SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Vivek Allahbadia Vs. Nisha Vivek Allahbadia

Vivek Allahbadia Vs. Nisha Vivek Allahbadia

SooperKanoon Citation : sooperkanoon.com/1174378

Court : Mumbai

Decided On : Dec-22-2014

Judge : The Honourable Mrs. Justice V.K. Tahilramani &Amp; a.K. Menon

Appeal No. : Family Court Appeal Nos. 143 of 2012 & 144 of 2012 with Civil Application Nos. 16 of 2012, 17 of 2012 in FCA No. 143 of 2012, 144 of 2012

Appellant : Vivek Allahbadia

Respondent : Nisha Vivek Allahbadia

Judgement :

Oral Judgment: (A.K. Menon, J.)

1. By this common judgment we dispose of Family Court Appeal Nos.143/2012 and 144/2012 and all Civil Applications pending therein. In the Appeal No.143 of 2012 the Appellant husband (for brevity referred as "Appellant") challenges the judgment dated 21st August, 2012 passed in M.J. Petition No.A-102 of 1999 filed by him for divorce. By the said judgment the Family Court dismissed his petition seeking divorce on the grounds of cruelty and custody of child Sidharth was retained with the Appellant till he became a major without any restrictions on the child visiting the Respondent wife (for brevity referred as "Respondent"). The Appellant claimed an injunction against the Respondent mother ordering her from removing the child from the jurisdiction of the Court which was also dismissed. As on date the child has attained majority and is presently staying with the Appellant.

Hence we are not required to look into the aspect of custody.

2. In Appeal No.143 of 2012 a Civil Application bearing No.16 of 2013 in is taken out by the Respondent seeking payment of arrears of maintenance and handing over of stridhan property and for providing accommodation in accordance with the order dated 8.8.2012 passed by the Additional Chief Metropolitan Magistrate Court at Girgaon. This Court vide orders dated 16th July, 2013 and 18th July, 2013 made it clear that the prayer in relation to accommodation cannot be granted since it was not the part of proceedings before the Family Court In Civil Application No.16 of 2013 an order came to be passed whereby the Appellant husband was directed to deposit arrears in the court.

3. In FCA No.144/2012 the Appellant husband challenges the judgment dated 21st August, 2012 passed in M.J.Petition No.C-192 of 2000 filed by the Respondent wife seeking maintenance before the Family Court. Thus, separate appeals are filed one challenges the order declining divorce and the other challenges the grant of maintenance and return of stridhan.

4. In Appeal No.144 of 2012 the Respondent wife took out Civil Application bearing No.17 of 2013 wherein the Respondent sought deposit of arrears of maintenance after adjusting interim maintenance, a direction to hand over stridhan property and to provide accommodation. The relief in both Civil Applications being identical these applications were directed to be heard alongwith Civil Application No.311 of 2012 which came to be disposed of by 25.11.2013. Interim stay was sought to the part of the impugned judgment of the Family Court directing the Appellant to pay Rs.50,000/- per month and directing to handover stridhan. The order recorded that the Appellant had also deposited Rs.50 lakhs of which the Respondent was allowed to withdraw 25% and the interim order and judgment of the trial Court was stayed on applicant continuing to pay Rs.50,000/- by way of maintenance.

5. The order passed in Civil Application No.311 of 2012 in FCA No.144/2012 in M.J.Petition No.192 of 2002 dated 25.11.2013 came to be challenged in the Hon'ble Supreme Court and vide order dated 22.8.2014 the Supreme Court disposed of the SLP with a request to this Court to dispose of above FCAs within a

period of four months and in the interim directed the Appellant husband to pay maintenance at rate of Rs.50,000/- per month from 5th September, 2013 till disposal of the appeals by this court and subject to further orders of this court.

6. We have heard the learned counsel for the parties at length. On behalf of the Appellant a common compilation of the documents was tendered in both the appeals. The Respondent has objected to documents which are not admitted in evidence. The Respondent has filed a compilation of documents comprising income tax records of the Appellant husband alongwith other documents. Learned counsel for the Appellant has tendered 9 volumes of documents and has separately filed extracts from the 9 volumes so as to obviate intermittent reference to 9 volume compilations. In FCA No.144 of 2012 the Respondent has filed an affidavit in reply in which paragraph 6 summarises the income tax returns, capital expenditure and capital assets value from the assessment year 2002-03 to assessment year 2010-11. Both the parties agreed before us that the contents of the said summary is accurate and there is no need to fall back upon 9 volumes for purpose of verification of these figures and burden the record any further.

7. Learned counsel for the Respondent has also submitted a list of documents on which the Respondent relied in the Family Court in M.J.Petition No.109 of 1999 with certain enclosures. It was Respondent's case that this compilation constitutes evidence of stridhan. This has been objected to by the Appellant's counsel who states that only three documents forming part of the compilation have been taken on record by the Family Court. Those are list of documents itself dated 22.8.2003 which is marked as Exhibit-41, the first photograph showing a view of certain persons to the exclusion of the couple being Exhibit-44. A letter dated 8.1.1999 from the Appellant to the Respondent being Exhibit-48 and the letter dated 27.1.1999 from the Respondent to the Appellant Exhibit-48 in reply to the letter at Exhibit-48 which was marked as Exhibit-49. We have therefore taken into consideration only the Exhibit-41, 44, 48 and 49. Although both the parties wished to produce additional documents before us we have declined to consider them since those were not before the trial Court.

Factual Overview

8. The Appellant's family consisted of his father, mother, a brother, brother's wife and himself. The Respondent's family consisted of her parents and one sister. The marriage was an arranged marriage. According to the Appellant, the father of the Respondent had stated at the time of the wedding that the Respondent is engaged in the family business of Khosla Surgicals and Khosla Surgicals Pvt. Ltd. The matrimonial home was housed in a building in Wadala, Mumbai known as "My Nest". It is a ground plus three storied structure belonging to the Appellant's father's HUF wherein the Appellant had a share. On the ground floor, the Appellant's father ran a nursing home. The first floor was occupied by tenants and the second and third floors were occupied by the Appellant and his family members.

9. The Respondent's family was affluent and stay in an up market area in Peddar Road, South Mumbai where they had two apartments. The Appellant came from a family of doctors and the Respondent from a family of business people. The marriage took place on 2nd June, 1994. The Appellant and the Respondent cohabited for four years and have been living separately since 7th July, 1998. The petition for divorce came to be filed on 25th July, 1999. There is one son born out of the wedlock, who is now major and the Appellant is funding his education. The son is also residing with the Appellant at present.

10. The Respondent wife filed Petition No.C-192 of 2002 seeking maintenance and return of Stridhan. For the sake of convenience we refer to the Respondent-wife as the Respondent and the Appellant-husband as the Appellant, although she was the Petitioner in Petition No.C-192/2002. The Respondent sought an order against the Appellant, inter alia directing him to provide an area of 1000 sq. ft. from the premises admeasuring 3000 sq. ft. believed to be in his occupation, in alternative pay to the Respondent Rs.30,000/- per month as and by way of rent. The Appellant denied her claim and contended that the Respondent was taking advantage of her own wrong and abusing the process of law especially since interim maintenance was already being paid in Petition No.A-102/1999 and this new petition seeking residential accommodation which was filed in the year 2002 was misconceived, misleading and malafide. He further contended that none of the conditions provided in the Hindu Adoption and Maintenance Act, 1956 were

seen in the present case which entitle the Respondent to claim relief. The so called matrimonial home was part of a joint family property with the father and brother of the Appellant holding 3/4th share, and the Appellant 1/4th share. Furthermore, the Appellant questioned jurisdiction of the Family Court to grant division and partition of the property. It was clarified that the premises is not of an area of 3000 sq. ft. but only 2161 built up area and there was no question of providing any premises to the Respondent. The Respondent also claimed that certain items of jewellery and other gifts constituted Stridhan were entrusted to the Appellant and sought return of these items.

The Evidence

11. The Evidence in both the divorce petition and maintenance petition was common. The Appellant has led evidence of three witnesses apart from the Appellant himself. In the evidence, the Appellant has stated that marriage was arranged marriage and that the parties cohabited at Wadala and one son Sidharth was born on 26.4.1995. At that stage the child was with the Respondent's mother. He has deposed that the Respondent used to help her father in the family business and she was from a well to do family, had an active social life and likes to go to pubs and discotheques. He deposed that they were from an orthodox Hindu family but he did not mind her working but not at the cost of household affairs. It is contended that the Respondent had completed a course in Hotel management and was working with her father. The Respondent was not very close to family members of the Appellant. She was having moods swings and was enjoying social life and going to pubs.

12. The witness deposed that on the honeymoon trip to Italy he experienced her aggressive attitude when the Respondent walked away back to the hotel after quarelling on a petty issue. She threw tantrums and used abusive language. Apart from this one incident the Appellant has not deposed to any other incident of aggressive behavior, rudeness at the material time. The Appellant deposed that his is a family of doctors and the atmosphere at home is calm. His sister-in-law is also a doctor and she is working part time and yet managing the house. However, the Respondent did not perform her household duties on the pretext of going to

work from 9 am to 5 pm. The Respondent was aggressive and was indifferent to all the family members. Initially the Respondent's behavior with domestic and hospital staff was good but later it turned rude with them. The Appellant was mentally disturbed due to the conduct of the Respondent.

13. The witness further deposed that he is living in house which is a HUF property. His father has 50% share, his brother has 25% share and the Appellant has 25% share. He has no share in the nursing home which is run on the ground floor. The father of the Respondent has the business of exporting surgical instruments and the Respondent was a Director in the company and was drawing a salary till she joined the Appellant in U.K. and even after returning from U.K. she continued to work with the company.

14. The evidence of Appellant reveals that relations between the parties and their respective families were not cordial. He deposed of the instance when the Respondent's parents visited the U.K. during the Appellant's tenure there. The Respondent neglected the house and she went with her parents to outings, restaurants and spent substantial money on his card but thereafter, when the Appellant's parents visited, they were totally neglected. Abusive language was resorted to and the Appellant's parents left within three weeks instead of continuing to stay for six weeks.

15. The Appellant further deposed that he decided to cut down his training in U.K. on account of failing health of his mother and when he suggest this to the Respondent, she rejected his suggestion and there were heated arguments on this issue. The Respondent was not keen on returning to Mumbai. They eventually did. After return to Mumbai she would neglect to the child and was rude to everyone in his family. She used to go to her father's office to work and return home late. In terms of other incidents of the cruelty cited, once, in a fit of anger, she threw a very hot cup of tea at the Appellant which resulted in a burn injury on his left shoulder.

16. On 7.7.1998, it seems a party had been arranged by the Appellant's brother to celebrate his birthday and the Appellant insisted that child be fed prior to leaving for the party. The Respondent was so furious that she flung a vase at the Appellant which hit him on his knuckles. The Respondent apparently slapped the

Appellant on his face and in view of this conduct the Appellant called his father while the Respondent was trying to call Wadala police station. All these acts are cited as instances of cruelty.

17. In his affidavit in lieu of examination-in-chief in paragraph 7, the father has deposed that he had witnessed that his son was patient with the Respondent but on several occasion the Respondent would get violent and fling paperweights and other objects at the Appellant. That her aggression was exceptionally abnormal apart from her being abusive, rude, arrogant and condescending. The atmosphere in the house was vitiated due to Respondent's unpleasant behavior. In the evidence of the father in support of the acts of cruelty he has corroborated the version of the Appellant that she would be working and returning late and not contributing to the household. She was very curt and the family was reluctantly suffering her behavior. Though the father of the Appellant had no daughters, the Respondent was treated as their own daughter and that on many occasion he had explained to her that the evidence of a happy marriage was mutual respect, tolerance and affection. He has deposed that during his visit to U.K. he was disturbed to see that the Appellant was going through stress. They were to stay in U.K. for six weeks but on both occasion stayed only for three weeks because of the Respondent's behavior and chose to visit other places since he was not feeling welcome. He has deposed that during the stay in the U.K. He noticed that the Respondent would be late in waking up and the Appellant would prepare breakfast and feed the baby.

18. The father has deposed that on 7th July, 1998 he had witnessed the arguments after which the Respondent was calling her sister and brother in law at about 12.30 am and she left with them after carrying her purse and some files. After one month she returned and picked up her clothes and jewellery. In the cross examination of Appellant's father it has been brought out that the family had no objection to a daughter-in-law who was working. This flies in the face of the Respondent's submission that even according to the Appellant and other family members she was not expected to work and her desire to work was causing discontent. However, it has come out in the cross examination that the witness's wife i.e. the Appellant's mother was also practicing as well as looking after

household work.

19. On the issue of return of Stridhan PW 3 Praveen Salunke who was working as watchman of "My Nest" housing the matrimonial home has deposed that the Respondent was always rude and addressed them rudely.

20. The evidence of the Respondent was filed by way of affidavit in lieu of examination in chief in which she blamed the Appellant on all counts. He deposed that in first week of August 1998 the Respondent visited matrimonial house to collect her personal belonging since in July she had only carried some documents. She came along with her sister and brother in law to collect clothes, jewellery, fixed deposit receipts and gold bonds. This happened in presence of Appellant's parents and a friend of the Appellant who had come to meet him and the watchman who carried the suit cases to be put in the car. The Respondent reportedly left the house abusing the Appellant and his family members which could be heard by the neighbours which caused embarrassment. The Respondent did not permit the Appellant to meet their child. According to the Appellant she put unreasonable demands to even allow him to meet child or even meet for attempt of reconciliation including demand that the Appellant should not maintain any relation with his family. This demand was repeated even at Hotel Marine Plaza where they met for reconciliation. It is thereafter that she wrote letter dated Exhibit-48 to which the Respondent replied at Exhibit-49.

21. She deposed that she was forced to leave the matrimonial home without taking anything at midnight on 7th July, 1998. Thereafter the Appellant filed a petition for divorce in January 1999. The Respondent deposed that she was from a conservative and cultured family and girls are not permitted to go to discos and pubs but on much instance by the Appellant she started accompanying the Appellant to pubs and discos. She disputed the allegations of friction during honeymoon and it was a minor wear and tear. She had disputed that there were any fights. She has deposed that the Appellant's mother treated her badly and that for the Respondent's birthday the Appellant did not contribute anything and forced her to get money from her parents. She contends that on 7th July, 1998 she and her son were "thrown out of the matrimonial home" and even 3-4 months

thereafter the Appellant did not call to ask about the child. Mr.Cama relied upon the evidence of the Respondent that when she had conceived she had gone to her mother's house and after about 45 days after delivery when she returned matrimonial home no maid was kept to even clean the house or help her to look after the baby. The Appellant's parents were ill treating her and the Respondent was not provided with proper food and many times stale food was served.

22. The Respondent further deposed that whenever she tried to cook, there was opposition from the parents and ultimately the Respondent's mother arranged for a maid servant. She contends that she was doing all household work and looking after son when the Appellant was abroad and before she joined him in U.K. She cited an incident in December 1995 when they were living in Wales and their son was ill. The Appellant preferred to go shopping leaving her and the son alone in the house. She deposed that she returned to India with child since the child could not bear the cold in UK. Although she stayed with her parents she used to visit the Appellant's parents every weekend. That she tolerated physical and mental torture of the Appellant's parents for the sake of her son and thereafter on 7th July, 1998 she was physically thrown out of the house by the Appellant and abused in front of maid servant. She had no other option but to call her sister and brother in law who took her away. She has deposed that on earlier occasion also she had been thrown out of the house in February 1996 and that their were subsequent meetings of parents on both sides to resolve the differences despite which the Appellant's parents misbehaved with the Respondent's parents. The Appellant was mute spectator. She states that she was not welcome in the family. That she has to do household work and look after the Appellant's mother and cook for entire family. It appears that due to constant fights the Appellant's parents decided to give them space on the second floor with her own pantry. She contends that she was always willing to join the Appellant and tried her best to reconcile and resolve dispute but due to Appellant's conduct co-habitation is not possible. She has then deposed of the Appellant's assets and source of income.

23. In her cross examination she has denied that the honeymoon was not enjoyed and denied the suggestion that the Appellant had to borrow money due to excessive expense incurred by the Respondent. She admits that in December

1995 she returned from U.K. due to extreme cold. She admits her inability to produce any documents to show that her father had incurred expenses at the time of child's birthday party. She denied misuse of debit card of the Appellant.

24. She has denied the allegations of ill treatment of the Appellant's parents during their visit to U.K. She has also denied attending father's office during the day and that she was not sympathetic towards mother in law due to her ailing health. That she has not attended her funeral since she was at U.K. and she did not attend 13th and 14th day since she was not well. She has further deposed that she admits that although she has contended in the affidavit of evidence that she tolerated torture and she has not narrated a single incident in the pleadings. She has in her deposition contested the version of the Appellant as to the incident on 7th July, 1998. She denied that she slapped the Appellant. She however admits that she called her sister and brother in law and requested them to call the police. She denies having gone to matrimonial home in August 1998 to collect the belongings or having sent brother in law. After July 1998 she says she has never visited matrimonial home.

25. Apropos access to the child she has contended that the Appellant did not seek access to meet the child before moving an application in the court. She admits that although she deposed that she was beaten in presence of maid servant Sarita she has not been examined and she does not know her whereabouts. She also admits in deposition that she did not make any application for return of stridhan in 1998 nor was any complaint made to police about the Appellant's failure to return stridhan. In cross examination the Respondent has denied that she threw flower vase and at the Appellant. She however admitted that she has not filed any petition for restitution of conjugal rights and there is no possibility of going back and co-habiting with the Appellant.

26. According to her there was no meeting between the Appellant and the Respondent to discuss reconciliation. She contends that the Appellant and his parents were entrusted with jewellery two days prior to the marriage and the remaining item was entrusted to Appellant's mother after the marriage.

27. In paragraph 7 of the deposition the said witness states that when they got the Respondent back home, the time was around 1.30 am in the morning. They got her back only in the clothes that she and her son were wearing at that moment. This deposition alludes to the fact that nothing else was carried with them. In the cross examination he has denied having visited matrimonial home after July 1998 to collect her belongings. He has also admitted that he did not actually see the marks on the Respondent nor did he take her to the doctor or police station after the alleged incident. The evidence of this witness does not appear to be entirely believable on this aspect.

Rival Submissions:

28. Mrs.Deshmukh, learned counsel for the Appellant has addressed us on three issues, namely, divorce, maintenance and Stridhan. She submitted that the facts of the case reveal that the Appellant was entitled to divorce on the ground of cruelty under section 13(1)(ia) of the Hindu Marriage Act, 1955. She submitted that during four years of co-habitation the Appellant was treated with cruelty by the Respondent. The Appellant had satisfied the test of cruelty as recognised by law and that the trial Court was in error rejecting the claim for divorce.

29. According to the learned counsel the value systems of both parties were different. She identified grounds of cruelty generally under the following heads :

(a) the Respondent was arrogant, rude, over bearing and condescending in her behavior towards the Appellant and his family members;

(b) the Respondent neglected the child's requirement;

(c) the Respondent deliberately left the Appellant's matrimonial home despite the fact that the Appellant's mother was suffering from cancer at the material time;

(d) the Respondent failed to discharge her duties as a wife and a family member;

(e) the Respondent was aggressive in her behavior and often violent;

(f) the Respondent regularly issued threats to the Appellant to call police;

(g) the Respondent made several attempts to assault the Appellant by throwing things at him and

(h) the Respondent treated the Appellant with cruelty by making false accusations including pleadings.

30. In support of these conditions the learned counsel for the Appellant relied upon the averments in the petition alluding to the fact that the Respondent was fond of attending discotheques and parties, was aggressive in her behavior, created nasty scene during their honeymoon and generally created a tense atmosphere in the family. She was disrespectful to the Appellant's family members, even when the Appellant had left for higher studies to the U.K. the Respondent was rude in her attitude and complained about his parents on the telephone during the time she remained in India and before she joined the Appellant in U.K. in September 1995. Her excessive socialising by visiting pubs and discos leaving behind the child unattended with maid servants created lot of problems for him. The Respondent was then sent back to her parents home in December 1996 and she resided with her parents till April 1997 during which period she refused to communicate with Appellant's parents and was attending her father's business. The Respondent later joined the Appellant in Scotland but she resorted to old habits of attending parties etc. and neglecting child.

31. Excessive socializing was a bone of contention resulting in fights and the Appellant facing hardship in education. It is alleged that during his stay in India she insulted his mother for not allowing the Respondent to go for parties leaving behind the child with the servant. That the Respondent used foul language in front of the parents against the Appellant. The Appellant kept quiet in view of welfare of the child and agreed to take her back to U.K. to avoid hardship to the Appellant's parents specially due to his mother being in bad health and suffering from cancer. Mrs.Deshmukh further submitted that the marriage has broken down irretrievably.

32. Mrs.Deshmukh in support of her contention relied upon pronouncements of the Supreme Court in the matters of:-

(i) (2007) 4 SCC 511 Mr.Samar Ghosh vs. Mrs.Jaya Ghosh

(ii) (2013) 5 SCC 226 K.Srinivas Rao vs. D.A. Deepa

(iii) 2004 (2) Bom.C.R. 384 Vijay Kumar R.Bhate vs. Neela Vijay Kumar Bhate

33. Samar Ghosh (supra) being the leading case on the subject i.e. section 13(1)(ia) deals with mental cruelty. It is observed that no uniform standard of living can ever be laid down for guidance as to what constitutes the mental cruelty. For the sake of convenience reproduced below are the broad guidelines which Hon'ble Supreme Court set out in paragraph 101 of the judgment in Samar Ghosh:-

(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 sterilization 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;

34. Mrs.Deshmukh then relied upon the decision of the Supreme Court in K.Srinivas Rao (supra). The view taken in Samar Ghosh was reiterated and further

reference was made to the decision of the Supreme Court in V. Bhagat vs. D.Bhagat wherein it was held that assertions by one party to the marriage that the other was suffering from mental hallucination, had a morbid mind for which he needs expert psychiatric treatment and that the other was suffering from paranoid disorder, etc. can cause mental cruelty. Such pleadings are bound to cause immense mental pain and anguish to the other party the Court observed.

35. The Court also considered matter of Naveen Kohli v. Neelu Kohli in which the wife got an advertisement issued in a national newspaper to the effect that her husband was her employee. The wife got another news item issued cautioning his business associates from dealing with him. This was cited as mental cruelty to the husband and the Supreme Court held that the finding of the High Court that these proceedings could not be taken to be such which may warrant annulment of marriage was wholly unsustainable.

36. In K.Srinivas Rao (supra) it was further observed that 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 prospects 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.

37. In Vijay Kumar Ramchandra Bhate (supra) the Supreme Court considered whether the averments, accusation and character assassination of wife by Appellant in written statement constitutes mental cruelty for sustaining claim for divorce under section 13(1)(ia) of the Act and found that the accusations leveled against the wife such as unchastity and indecent familiarity with person outside wedlock and allegations of extramarital relationship is grave assault on character, honour, reputation, status as well as health of a wife and would constitute cruelty.

38. Mrs. Deshmukh therefore submitted that in view of these pronouncements, the Appellant had made out a case satisfying the basic criteria required to seek a decree of divorce.

39. On the issue of maintenance Mrs.Deshmukh submitted that the Respondent wife was a person of substantial means. She had business interest in Khosla Surgicals and businesses established by her late father which she had taken over. She was a Director in Khosla Surgicals Pvt. Ltd., a company dealing with surgical equipments. Before the marriage when the parties met. The Respondent's father had stated that she would like to work in his business and she was engaged in aforesaid family business. Mrs.Deshmukh further urged the point that the Respondent was a partner in Art and Artifacts, a business which she had not disclosed and in this respect she relied upon some print outs of web page of the website justdial.com in her attempt to demonstrate that she was engaged in the interior designing business. We do not propose to rely upon these documents as they were not part of the record of the Family Court.

40. Learned counsel for the Appellant relied upon TDS certificates appearing at Page 81 to 84 of the compilation of documents relied upon by the Appellant to show that the Respondent was recipient of diverse sums of money amounting to Rs.2,10,000/- during the period 1.4.2005 to 31.3.2006 from one Cozy Furnitek Pvt. Ltd. which paid for technical and professional services. Cozy Furnitek Pvt. Ltd. is admittedly, a company controlled by the Respondent's brother in law Vivek Tarneja. Mrs.Deshmukh also relied upon profit and loss account for the year ended 31st March, 2006 of Khosla Surgicals Pvt. Ltd. wherein the Respondent wife is a partner holding 10% stake and was entitled to her share of distribution of Rs.5 lacs as net profit after tax. The P and L account was produced by the concerned Income Tax Office pursuant to summons issued by the Family Court.

41. Mrs.Deshmukh submitted that the Respondent had masked her real income and deliberately not disclosed her real income and that from various admissions and documents on record it could easily be inferred that she had substantial income. The fact that she travelled abroad on a business visa is indicative of this fact. She owns immovable property in South Mumbai and Central Mumbai which are very valuable. The Respondent has contended that the properties do not fetch her any income. She states that she is not working, therefore, she claims that she is entitled to receive maintenance from her husband. Mrs.Deshmukh relied heavily upon the Respondent's conduct in not disclosing her real income. On the other

hand she juxtaposed this lack of transparency with conduct of the Appellant who had placed all the documents before the Court. She highlighted the fact that expenses of the child including his education was fully borne by the Appellant husband with whom now the son stays and pending the proceedings the son has chosen to stay with the father. She submitted that income tax returns of previous year 2005-06 were made available before the court only after the witness summons were issued to Income tax Officer. This finds place in the compilation of the Appellant at Page 87. It was contended that the Respondent wife had found a treasure trove in the father's flat in Jewellers Apartment, where the Respondent's parents were staying and she took complete charge of her father's business and deserted the Appellant.

42. As regards the Respondent's income and capacity to earn i.e. in respect of issue of maintenance the Appellant's counsel has brought our attention to the fact that the Respondent has travelled on business visa overseas and the Respondent has admitted that she had gone with her father for business cum holiday trip. Thus, the Respondent has admitted to some business interests. The Respondent has also been confronted with the evidence of her business activities inasmuch as the Appellant has alleged that she is partner of the firm Art and Artifacts and that she is earning regular income. The Respondent has denied being connected with Art and Artifacts and denies she draws salary from Khosla Surgicals and even as a Director of Khosla Surgicals. She admits having gone abroad 2-3 times once for wedding in Philippines. These are aspect on the issue of maintenance which we have considered separately in this judgment. Mrs.Deshmukh, therefore, submitted that the Respondent cannot sit idle and claim to be maintained by the Appellant. In FCA No.120/2012 dt. 9/10/2014 Col.Joseph Philip vs. Ritu Joseph Philip the Division Bench of this Court to which one of us (Smt.V.K. Tahilramani, J.) was party vide order dated 9/10/2014 has held that the wife's contention that although she was qualified dentist but will not work but devote time to work for her Trust from which according to her, she gets meagre income is not a correct approach. The Court held in that case, that a qualified lady who was working earlier and earning and who is still capable of earning cannot just give up her job and sit back and expect her husband to provide for her.

43. Mrs.Deshmukh therefore submitted that the maintenance granted to the Respondent was excessive, without any justification and submitted that the Respondent is well provided for and capable of earning and was in fact earning enough. Therefore she submitted that the order granting maintenance ought to be set aside.

44. As far as relief granted directing the Appellant to return Stridhan, Mrs.Deshmukh submitted that Respondent had miserably failed to establish the fact that the Stridhan was in fact retained by the appellant. Quite apart from the fact that there was no extent of stridhan and no evidence particularly the items in list relied upon by the Respondent, the evidence of witnesses on behalf of the Respondent failed to establish that Stridhan was retained by the Appellant. Mrs.Deshmukh submitted that there is no evidence apart from bare statement in paragraph 14 of the affidavit in lieu of examination in chief. No bills of ornaments purchased by the parents of the Respondent are produced. Furthermore, it was pointed out that although written statement mentions Stridhan there is no counter claim for return of Stridhan and no demand made from 1998 till 2002. In cross examination in paragraph 45 the Respondent admits that she has not made any application in 1998 nor made any police complaint. On the other hand the evidence of the Appellant indicates that those items were not retained by the Appellant and that the valuables were taken away by the Respondent. She therefore submitted that the findings of the trial court on the issue of Stridhan were not sustainable.

45. Mr.Cama, learned counsel for the Respondent has pointed out various instances of alleged cruelty and how the same has been dealt with in pleadings, evidence of the Appellant, Respondent and other witnesses and the order. In his view the Appellant has not succeeded in proving cruelty in particular he submitted that the incident in Italy during honeymoon, allegations of neglect of child, making false allegations, therefore, to call police, allegation of non discharge of duties as wife, wild and aggressive behavior have not been established in the evidence. These incidents even if true are not more than three on record over a four year period.

46. Mr.Cama on the other hand has contended that concept of cruelty requires the Appellant to make out specific conduct amounting to cruelty and that he has failed to discharge his burden. He relied upon pronouncement of the Supreme Court in following cases:

(i) AIR 2011 SCC 114 Gurbux Singh vs. Harmander Kaur

(ii) AIR 1988 SC 407 J.L. Nanda vs. Smt.Veena Nanda

(iii) 2010 (2) Bom.C.R.432 Manish S.Agarwal vs. Dolly M.Agarwal

(iv) 1990 (Supp.) SCC 727 Wander Ltd. and Anr. Vs. Antox India Pvt. Ltd.

(v) AIR 2011 SC 2748 Vinay Parmar vs. Paramvir Parmar

(vi) Cri.Appeal No.1627/2007 (AIR 2008 SC 530) Chatur Bhuj Vs. Sita Bai

47. In case of Gurbux Singh (supra) the Supreme Court while reiterating the guidelines laid down in Samar Ghosh (supra) observed that since cruelty has not been defined under the Act, it is quite possible that a particular conduct may amount to cruelty in one case but the same conduct may not necessarily amount to cruelty due to change in various factors. That married life should be reviewed as a whole and few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period of time. Making certain statement at the spur of moment and expressing certain displeasure about the behaviour of elders may not be characterized as cruelty.

48. In J.L. Nanda (supra) the facts reveal that there was disagreement and disharmony between the parties from the very beginning. A male child was born to the couple but they lived together only for few years. Thereafter they lived separately. The main allegation of the Appellant in that case was that from very beginning the Respondent wife did not like to live in the joint family. She used to behave in a peculiar manner always created ugly scenes, indulged in quarrels and taunting and ultimately forced the Appellant to a government allotted quarter and live separately away from family members.

49. The Division Bench of the High Court in that case came to the conclusion that although it was unfortunate that the parties have not been keeping good relations but it could not be said to be a case of cruelty entitling the Appellant to a decree of divorce. In that case Supreme Court dismissed the appeal and confirmed the order of the Division Bench of the High Court. The reasoning in case of J.L.Nanda (supra) can be read into the present case as well.

50. In Manish Satpal Agarwal (supra) the Division Bench of this Court held that the wife ridiculing the husband by calling him mentally weak could not be said to be an act of cruelty and that such allegations cannot be the basis for dissolving the marriage and cannot amount to cruelty.

51. As far as maintenance is concerned Mr.Cama disputed the contentions of the Appellant and submitted that the appeal No.144 of 2012 challenging the order granting maintenance makes out no case for interference. He contended that the amount ordered was less than the bare minimum that his client was entitled looking at the status of the Appellant. Mr.Cama on the other hand disputed the submissions made by Mrs.Deshmukh and inter alia stated that the Respondent has no income whatsoever as on date of filing the petition for maintenance.

52. Mr.Cama relied upon income returns and capital expenditure and value of the Appellant from year 2002-03 to 2010-2012 as summarised in affidavit of the Respondent dated 25th November, 2013 which she filed in reply to the Family Court Appeal No.144 of 2012. Mr.Cama submitted that the Respondent is not wealthy. She was employed with Khosla Surgicals Pvt. Ltd. It is incorrectly contended and that she was engaged in business in the name and style of Art and Artifacts. He contends that there was nothing specifically contended and apart from stating that she was a partner of Art and Artifacts and referring to a print-out of the web page which was also not proved is of no avail. The business of Khosla Surgicals Pvt. Ltd. was bequeathed to her sister as per Will of her late father. As far as Flat 706 at Jewellers Apartment is concerned, her mother was the sole and absolute owner of the said flat and while selling the said flat the Respondent was only shown as the co-owner but entire sale price of the said flat was paid to mother as stated in clause 4 of the agreement dated 5th September, 2002.

Mr.Cama contended that the copies were obtained through illegal means. It is not in dispute that the Will has been probated and therefore production of document of this Court could always have been sought. We do not wish to read much into this objection. Mrs.Deshmukh relied upon partnership deed dated 28th September, 2007 between Vivek Tarneja and the Respondent which disclosed that it carries on business in partnership and both parties have 50% shares in the profit and loss. According to Mr.Cama the Appellant husband has a huge income whereas the wife does not and the husband status has gone up whereas Respondent's status has not. Mr.Cama contends that the income of the husband is about Rs.2 lacs per month.

53. This appears to be correct as can be seen from the list of income tax returns filed. The income tax returns figure of Rs.2 lacs per month however did not hold good at the time when the petition seeking maintenance was filed in the year 2002. The income of the Appellant husband admittedly is much lower on the Respondent's own showing based on the affidavit in reply that she has filed in FCA 144 of 2012. The Appellant's income was about Rs.1 lac per month as on 1.4.2006 which has grown to little over Rs.2 lac per month as of 1.4.2011.

54. Mr.Cama drew our attention to the petition No.C-199 of 2012 and relied upon the averment in paragraph 9 of the petition that income of the Appellant is about Rs.2 lacs. He then referred to paragraphs 6, 12 and 15 of the written statement filed by the Appellant husband while disputing the contentions of the Appellant.

55. Mr.Cama made a specific reference to the cross examination of the Appellant by the Respondent's counsel on 7.8.2008 to rely upon the fact that he was earning 1800 to 2000 pounds while in England and that the Respondent was informed that she would be a housewife after the marriage. He therefore contends that the Appellant would be obliged to maintain the wife and ensure that she has a standard of living commensurate with that of the Appellant. Mr.Cama then made reference to the cross examination of the Appellant on 20.11.2006 when the Appellant admitted that flat situated at Cherrysons building at Bandra which was owned by the Appellant was sold for Rs.1 crore. We have noted that the Appellant denied that those funds were used to purchase flat in Hiranandani complex. The

Appellant contended that the flat at Hiranandani complex is belonging to his mother and father and he was ready to produce relevant documents in this behalf.

56. Mr.Cama then relied upon cross examination of the Appellant on 13.12.2006 to show that substantial sums had been invested by the Appellant and substantial amount has been received by way of income from the said investments. He relied upon admission that the Appellant paid Rs.16,67,252/- for purchase of the car. Mr.Cama relied upon deposition of Appellant on 7th February 2007 and the Appellant admitted being joint owner alongwith father after demise of mother. Mr.Cama relied upon deposition of witness on 21st February, 2005 wherein the Respondent has admitted that his annual income was about Rs.9 lacs. This was elicited during the cross examination and when compared to the table extracted in the affidavit filed in reply to FCA appears to be incorrect. In fact, the income appears to be higher than Rs.9 lacs as it appears from the table reproduced.

57. In paragraph 6 of the Respondent affidavit dated 25th November, 2013 filed in reply to the Family Court Appeal No.144 of 2012 the Respondent has summarised the earnings of the Appellant based on income tax returns for the assessment year 2002-2003 to 2010-2012. Both the parties agreed that the figures appearing in the said table are accurate. The table discloses that the Respondent's professional income for the year ended 31.3.2010 was approximately Rs.26,64,113/- Mr.Cama also relied upon letter written on behalf of the Appellant to Assistant Commissioner of Income Tax setting out various investment by the Appellant in Kotak Mahindra Mutual Fund Rs.30 lacs, ICICI Prudential Mutual Fund Rs. 30 lacs, RBI Relief Bond Rs.1,35,00,000/-. This letter is written in response to query of the authority and it is exhibited in the lower court. The Respondent further contends that the Appellant is extremely wealthy who purchased immovable property and expensive equipment, an expensive car without taking a loan.

58. We may state here that we are not inclined to consider the value of equipment for carrying out his professional engagements. Those are not to be included in the figures of income to be assessed for deciding the issue of maintenance. However, to submit that Rs.50,000/- is to be paid from the date when the application was made i.e. from 2002 would not be correct since in the year 2005 his income was

about Rs.75,000/-per month but according to table the income would be in region of little over one lac to be expected to pay 50% of his income would in our view is not justified.

59. Mr.Cama submitted that looking at current income the amount fixed by the Court would provide for Rs.6 lac per annum. He further submitted that the Respondent is not working after child birth and keeping with expectation that of the Appellant and family members that she could not work full time but she could be engaged in part time activity. According to Mr.Cama she is not working in Khosla surgical business and the same was bequeathed to Respondent's sister and no money was received from sale of flat no.706 or from sale of the garage no.5. That garage no.34 and gala no.424 do not earn any income for the Respondent. Accordingly, he submitted that the amount ordered by the Family Court was just and proper.

60. Mr.Cama then relied upon the decision of the Supreme Court in Vinny Parmar (supra) wherein the Supreme Court had occasion to consider permanent alimony enhancement. The Court cited that earlier decision in Chaturbhuj vs. Sita Bai AIR 2008 SC 530 in which the Supreme Court held that where the personal income of the wife is insufficient she can claim maintenance under section 125 of Cr.P.C. The test is whether the wife is in a position to maintain herself in the way she was used to if she was with her husband. It was held that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family and the expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under section 125 Cr.P.C.

61. As far as issue of stridhan is concerned, Mr. Cama pointed out that the Appellant's contention that there was no evidence on the issue of stridhan is not correct. He submitted that the documents produced along with list dated 22.8.2003 and marked Exh.41 clearly evidences stridhan and that the Appellant has failed to establish that these items were not in their possession. He submitted that there is no denial by the Appellant that those items were given to the Respondent as stridhan and the case of the Appellant is to the effect that all the items of stridhan

had been taken away by the Respondent after she visited matrimonial home in August 1998. He submitted that the evidence of Suresh Shetty PW 4 does not state that he saw Respondent's brother in law and sister taking away jewellery, in fact, the witness Mr.Shetty admits that from where he was seated, he could not see the store-room in which the items were apparently kept. Mr.Cama also assailed the evidence of PW 3 Salunke, who according to Mr. Cama has made some vague statement in his deposition of having carried certain bags to the car of the brother in law of the Respondent. He submitted that the evidence on record is sufficient to establish that items of stridhan are still in the custody of the Appellant and his family members. He supported the discretion exercised by the Family Court to this effect.

62. Mr.Cama then relied upon the judgment in case of Wander Ltd. (supra) to contend that the Appellate Court should not interfere with the exercise of discretion on the ground that if appellate court has considered at the trial stage it would have come to different conclusion. If the discretion has been exercised by the trial court reasonably and in judicial manner the fact that the appellate court would have taken different view may not justify interference with decision of the trial Court. He therefore submitted that the trial court had correctly arrived at the finding apropos stirdhan.

CONCLUSION

63. Apropos the issue of divorce having reviewed the evidence as appearing on the record, there is no reason to fault the findings of the learned Judge on the first issue, namely, whether or not Appellant proves that the Respondent has treated the Appellant with cruelty. In fact the answers to issue nos.1 to 5 do not call for any interference. In our view the trial Court has correctly appreciated the evidence and come to justifiable findings that the Appellant has failed to prove that the Respondent has treated him with cruelty. The instances of cruelty enlisted by the Appellant husband are as follows : rude, excessive socialising, going to pubs and discos, neglect of child throwing a vase, throwing hot cup of tea and making false accusations.

64. As far as visits to discos and pubs is concerned, it has come in the cross examination that they both visited discos and pubs even during the period of courtship. He admitted in relation to the honeymoon episode and he did not complain about it to the family members about aggressive behavior or complaint to anyone about her behavior.

65. The first instance of cruelty relied upon by the Appellant with respect to honeymoon is hardly to be considered as an act of cruelty. Whatever be the reason which led to the incident, the Respondent having walked away and returned to hotel after a quarrel with the Appellant cannot amount to an act of cruelty. There is then the specific incident of the Respondent throwing a hot boiling cup of tea at the Appellant and on one occasion a vase was thrown which hit the Appellant's knuckles. The Appellant's father in his evidence has deposed that the Respondent used to throw things including paper weights at the Appellant. The Appellant himself did not talk about paper weights thrown at him. The vase incident did not result in physical harm to the Appellant inasmuch as no medical treatment worth mentioning has been taken by the Appellant. Even assuming that the medical treatment was available within the nursing home on the ground floor there is no mention that the Appellant was treated for injuries resulting from the vase being thrown at him. As far as hot cup of tea is concerned, although the Appellant himself has not spoken of any injury caused to him, the Appellant's father in his evidence deposed that he has seen some burn injuries on person of the Appellant.

66. The contention of the Appellant that the Appellant's parents had to leave within three weeks instead of staying for six weeks due to conduct of the Respondent does not appear to be accurate since in the cross examination of the Appellant on 31st August, 2006 the Appellant has admitted that his parents came to the U.K. and their return tickets was booked with fixed date of journey and return flight after three weeks. This contention that the Appellant's parents had to return in three weeks earlier is not correct.

67. This deposition needs to be viewed in the background of the fact that evidence on record establishes that the Appellant and the Respondent were provided

separate kitchen on the second floor for their needs in view of difference of the parties affecting the entire house.

68. As far as cruelty resulting from false accusations is concerned the evidence does not reveal that any accusations have been proved to be false. In our view none of the allegations made by the wife entitle the husband to divorce on the ground of cruelty.

69. Thus, we are of the view that evidence does not reveal that the Respondent has treated the Appellant with cruelty. At the best it establishes inappropriate and intemperate behavior which is not expected in matrimonial relationship. Considering the guidelines in paragraph 101 of Samar Ghosh (supra), we can conclude that is correctly put in clause (x) that the marriage should be reviewed as a whole and few isolated instances over a period of four years will not amount to cruelty. The incidents that have been highlighted by the Appellant over a period of 4 years of co-habitation do not in our considered opinion amount to mental cruelty. Taking a cue from the guidelines indicated by the Supreme Court in paragraph 101 of Samar Ghosh (supra) mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference, neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable and frustrating in one spouse caused by other over a life time may lead to mental cruelty. Irretrievable break down of marriage although argued by counsel on behalf of the Appellant, as one of the reasons why in the present case marriage ought to have been dissolved is no ground to the Appellant under section 13(1)(ia) of the Hindu Marriage Act which constitute mental cruelty. Thus, at the best evidence shows insuperable incompatibility between the parties falling short of cruelty. Be that as it may, irretrievable break down of marriage owing to severe and / or insuperable incompatibility does not amount to cruelty and as such no relief can be granted in appeal against the impugned order and judgment as far as divorce is concerned.

70. In the result Family Court appeal No.144 of 212 to the extent it challenges the order declining divorce on the ground of cruelty cannot succeed. The Appellant's son Sidharth is presently a major and of his own volition staying with the Appellant

who alone is funding his education. It is, therefore, not necessary to consider the challenge to the impugned order to the extent it concerns the son, who was minor at the time of passing of the impugned order.

71. As far as maintenance is concerned,the Respondent has not made any averment nor has she deposed that the income disclosed in returns of year 2005-06 was last time that she drew income from the firm. There is no evidence of the firm being dissolved and entire burden of showing this was on the Respondent and till then there should be presumption that she continues to hold stake in the firm. There was no endeavor whatsoever to disclose income over the years. On the other hand evidence was sketchy and vague. Reference was made by Mrs.Deshmukh to the Will of Respondent's father to state that she has inherited a residential apartment, two garages in the building "Jewellers Apartment" one of which was sold. These facts have not been denied. Furthermore, she submitted that there is nothing in the evidence to establish that she enjoyed a particular life style during the four years of cohabitation which the Appellant is liable to support by making payment towards maintenance. She admits that she has not contributed for child's education, although she was well to do and there was no basis whatsoever for the Family Court to grant maintenance at the rate of Rs.50,000/- from the date of application. Apparently, on the date of application the Appellant was earning only Rs.13 lacs per annum as the gross income.

Another important factor which Mrs. Deshmukh drew our attention to is the fact that in the Will Schedule I lists out valuation of the immovable property of the deceased father as well as movable property. The valuation also reveals that immovable property of the deceased father was worth about Rs.3,20,00,000/- as of 2005 i.e. more than 10 years ago. Out of the premises which admittedly came to the Respondent as garage No.5 which is worth Rs.10 lacs and another garage No.34 which is worth Rs.15 lacs and gala no.424 which was worth Rs.50 lacs. It is common knowledge that the value of the property in Mumbai over these nine odd years has multiplied. This apart, the movable property owned by the deceased father of the Respondent in Government bonds and other banks amount to around Rs.3,09,95,000/- Furthermore, the Respondent's father owned shares of 23 limited companies.

72. These have been bequeathed to nominees as recorded with the companies. The names of the nominees have not been disclosed by the Respondent. It is material to note that the Respondent has not denied being beneficiary of some of the properties left behind by her deceased father. Therefore, an adverse inference could be drawn to the effect that substantial assets have come to the hands of the Respondent. This is not to suggest that she is not entitled to maintenance from the Appellant.

73. On a query from the Court whether she was a partner, learned counsel for the Respondent on the first day this matter was heard, we were informed by her Advocate that she would have to check and revert. On the next day Mr. Cama after taking instructions from his client stated that his client "has no recollection" of whether or not she was a partner in the firm. While it is difficult to appreciate selective memory loss, be that as it may, she has admitted in her in cross examination on 5th May, 2012, that the gala in Prabhadevi is in her name. According to her it is occupied by the neighbor and she is not charging any rent to neighbor because he was occasionally using and not regularly and he was a family friend. She admits that she has travelled on business visa to Thailand but contends that her sister has gone for business and she accompanied her sister for holiday. This leads us to draw, a justifiable adverse inference as to her income.

74. Mrs. Deshmukh relied upon the list of assets of the Respondent as per the Will and submits that she is currently residing in two bed room apartment in Mumbai at Peddar Road in up market area of South Mumbai with her mother. She contended that flat No.706 in the same apartment was sold in 2008 but the entire sale proceeds have gone to her mother. Even ignoring this she is the absolute owner of garage no.34 in said building and relevant shares in society, gala no.424 in Kalyan Udyog Bhavan and probably bonds, fixed deposits and shares to which she is beneficiary under the Will. There is no reason to believe that she is not a Director of Khosla Surgicals Pvt. Ltd. holding 14% stake in that business. She has also been receiving amounts from Cozy Furnitek Pvt. Ltd. controlled by Vivek Tarneja. Accordingly, she submits that grant of maintenance by the Family Court is not justified.

75. She submits that the parties have stayed as husband and wife only for four years and have been separated for 16 years. She states that while considering life style and standard of living in order to arrive at the amount of maintenance the life style which needs to be considered is not that of the Appellant today but that of the Appellant in the year 1998. It is difficult to accept this submission inasmuch as that had she been living with the Appellant her standard of living would have been commensurate with that of the Appellant. Having said this there is no evidence to show that the Respondent is not enjoying equally good standard of living in her present state.

76. The Respondent wife was admittedly owner of a gala at Kalyandas Udyog Bhavan at Prabhadevi. However, she has contended albeit incorrectly that she does not derive any income from the said premises. She contended that the office was not being used and not given on rent since she does not want to get into legal battles for recovery of possession later on nor does she want to sell it. However, she admits that the said gala is used by someone else whom she chooses not to name but does not receive any rent for the same. She admits to be owner of garage no.34 which stands exclusively in her name but disputes the value of premises. She also disputes present value of gala at Prabhadevi. The entire value of the property held by a person and kept idle can be used as a yardstick to indicate income potential and actual income since it has never been the Respondent's case that she is living in penury.

77. Applying these tests in the instant case we are of the opinion that the versions given by the Respondent wife apropos her lack of income are not believable. The Respondent wife is from affluent family background and appears to be well provided for. In view of her reluctance to reveal her actual income we are led to believe that she has substantial income of her own. In any event right from the time of marriage she was involved in family business and there is nothing in the evidence to suggest that she has no income at all. Her income or absence of it was within her knowledge. A bare denial will not suffice. In the present case, the wife has been awarded maintenance by the Family Court commencing from 13.8.2002 at the rate of Rs.50,000/-. We find ourselves in agreement with the submission of Mrs.Deshmukh that there is no justification in directing the payment

of Rs.50,000/- per month maintenance from 13th August, 2002. We are of the view that amount should be commensurate with the earning of the Appellant. We therefore propose to modify the figure of maintenance and stagger the same over different years in respect of 13.8.2002 to 1.4.2006. On Respondent's own showing the Appellant's income has not exceeded Rs.26 lacs per annum with effect from 1st April, 2009.

78. On the issue of Stridhan, the learned counsel for the Appellant submitted that although separation took place effective from 7.7.1998 when the Respondent wife left matrimonial home no claim whatsoever was made for return of stridhan whether by way of letter, application or other mode till 18th June, 2002 when for the first time in her written statement dated 18th June, 2002 the Respondent averred that she had been given Stridhan property which she entrusted to the Appellant and his parents and they were illegally holding gold ornaments belonging to Respondent and that the Respondent is contemplating legal action to get back stridhan property. She contended that list of items constituting stridhan was mentioned in Exhibit-2 to the written statement. We have perused said list and fail to understand how items given at the time when Sidharth was born constitute Stridhan. Bed sheets, bed covers and Siddhartha's bags, toys cannot constitute Stridhan. This discloses an attempt at burdening the Appellant husband with claims which by virtue of inclusion of these items are highly suspect. We are unable to subscribe to the view of the trial Court in the matter of Stridhan or in the matter of maintenance for the reasons set out herein As far as evidence on point of stridhan is concerned at page 184 of FCA in paragraph 11 of her evidence which states that "Thereafter I left house at 1 am with my son without taking anything". In paragraph 14 she has deposed that she was given gold, silver and diamond ornaments by his parents in-laws friends and that constitute stridhan Exhibit-B to her petition and that all items in list were entrusted with the Appellant who had illegally withheld the same.

79. We have already seen that there is absolutely no evidence forthcoming on various items to prove that these items were actually given to the Respondent whether by her parents or by friends and relatives or by Appellant's parents. The only evidence that she has relied upon apart from this is video cassette of

engagement and marriage photographs with exception of photograph which is marked Exhibit-44 which have not been proved. Exhibit-44 does not assist the Respondent. On a query from the Appellant's counsel as to receipts, bills or documents to show that ornaments were given by her parents at the time of marriage she stated that she would produce the documents but nothing has come on record. She has deposed that after July 1998 incident she has asked the Appellant to handover clothes and jewellery within a week and she was told that the Appellant does not wish to return anything. She admits that she has not made any complaint to any authority as to alleged failure to return jewellery. The brother in law Vivek Tarneja has deposed that when he visited matrimonial home after being called there by the Respondent in July, 1998, he was told that the Respondent had been beaten by the Appellant on her back and neck and she had blue marks all over her body. The deposition of the said witness is dated 22nd July, 2010 whereas the deposition of Praveen Salunke watchman and Mr. Suresh Shetty PW 4 who has deposed that he met Respondent on 24th August, 2002 and 24th August 2007 respectively. If they had not met Respondent at the matrimonial home in August 1998 the deposition of Respondent's witness Vivek Tarneja would have said so.

80. The evidence of Mr.Pravin Salunkhe, the watchman is also revealing. He has deposed that in August 1998 the Respondent's sister and brother in law came to building "My Nest" at Wadala and told him to carry six suit cases a few handbags from the house to their car which was parked outside main gate of the building and as per their instructions he carried bags up to the car and loaded the same in the car. In the cross examination the said witness PW 3 Salunkhe has stated that the Respondent used to speak in rough language if any mistake occurred and if there is no mistake on her part her behavior was normal. However, he did not remember any incident of rude behavior at the time of his deposition. He deposed that he heard noise of quarrelling on several occasions specially of the Respondent whose voice he heard in loud voice. He has deposed that in August 1998 he did not see anybody other than Respondent's sister and brother in law coming and leaving house.

81. In the cross examination he has reiterated that except the Respondent's sister and brother in law he does not remember having seen Respondent after July 1998 in the said building. On the aspect of return of stridhan, the deposition of witness to the effect that he has personally carried six suit cases and some handbags and loaded them into car has not been shaken There is no reason to disbelieve this witness, whose deposition appears to be truthful. This witness when confronted was fair enough to state that the Respondent was rude only when he committed mistakes otherwise her behaviour was normal.

82. This was controverted by Mr.Cama, learned counsel for the Respondent wife who relied upon Exhibit-41 of the compilation referred to us. At the outset but Exhibit-41 is only list of documents tendered on which the Appellant relied, none of the contents of the list save and except item no.2 and 5 and one photograph has been marked. Thus, in our view the Respondent has failed to establish any existence of stridhan being retained by the Appellant or his family members. Let alone retention by them. We find no justification in the Family Court having arrived at affirmative finding in respect of additional issue as to whether the Respondent proves existence of stridhan.

83. The reasoning given in relation to stridhan issue is to be found in paragraph 153 of the impugned order wherein the learned Judge has relied upon inconsistencies in the evidence of PW 1 as well as PW 2 which rendered them unworthy, inappropriate and unbelievable. As far as evidence of PW 3 is concerned the learned Judge has found inconsistency in the number of bags referred by PW 1 and PW 3 and has on that basis sought to disbelieve evidence of the witness. The fact remains that the Family Court has not arrived at a finding that incident of August 1998 did not occur at all. As pointed out above the evidence of PW 3 Suresh Shetty to effect that he met sister and brother in law of Respondent after July 1998 at the matrimonial home and evidence of Shetty PW 3 to the effect that he was present when sister and brother in law of the Respondent visited him after July 1998 has not been challenged. The sister of the Respondent has led no evidence and brother in law does not dispute the deposition of Suresh Shetty. PW 3 and Praveen Salunke PW 4.

84. Thus, it is established beyond reasonable doubt that the visit/meeting of August 1998 of the sister and brother in law did take place. This fact read with the total absence of evidence and proof of existence of stridhan, the finding of the Family Court is not sustainable. The impugned finding could not be made in view of evidence in the first place. Thus, we are not in agreement with the finding of learned Judge that the property mentioned in the list Exhibit-Bis in possession of the Appellant and his parents. We therefore set aside this finding and we answer the additional issue framed in the negative.

85. In the result Appeal No.143 of 2012 challenging the rejection of the Petition A-102 of 1999 for divorce is dismissed. FCA 144 of 2012 is partly allowed. Appellant to pay to the Respondent maintenance at the rate of Rs.30,000/- from date of filing application to 31.3.2004; Rs.40,000/- from 1.4.2005 to 31.3.2009 and Rs.50,000/- from 1.4.2009 onwards. The order directing the Appellant to handover Stridhan property in list Exhibit "B" in Petition No.C-192 of 2009 of the Family Court is hereby set aside.

86. Both the appeals and civil applications are disposed of in above terms.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com