife.

23. In the case of *Samar Ghosh v. Jaya Ghosh* (2007)4 SCC 511), illustrations of mental cruelty have been set out in Paragraph 101, which reads thus:

œ**101.** No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of œmental cruelty?. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental

health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.?

24. In the case of K. Srinivas Rao v. D.A. Deepa (2013) 5 SCC 226), in Paragraph 16, the Apex Court held thus:

œThus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.?

(emphasis added)

25. In the case of Ravi Kumar v. Julmi Devi (2010)4 SCC 476), in Paragraphs 19 and 20, the Apex Court held thus:

œ19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, some time it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial, behavior defies any definition and its category can never be closed. Whether husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any pre-determined rigid formula. **Cruelty in matrimonial cases can be of infinite variety it may be subtle** or even brutal and may be by gestures and words. That possibly explains why Lord Denning in **Sheldon v. Sheldon** held that categories of cruelty in matrimonial cases are never closed.?

(emphasis added)

The learned counsel appearing for the Appellant relied upon an unreported decision of this Court in the case of NageshDhanapp Chilkanti (supra). In Paragraph 9, the Division Bench held thus:

œ9. The appellant has categorically deposed in examination in chief before the Family Court that by filing of false complaint for alleged commission of offence under Sec. 498A of IPC the respondent has falsely prosecuted the appellant and his family members. The cross examination of the appellant indicate that the fact of acquittal of the appellant and his family members was never disputed and as such the Family Court ought to have proceeded to accept the contention of the appellant that false criminal cases were filed against the appellant and his family members with a view to cause utmost embarrassment, humiliation and sufferings. Filing of false criminal cases against the appellant and his family members would very much constitute mental cruelty.?

26. Now coming back to the case in hand, the Respondent has not substantiated allegations of cruelty in her evidence. She could not substantiate the allegations even in the criminal Court. Only witness examined by her is Mr.V who was a member of Nyaya Nivada Samiti of Shri Som Wanshiya Sahastrajur Kashatriya Samaj Seva Mandal in the year 1999. He deposed regarding the application made by the Respondent's father to his Community which is at Exhibit-74. He deposed regarding the proceedings before the Nyaya Nivada Samiti. He has stated that though various notices were sent by the Committee, there was no response from the Appellant. Even taking the said evidence as correct, the same does not help the Respondent to establish allegations of cruelty made by her. We have already noted earlier that in the application at Exhibit 74, there was no allegation against the Appellant of cruelty and in fact, the request of the father was to make an effort to resume cohabitation.

27. As held by the Apex Court, whether a particular act will constitute cruelty or not will depend upon the facts and circumstances of each case. Whether an order of acquittal in criminal prosecution lodged at the instance of the spouse amounts to cruelty will depend upon the facts and circumstances of each case. Whether the criminal Court has recorded a finding that the prosecution case was false is again

not a clinching factor. Considering the evidence on record, the Matrimonial Court will have to decide whether the prosecution which resulted into acquittal will amount to an act of cruelty. In a given case, depending upon the evidence on record, even if the acquittal is on the ground that the charge could not be substantiated and even if there is no finding recorded by the Criminal Court that the prosecution case was false, there can be a case of cruelty. It depends on the manner in which the complaint is filed and prosecuted.

28. Therefore, the scenario which emerges can be summarized thus:

(a) the Appellant established that the Respondent could not substantiate the allegations of cruelty in the criminal case. Even the allegations of cruelty made by the Respondent in the written statement in the present case could not be established by her;

(b) The Appellant and his family members were required to attend Criminal Court on 56 different dates from the year 2001 to 2004. Considering the manner in which the criminal case proceeded, the Appellant and his family members were subjected to humiliation, trauma and agony as set out in the deposition of the Appellant;

(c) The Respondent made a very serious defamatory allegation against the Appellant, both in the written statement and in her evidence, that due to ill-treatment by the Appellant, she started suffering from arthritis. The Respondent made no efforts to substantiate the said allegation. Thus, the Respondent made unfounded defamatory allegation against the Appellant;

(d) The Respondent made another serious allegation against the Appellant, both in the written statement and in her evidence, that due to harassment suffered by her from the Appellant, her father suffered shock which lead to his death. Not only that the Respondent did not substantiate the said allegation, even the cause of death of her father was not brought on record. Even this allegation is an unfounded defamatory allegation;

29. We have no hesitation in holding that the aforesaid conduct amounts to mental cruelty to the Appellant and by reason of such mental cruelty, he is not reasonably expected to continue cohabitation with the Respondent.

30. Now turning to the impugned judgment, we find from Paragraph 16 thereof, the learned Judge seems to have proceeded on the footing that merely because there was an order of acquittal, it was not sufficient to draw an inference that the case is false.

31. The learned Judge of the Family Court has not at all appreciated the case in the right prospective and he seems to have over simplified the matter.

32. As the Respondent has failed to prove the allegations of cruelty against the Appellant and she has failed to prove that it was the Appellant who had deserted the Respondent, the bar under Section 23(1) of the said Act will not apply in the present case.

33. Learned counsel appearing for the Appellant has made submissions on the issue of grant of permanent alimony under Section 25 of the said Act. The learned Judge of the Family Court decided the case in the year 2006. There is no evidence on record as regards the present income of the Appellant. Under Section 25 of the said Act, the wife can seek permanent alimony even after passing of a decree of divorce. In this Appeal, it will be unjust to record a finding regarding entitlement of the Respondent to receive permanent alimony. We, therefore, propose to grant liberty to the Respondent to file a separate application under Section 25 of the said Act by keeping all the contentions of the parties open. It is obvious that the concerned Court will have to take into consideration the findings recorded in this judgment while deciding the application made by the Respondent.

34. Accordingly, the Appeal must succeed and we pass the following order:

ORDER

(a) The impugned judgment and decree dated 5th April 2006 is quashed and set aside;

(b) The marriage solemnized between the Appellant and the Respondent on 3rd July 1998 stands dissolved by a decree of divorce under Clause (ia) of Subsection (1) of Section 13 of the Hindu Marriage Act, 1955;

(c) To that extent, the Petition No.A-100 of 2005 stands allowed;

(d) It will be open for the Respondent to make an application to the appropriate Trial Court for grant of permanent alimony under Section 25 of the Hindu Marriage Act, 1955; If such application is made, the same will be decided on its own merits in the light of the observations made in this judgment;

(e) The Appeal is allowed on above terms;

(f) There will be no order as to costs.

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