

SA Vs. AA

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Court : Delhi

Decided On : Mar-22-2016

Judge : Vipin Sanghi

Appeal No. : MAT. APP. 68 of 2012

Appellant : SA

Respondent : AA

Judgement :

1. The present appeal under Section 28 of the Hindu Marriage Act (HMA) is directed against the judgment and decree dated 20.10.2012 passed by the learned ADJ (East), Karkardooma Courts, Delhi in HMA No.323/2010 preferred by the respondent/husband against the appellant/wife. By the impugned judgment, the learned ADJ decreed the petition preferred by the respondent/husband under Section 13(1)(ia) of the HMA against the appellant/wife, thereby holding that the respondent/husband has been subjected to cruelty by the appellant/wife, which were found to be grave and weighty. Consequently, the marriage between the parties was dissolved by a decree of divorce.

2. The parties were married at Delhi on 03.02.2005. One male child was born out of the wedlock on 30.12.2005. The allegations of the respondent-husband and the counter allegations of the appellant-wife are set out in the impugned judgment and the same are, therefore, not being reproduced herein.

3. The learned ADJ framed the issue whether the appellant/wife had treated the respondent/husband with cruelty after the solemnization of the marriage. In support of his case, the respondent/husband examined himself as PW-1. He also produced one Sh. PM as PW-2, who lives in the neighbourhood of the matrimonial home. On the other hand, the appellant examined herself as RW-1. The respondent/husband/PW-1 deposed on the lines of his allegations made in the petition is his examination-in-chief on affidavit. The learned ADJ observed that he was not cross examined about the several incidents constituting the infliction of physical and mental cruelty upon him, on which the respondent had deposed in his examination-in-chief.

4. The learned ADJ proceeded on the basis that the appellant had neither cross examined the respondent about the incidents, nor given any suggestions to him that he was deposing falsely and thus, the same could be safely accepted as true. He held that since the appellant had not contradicted the alleged acts of cruelty, and the testimony of the respondent/husband had not been impeached, he could assume that the alleged acts of cruelty are true. While appreciating the evidence of the appellant/wife, the learned ADJ observed that the appellant sought to place reliance on medical records and medical prescriptions. However, she did not examine the author/doctor of the said record. She also did not examine any of the eye witnesses to the incidents which she had claimed were witnessed by many people. She did not even examine her parents, who were also allegedly witnesses to several incidents narrated by her. The learned ADJ held the testimony of the appellant lacks credibility and was, thus, held to be unbelievable.

5. The acts and incidents of cruelty attributed to the appellant, in respect of which the learned ADJ examined-whether they constituted cruelty as understood in law, are the following:

(a) giving repeated threats to commit suicide, and even trying to commit suicide. On one occasion, the appellant brought one filled kerosene can and opened its lid, but the respondent and neighbours stopped her from doing so;

(b) forcibly pushed the penis and testicles of the respondent, due to which the respondent received injuries and swelling on his private parts;

(c) repeatedly slapping the respondent on various occasion;

(d) taunting the respondent that he is nothing, and he can do nothing, and also he cannot satisfy her;

(e) never allowing the respondent to meet with the minor child;

(f) insulting and misbehaving with the respondent and his family members;

(g) leaving the matrimonial home without informing the respondent, and on asking abusing and quarrelling with the respondent;

(h) always quarrelling with the respondent and abusing him;

(i) refusal to have sex with the respondent;

(j) forcing the respondent for the transfer of his property in her name.

6. The learned ADJ held that the respondent/husband had established the ground of cruelty to seek a decree of dissolution of marriage between the parties.

7. The first submission of Mr. Mehta, learned counsel for the appellant is that the appellant/wife had been thrown out from the matrimonial home on 07.05.2006 and that she had not left her matrimonial home on her own. Mr. Mehta submits that the learned ADJ has laid undue emphasis on the fact that PW-1 and PW-2 - though cross examined, were not given suggestions by the appellant that the said PWs were deposing falsely. Mr. Mehta submits, that the appellant having categorically denied all the allegations made against her by the respondent/husband in her written statement, it was not necessary for the appellant to formally give suggestions to the PWs with regard to each of the allegations made by them against the appellant. He submits that the said failure is not fatal to the case of the appellant, as the onus to prove the allegations of cruelty lay upon the respondent/petitioner in the divorce proceedings. In this regard, Mr. Mehta has placed reliance on *Sher Mohammad v. Mohan Magotra*, 202 (2013) DLT 708, where this Court has, inter alia, held:

"20. As far as the finding of the learned Additional District Judge, of there being no Agreement to Sell is concerned, I tend to agree therewith. The appellant/plaintiff in the present case has utterly failed to prove the availability with himself of the amount of Rs. 4,25,000/- paid in cash. Though in the evidence on record, there is a reference to a passbook of a bank account of the appellant/plaintiff having been produced during the course of the cross examination but the senior counsel for the appellant fairly admits that the said passbook does not justify the availability of Rs. 4,25,000/- with the appellant. As far as the argument of suggestion having not been given to PW2 is concerned, I may mention that the tenor of the entire cross examination by the respondent of PW2 is to challenge his statement; though of course no specific suggestion is given that he has lied on the aspect of payment of Rs. 4,25,000/- in cash in his presence. However, I am of the opinion that in a civil trial which is based on pleadings, there is no need for such suggestions to be given. The respondent in his written statement had already denied the said payment and it was for the appellant to prove the same. The practise of giving suggestions in cross examination to witnesses is of criminal trials where there are no pleadings and the defence is built up by giving such suggestions. However unfortunately the said practise of criminal trials has crept into the civil trials also to the extent that most of the cross examinations being in the

form of suggestions alone and which take considerable time. The purport of cross examination is to challenge the testimony and/or to falsify the witness or his credit worthiness and not to give suggestions to the effect that each and every deposition in examination-in-chief is false. Similarly, a party in a civil trial is not required to in cross examination put its case to the witness as the same as aforesaid already exists in the pleadings".

[emphasis supplied]

8. He has also placed reliance on *Suman Singh v. Sanjay Singh*, 2013(5) R.C.R.(Civil) 844 : 200 (2013) DLT 638 (DB). I may observe that this decision was relied upon by the respondent and in his rejoinder submissions, Mr. Mehta has also sought to place reliance on the aforesaid decision. Mr. Mehta points out that in this decision as well, the Trial Court had proceeded on the basis that the counsel appearing for the wife had failed to put forward her case to the husband in his cross examination, and had failed to give suggestions to him regarding number of allegations levelled against her by him in his examination in chief. The Trial Court had proceeded on the basis that the said failure constitutes an admission by the wife with regard to the correctness of the allegations of cruelty levelled against her by the husband. The Division Bench, in para 23, observed that:

"23. The aforesaid approach adopted by the Trial Judge is too narrow and pedantic. It is true that the cross-examination of Sanjay by the counsel acting for Suman is most unsatisfactory because with respect to numerous incidents deposed to by Sanjay the counsel has not even bothered to even suggest that the same are untrue. But, human relations have not to be severed due to level of advocacy falling below acceptable standards. In an adversarial litigation, which we follow in India, if a Judge were to find that a counsel's standard has not reached the desired level and the litigation ceases to be adversarial, the Judge must step in. We often use the phrase that a Judge is a match referee. We do not use the phrase that the Judge is an umpire. Now, an umpire has a static position as in the game of cricket. But a referee, as is to be found in a game of football, runs up and down in the field keeping a hawk's eye on the football to ensure that nobody fouls".

9. The further submission of Mr. Mehta is that the allegations made by the respondent in the divorce petition are completely vague and without any specifics. He submits that such vague and non-specific allegations can never form the basis of the petition seeking divorce on the ground of cruelty as specific instances of alleged cruelty with dates, time and particulars are required to be made. Non-specific and vague allegations are incapable of being met or denied and thus, cannot be acted upon by the Court.

10. Mr. Mehta has placed reliance, in support of the aforesaid proposition, on *Neelu Chopra v. Bharti*, 2010(1) R.C.R.(Criminal) 115 : (2009) 10 SCC 184. In this case, the Supreme Court was dealing with an appeal against a judgment of the High Court dismissing a petition for quashing of criminal proceedings against the appellant under Section 406, 498A, 114 of IPC. The supreme Court, inter alia, observed:

"7. There is undoubtedly some reference to the present appellants, but what strikes us is that there are no particulars given as to date on which the ornaments were handed over, as to the exact number of ornaments or their description and as to the date when the ornaments were asked back and were refused. Even the weight of the ornaments is not mentioned in the complaint and it is a general and vague complaint that the ornaments were sometime given in the custody of the appellants and they were not returned. What strikes us more is that even in paragraph 10 of the complaint where the complainant says that she asked for her clothes and ornaments which were given to the accused and they refused to give these back, the date is significantly absent.... ..

... ..

11. The High Court has merely mentioned that the allegations in the complaint are of retaining jewellery articles in possession of the husband and the petitioners. Now if the articles were in the possession of the husband, there is no question of the present appellants being in possession of the jewellery. This is apart

from the fact that it has already been expressed by us that there is no mention of the date on which the said ornaments, if any, were entrusted to the appellants or even the date when they were demanded back and were refused to be given back by the appellants or any one of them. Insofar as the offence under Section 498A IPC is concerned, we do not find any material or allegation worth the name against the present appellants....".

11. Similarly, a Division Bench of this Court in *State of NCT of Delhi v. Rakesh*, 2012 (2) JCC 1334, while dealing a criminal leave to appeal petition against acquittal of the respondent under Section 304B, 406, 498A and 34 IPC, observed that:

"8. The witnesses did not give specific dates when any specific dowry article was demanded by any particular accused. Allegations levelled by them are vague and general in nature. There is no direct, clinching and legal evidence against them in respect of cruelty under Section 498A.

9.

10. The evidence led in this case is lacking in details about the cruel treatment meted out to the deceased by the accused in connection with the dowry demands. Nothing has emerged that there were persistent and unabated dowry demands and she was physically or mentally tortured on her failure to fulfil them. So far as allegations against the respondents were concerned, these were omnibus in nature and had been made without any specific instances in order to involve the entire family and that too after the death of the deceased".

Thus, the Division Bench dismissed the leave petition preferred by the State.

12. Mr. Mehta further submits that the learned ADJ has adopted a different yardstick when it came to appreciation of evidence of the parties. He submits that the fact that the appellant had failed to produce other witnesses, including her parents, was taken as a circumstance to infer lack of credibility in the averments of the appellant, rendering them unbelievable. In para 50 of the impugned judgment, the learned ADJ observed as follows:

"50. The respondent has also stated in the cross examination that the incidents was witnessed by many people. She has named them in particular besides her parents. However, the respondent has chosen not to examine any of the said witnesses in support of her case. The totality of the circumstances shows that there is lack of creditability in the averments of the veracity of the respondent and thus the same cannot be believed".

13. However, the similar failure on the part of the respondent/husband to lead evidence of his parents and other family members in support of his allegations, or of the medical doctor in support of his alleged injury suffered on his private parts allegedly caused by the appellant, has not been looked upon with suspicion and the case of the appellant has been accepted as the gospel truth.

14. Mr. Mehta submits that in *Suman Singh (supra)*, the Division Bench found a similar infirmity in the judgment of the Trial Court in that case and observed as follows:

"24. A closer look at the impugned judgment would reveal that the learned Trial Judge had adopted different yardsticks while appreciating the evidence led by the parties. In case of Sanjay, his sole testimony has been held to be sufficient by the learned Trial Judge on the ground that "to seek a corroboration to a fact alleged by a spouse to a marriage regarding the healthy or unhealthy character of their intimate relation which belongs to the sacred and secrets precincts of marital life, and which are known only to the spouses and which are not supposed to be known to any other living soul on the surface of the planet, would amount to shutting one's eye towards the facts of life and reality". On the other hand, an adverse inference has been drawn against Suman for not examining her family members to disprove allegations levelled by Sanjay that he was not treated properly by family members of Suman whenever he went to her parental house. One of the allegations levelled by Suman against Sanjay was that the family members of Sanjay used to misbehave with

her and instigate Sanjay to treat her with cruelty since they did not approve of their marriage. The learned Judge has not drawn an adverse inference against Sanjay who has likewise not produced his parents to rebut the same.

25. As observed by us in the preceding paras, a pragmatic approach and not a pedantic one is required while dealing with matrimonial disputes. The Trial Judge has dealt with the evidence led by the parties in a very superficial manner".

Thus, he submits that the impugned judgment is patently laconic and cannot be sustained.

15. On the other hand, the submission of learned counsel for the respondent/husband is that the charge of cruelty levelled by the respondent against the appellant was completely established before the Trial Court. Learned counsel submits that in matrimonial disputes, the acts of cruelty, particularly concerning private affairs such as the physical relationship between the parties are extremely private matters, to which, for obvious reasons, even the close family members are not likely to be witness and privy. Thus, in respect of such allegations, it would be the testimony of the parties which would be of relevance, and the same would have to be weighed in the context of other surrounding facts and circumstances.

16. Learned counsel submits that the learned ADJ has referred to and relied upon several decisions including the decisions of the Supreme Court, which lays down the age old rule that if the correctness of a statement of a witness is not disputed or challenged in his cross examination, the Court may safely accept the statement of the witness as true.

17. Learned counsel submits that the decision of this Court in Sher Mohammad (supra) relied upon by the appellant is of no avail to the appellant, as in the cross examination of the respondent RW-1 and of RW-2, not only the appellant failed to challenge the correctness and veracity of their statements made in their examination-in-chief, but the appellant also did not conduct any cross examination so as to challenge or falsify the testimony, or its credit worthiness. He further submits that the said decision does not take into account the decisions relied upon by the learned ADJ, namely:

- i) Rajinder Pershad (D) by LRs. v. Darshana Devi, 2001(2) R.C.R.(Rent) 239 : (2001) 7 SCC 69;
- ii) State of U.P. v. Nahar Singh (D) and Ors., 1998(1) R.C.R.(Criminal) 867 : (1998) 3 SCC 561;
- iii) Srichand and Shivan Das v. The State, (1985) 28 DLT 360.

18. He submits that Section 138 and 146 of the Evidence Act are applicable with equal force to civil and criminal proceedings and, thus, the distinction drawn by the Court between civil and criminal cases in Sher Mohammad (supra) may be non-existent. In any event, since there are Supreme Court decisions on the proposition that the unchallenged testimony of a witness can safely be relied upon, this Court is bound to follow the decisions of the Supreme Court over and above the decisions of a coordinate bench of this Court, which has not alluded to the earlier decisions, including those of the Supreme Court.

19. Learned counsel has also placed reliance on Suman Singh (supra). In para 45 of the said decision, the Court observed that the nature of proof required in matrimonial matters is different. The facts alleged by a spouse about their private intimate life are not supposed to be known to any other person and no corroboration can be expected in such cases. To seek corroboration to a fact alleged by a spouse to a marriage regarding the healthy or unhealthy character of their intimate relation-which belongs to the sacred and secrets precincts of marital life, and which are known only to the spouses and which are not supposed to be known to any other living soul on the surface of the planet, would amount to shutting one's eye towards the facts of life and reality. Corroboration, therefore, to the version of either spouse can hardly be expected to come from any other independent source. Such matters are always decided on preponderance of probabilities. The Division Bench in para 45 of the judgment in Suman Singh (supra) referred to the earlier decision reported as A v. B, 1985 MLR 326 in this regard.

20. Learned counsel submits that the learned ADJ has exhaustively analysed and appreciated the evidence led by both the parties before reaching to the conclusion that the appellant had subjected the respondent to cruelty.

21. Having heard learned counsels for the parties, perused the impugned judgment and the evidence brought on record, as well as examined the decisions relied upon by the parties, I am of the view that there is no merit in the present appeal calling for interference with the impugned judgment and, consequently, the appeal is liable to be dismissed.

22. At the outset, I may observe that one of the submissions of the appellant/wife before the Trial Court was that the allegation of cruelty on account of infliction of physical injury on the private parts of the respondent stood condoned, as the said incident was stated to have taken place on 11.02.2005, whereas, admittedly, the appellant had delivered a male child on 30.12.2005. Thus, the parties had continued to cohabit as husband and wife even after 11.02.2005, as the child was conceived sometime in March 2005.

23. The learned ADJ has, in the impugned judgment, considered the meaning of 'condonation' in the context of a matrimonial offence by placing reliance, inter alia, on *Dastane v. Dastane*, AIR 1975 SC 1534, and the decisions of this Court in *Dr. Seema v. Dr Akhilesh Chaudhary*, 177 (2011) DLT 537, wherein it has been observed that the condonation itself is conditional upon the condition that the offending spouse does not commit further matrimonial offence after condonation has taken place. Further matrimonial offence would revive the earlier offence, which may have been condoned so as to give a cause of action to the aggrieved spouse to base his petition seeking dissolution of marriage on the earlier condoned act of cruelty/matrimonial offence. On this aspect, neither party has advanced any submissions. Even otherwise, the reasoning adopted by the learned ADJ on the said aspect is sound and does not call for interference.

24. In the present case, the respondent/husband made specific allegations of cruelty against the appellant/wife apart from making several generalised statements. He specifically alleged that the appellant used to call him 'Hathi' or 'Mota Hathi'. He also specifically alleges that on the night of 11.02.2005, the appellant pushed the penis and testicles of the respondent at the time when he wanted to have intercourse with the appellant, due to which he received injuries and swelling on his private parts. Moreover, he specifically attributed to the appellant statement to the following effect:

"YEH TERE LIYE NAHIN HAIN KYONKI TERE BASKI MERE PYAAS MITANI NAHI HAI MOTE HAATHI APNA WAJAN KUCH KAM KAR AUR MUJHEY SATISFIED KAR JAB TERE BASKI KUCH NAHI THA TOH SHADI KYO KARI THI".

He deposed in his examination-in-chief on the same lines.

25. The respondent specifically averred with regard to the incident which transpired on 28.06.2006 in para 10 of his petition, wherein he stated:

"10. That on 28.06.2006 the petitioner since was living in great tension requested the respondent to give the child to him but in spite of giving the child, the respondent slapped the petitioner and asked to leave the house as the respondent had already turned down the other family members from the house. It is submitted that the petitioner requested the respondent to keep on cooling her mind but she started infuriated and started trying loudly by abusing the petitioner and stated that she would put herself to fire and would involve the entire family members in the dowry death case and in this process the respondent brought one filled kerosene can and opened its lid but the respondent and other neighbours stopped her doing so and forcibly taken away the said can from her hands. The petitioner remained the whole night under great terror and tension of the behaviour of the respondent. It is submitted that in the morning the petitioner with folded hand requested to keep quiet and to prepare tea etc. but the respondent was not in a mood to settle herself in the family of the petitioner only. The petitioner called her parents but only her brother came at about 12:30 p.m. on 29.06.2006 and told him about what she did in the night and in the previous days. It was her brother who asked the petitioner to transfer the ownership of this house in her name so as to keep her mum on every

matter and also the respondent seconded what her brother said and asked the petitioner to do. The petitioner felt himself in dilemma and was out of sight to think right or the wrong and ultimately brother of the respondent namely Rahul left in the evening directing the petitioner to do whatever he said to do to the petitioner".

26. He also made deposition with regard to the incident of 05.07.2006 when, according to him, the appellant took out her entire jewelry from the almirah and other valuables from the almirah and asked the respondent to make up his mind to transfer the house in her name and stated that was the only way left with the respondent to make the appellant his completely devoted wife. She also stated that she has lot of resources to harass the respondent and his family members and that she has power to crush the entire family of the respondent by force. He also made a specific deposition that on 05.07.2006, the appellant left the matrimonial home with all her jewelry and other valuable articles and since then she had been living with the parents. He also specifically deposed that on 31.10.2006, the appellant and several persons attacked the respondent while he was at home and has created seen in the area and asked the respondent to take steps to transfer his property in her name or to give L 1 crore, otherwise the respondent and his family members would be responsible for the consequences.

27. The examination in chief of the respondent PW-1, as noticed above, is exactly on the same lines as the averments contained in the petition. Thus, the respondent has made specific statements in his testimony with regard to the incident of 11.02.2005, 18.06.2006-which continued into early hours of 29.06.2006, 05.07.2006 and 31.10.2006.

28. In the face of the aforesaid specific averments, it cannot be said that the respondent did not make specific allegations of cruelty against the appellant by giving particulars of the dates and events which, according to him, transpired and constituted acts of cruelty on the part of the appellant.

29. The parties are required to make specific pleadings for the reason that it enables the opposite party to specifically meet, verify, and if necessary, challenge/deny the averments/allegations. Otherwise, the opposite party would remain in the dark and would not be able to effectively deal with the accusations, allegations and averments made against him/her.

30. Apart from making the aforesaid specific allegations, the respondent also made general allegations in his petition with regard to the alleged general conduct and behaviour of the appellant. It may not always be possible for a party to make specific allegations with regard to the date, time, place of occurrence in relation to a generalised conduct, act or omission - where such conduct is repeated continuously over a period of time. Thus, the allegations that the appellant used to call the respondent 'Hathi' or 'Mota Hathi', cannot be given a particular date, time or place of utterance as, according to the respondent, such an utterance was repeatedly made by the appellant. Similarly, it may not be possible to give specific dates and times in relation to the allegations that the appellant denied sex to the respondent consistently. When two parties are in a marital relationship, neither is expected to maintain a logbook and note down therein each and every instance of matrimonial offence committed by the other. When the allegation is that a party showed uncooperative attitude towards his/her spouse and family members; did not show respect to the other spouse and his family members; misbehaved and abused with the opposite party and his family members - in respect of such allegations, it may not be possible to plead a specific date, time or place of occurrence. However, when intolerable conduct/matrimonial offence manifests itself into an incident which has larger proportions, the aggrieved party would be able to pin pointedly - with particulars and details, recite and establish such matrimonial offence.

31. Thus, I am of the view that the decisions relied upon by Mr. Mehta in Neelu Chopra (supra) and Rakesh (supra), firstly, do not apply in the facts of the present case - as there are specific allegations with dates and description of events which took place leading to commission of acts/omission of cruelty against the respondent. Secondly, in a matrimonial relationship, the same strict rule and yardstick cannot be adopted as

in criminal cases. For the same reasons, I am of the view that the observations made in para 23 of Suman Singh (supra) relied upon by the appellant are of no avail in the facts of this case.

32. The appellant cross examined PW-1 and PW-2. In the cross examination of PW-1, the appellant sought to raise a doubt with regard to the incident alleged by the respondent, which allegedly took place in the night of 11.02.2005. PW-1 was asked whether he had consulted the doctor upon receiving injury on his private parts, to which he stated that he did. Upon his being asked whether he had any medical proof regarding the injury, he stated that he did not have any such proof. The claim of the respondent/husband that he was denied co-habitation by the appellant was also sought to be challenged, as he was questioned whether he established physical relationship with the appellant after the marriage. He responded by saying "I passed several nights (physical relationship) with the respondent". The cross examination of PW-1 shows that several questions were posed on the aspect of demand and receipt of dowry by the respondent/husband. He states that the appellant used to call him 'Mota Hathi' and used to quarrel with him. He also stated that the appellant "used to taunt me that I am nothing and I can do nothing and also I cannot satisfy her".

33. Pertinently, there is absolutely no cross examination of PW-1 on any of the other aspects on which he has deposed, namely, the incident of 28.06.2006 - which continued into early hours of 29.06.2006. The appellant is accused of slapping the respondent, upon the respondent asking her to give the child to him. On the said date, the appellant also asked the respondent to leave the house, as she had already turned away the other family members from the house. The appellant also got infuriated upon the respondent trying to pacify her, and she started loudly abusing the respondent and stated that she would put herself on fire and involve the entire family of the respondent in a dowry death case. In the process, she brought one filled kerosene can and opened its lid, but the respondent and other neighbours stopped her from doing so and forcibly took away the can from her hands. The respondent called the parents of the appellant, but only her brother came at about 12:30 p.m. on 29.06.2006. He was informed of what had transpired on the previous day. The brother of the appellant asked the respondent to transfer the ownership of his house in her name so as to pacify her. The brother the appellant Rahul left in the evening directing the respondent to act according to his advice.

34. Similarly, there is no cross examination in relation to the incident of 05.07.2006, when the appellant took away her entire jewelry from the almirah and other valuables and asked the respondent to make up his mind whether, or not, he would transfer his house in her name to secure the appellant's devotion and care. The appellant also threatened the respondent that she had lots of resources to harass the respondent and his family members, and to crush the respondent and his entire family by force. She does not even cross examine PW-1 in relation to his testimony regarding the incident of 31.10.2006, when the appellant and several persons attacked the respondent while he was at home and created a scene in the area and demanded the respondent to transfer his property in the name of the appellant, or give her L 1 crore. There is no cross examination on the respondents testimony that he was threatened with consequences, if he did not do so.

35. The respondent PW-1 was also not challenged in relation to his testimony that the appellant used to abuse him, ill-treat him and his family members, and the like. Similarly, PW-2, PM, a neighbour residing in the close vicinity of the matrimonial home of the parties was also not cross examined on several aspects. In fact, from his cross examination, it came out that he was a witness to the repeated quarrels that the appellant had with the respondent and his family members. These quarrels were not in the ordinary course of marriage, but were of a permanent nature by the appellant. He was a witness to the appellant abusing the respondent and calling him 'Mota Elephant'. He disclosed that the parents of the respondent had to move out in a rented premises on account of the disputes between the appellant and the respondent and his family members. He deposed that he was a witness when the appellant had called persons from Ghaziabad and from her family - whom he knew. He intervened when the quarrel was started by the family members of the appellant and their men. Upon this, the appellant asked him to as to why he was intervening, and also asked him to leave. The said persons remained at the place for about one hour, and the local people also gathered once the quarrel started. He was a witness to the said persons of the appellant trying to occupy the premises, and abusing and giving fist blows to the respondent. He even described that the parents of the appellant had come in a Santro

car, and they were accompanied by other people. He disclosed that his perception was that the intention of the other people was not good towards the respondent.

36. Reliance placed by Mr. Mehta on Sher Mohammad (supra), in my view, is completely misplaced. Firstly, in the present case, not only did the appellant not give any suggestion to the witnesses PW-1 and PW-2 to challenge their testimony in chief, but even otherwise, as noticed above, there was no cross examination of the said witnesses on the aspects on which they deposed, which were clearly damaging the defence of the appellant.

37. The decision in Sher Mohammad (supra) was rendered in a suit for specific performance of an agreement to sell. The Trial Court, after examining and appreciating the evidence, returned the finding that the agreement set up by the plaintiff was forged. It was held that merely because the payment under the purported agreement was made in cash, it did not make the agreement valid. Resultantly, the suit was dismissed with costs. In first appeal, it was argued before this Court that though the respondent/defendant had claimed the receipt containing the agreement to sell to be forged and fabricated, but in his evidence he had stated that his signatures had obtained on a blank paper and receipt/agreement to sell had been fabricated thereon. It was also argued that PW-2, who was a witness to the receipt, had deposed in his examination-in-chief that the consideration amount of Rs. 4,25,000/- was lying with the plaintiff, and that the said amount was paid to the defendant/respondent. However, no suggestion was given to PW-2 in his cross-examination that the said cash was not paid to the defendant. It was, thus, claimed that the payments stood proved, and the onus shifted upon the respondent/defendant, which he failed to discharge. It was in this context that the Court rejected the argument of the appellant/plaintiff that, as no suggestion had been given to PW-2 by the defendant challenging his statement that cash of Rs. 4.25 lacs was delivered by the plaintiff in his presence, that this Court made the observations as quoted above.

38. It is well settled that a judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expression which may be found there are not intended to be exposition of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. What is the essence in a decision is its ratio, and not other observations found therein, nor what logically follows from the various observations made in it. Each case depends on its own facts, and a close similarity between one case and another is not enough because, even a single significant detail may alter the entire aspect in deciding such cases. One should avoid the temptation to decide cases by matching the colour of one case against the colour of another. In this regard, I may refer to the judgment of the Supreme Court in *Bank of India and Anr. v. K. Mohandas and Ors.*, 2009(2) S.C.T. 560 : (2009) 5 SCC 313, wherein the Supreme Court referred to and relied upon *Quinn v. Leathem*, 1901 AC 495, *State of Orissa v. Sudhanshu Sekar Misra*, AIR 1968 SC 647; *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.*, (2003) 2 SCC 111.

39. The Supreme Court also noticed in its earlier in decision in *BPCL v. NR Vairamani*, 2004(2) R.C.R.(Rent) 486 : (2004) 8 SCC 579, wherein the Court emphasised that reliance should not be placed on a decision without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. It was also observed that judgment of Courts are not be construed as statute and the observations must be read in the context which appear.

40. As noticed above, in matrimonial cases, the approach of the courts is different from that adopted in other cases. In *Suman Singh (supra)*, the Division Bench while relying upon *A v. B (supra)* observed that the nature of proof required in matrimonial matter is different, considering the fact that matters relating to the private intimate life of the parties are not supposed to be known to other persons, and no corroboration can be expected in such cases. To seek a corroboration to a fact pertaining to health of the intimate relationship - which belongs to the sacred and secret precincts of marital life, and which are known only to the spouses to the exclusion of all others, would amount to shutting one's eye towards the facts of life and reality. Corroboration, therefore, to the version of either spouse on such aspects, can hardly be expected to come

from any other independent source.

41. The observations of this Court in Sher Mohammad (supra), therefore, cannot be applied in the facts of the present case. The observations made by the Court in Sher Mohammad (supra) when viewed in the light of the facts of that case could only mean that it is not sufficient for a plaintiff to rely upon the failure of the defendant to cross examine a particular witness of the plaintiff on a certain aspect. The plaintiff has stand on his own legs and to prove his own case to succeed.

42. As noticed above, Sher Mohammad (supra) was a case where the Trial Court had found the agreement contained on the receipt to be forged and fabricated. The Trial Court had also disbelieved the case of the plaintiff that he had made payment of L 4.25 lacs in cash to the respondent/defendant. It was in this context that this Court observed that mere failure to cross examine PW-2 on the aspect of the payment, allegedly made by the plaintiff to the defendant in his presence, was not enough to conclude in favour of the plaintiff that the said payment had been made. Even otherwise, it is seen from Sher Mohammad (supra) that while making its observation in para 20, as extracted above, this Court has not taken into consideration the decisions of the Supreme Court in Rajinder Pershad (supra), which, in turn, places reliance on Nahar Singh (supra). In Sher Mohammad (supra), this Court has sought to draw a distinction between a criminal trial and civil trial in the matter of appreciation of evidence. No doubt, the standard of proof in the two proceedings is different. In criminal trials, to secure conviction, the standard of proof applied is "beyond all reasonable doubt", whereas in a civil trial, the standard of proof required to prove its case by a party is that of "preponderance of probabilities".

43. Section 138 and 146 of the Evidence Act, which deals with the order of examinations, inter alia, states that:

"138. Order of examinations.-Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. Direction of re-examination.-The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter".

and Section 146, which deals with the nature of question which may be put to a witness in his cross examination, inter alia, states:

"146. Questions lawful in cross-examination.-When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture: Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character.

These sections are applicable to both civil and criminal trial, and the Evidence Act does not draw a distinction with regard to applicability of the said provisions to one, or the other trial. Pertinently, Rajinder Pershad (supra) is a case arising from a civil trial relating to eviction of a tenant by the landlord. In Rajinder Pershad (supra), the Supreme Court, inter alia, observed as follows:

"4. ... There is an age-old rule that if you dispute the correctness of the statement of a witness you must give him opportunity to explain his statement by drawing his attention to that part of it which is objected to as

untrue, otherwise you can not impeach his credit. In *State of U.P. v. Nahar Sing (dead) and Ors.*, [1998] 3 SCC 561, a Bench of this Court (to which 1 was a party) stated the principle that Section 138 of the Evidence Act confers a valuable right to cross-examination a witness tendered in evidence by opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by permitting a witness to be questioned, inter alia, to test his veracity. It was observed:

"14. The oft-quoted observation of Lord Herschell, L.C. in *Browne v. Dunn* [(1893) 6 The Reports 67] clearly elucidates the principle underlying those provisions. It reads thus:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practise in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

44. *Nahar Singh* (supra), which is relied upon in *Rajinder Parshad* (supra), was, no doubt, a case arising from a criminal trial. In *Nahar Singh* (supra), the Supreme Court observed:

"13. It may be noted here that part of the statement of PW-1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence PW-1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity.

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

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This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing".

45. Pertinently, *Browne v. Dunn* (supra), relied upon in *Nahar Singh* (supra) was itself a case arising from a civil trial. The House of Lords was dealing with a libel suit, wherein the aforesaid extracted observations were made. The said principle was also applied by this Court in *Srichand* (supra), a case arising out of Food Adulteration Act, wherein the Court observed:

"6. The law is well settled that where the evidence of a witness is allowed to go unchallenged with regard to any particular point it may safely be accepted as true".

46. Therefore, with utmost respect to the learned Judge, it appears that while making the aforesaid observations in *Sher Mohammad* (supra), the Court was not conscious of the earlier pronouncements of the Supreme Court, and of this Court. Since there are earlier decisions of the Supreme Court and this Court available on the same point, which apparently run contrary to what has been observed in *Sher Mohammad* (supra), I am bound to follow those decisions in preference to *Sher Mohammad* (supra).

47. The submission of Mr. Mehta that the learned ADJ has adopted different yardstick while appreciating the evidence of the parties also has no merit. The respondent/husband had not only led his own evidence, but also the evidence of PW-2, an immediate neighbour of the parties while they were living the matrimonial home. The said witness had deposed that he had intervened several times in the disputes between the parties being a neighbour and having known the respondent/husband for about 17-18 years. He deposed on the aspect of the parents and sister of the respondent shifting to a rented premises, as they could not live peacefully along with the appellant. He was a witness to the torture to which the respondent and his parents were subjected to by the appellant. He was also a witness to the incident involving the appellant calling persons from Ghaziabad to attack the respondent. As noticed above, in his cross examination, he has further elaborated on his testimony on the manner in which the appellant subjected the respondent to cruelty by, inter alia, calling him 'Mota Elephant'; quarreling with the respondent even on the streets; calling her parents and others from Ghaziabad who abused and gave fist blows to the respondent.

48. So far as non production of the doctor by the respondent regarding the injury suffered on his private parts-on account of the assault allegedly made on 11.02.2005 is concerned, one has to keep in mind that the nature of injury claimed to have been suffered, and the manner in which the same is claimed to have been suffered, must have put the respondent to great deal of embarrassment and, therefore, his failure to maintain the medical record in relation to the said injury, or to summon the doctor cannot lead one to assume that the respondents stands discredited. Even if the said incident were to be ignored, the other incidents established on record by the respondent/husband, by themselves, constitute sufficient evidence of the respondent being subjected to cruelty by the appellant. The calling of names and hurling of abuses such as 'Hathi', 'Mota Hathi' and 'Mota Elephant' by the appellant in respect of her husband - even if he was overweight, is bound to strike at his self respect and self esteem. Obviously, the respondent was sensitive to such taunts, and it is not the appellants case that the taunts were made jokingly, or out of love and affection, and without malice.

49. It has come on record that the appellant taunted the respondent for not being able to satiate her sexual desire on account of his being heavy weight. It has also come on record that on 28.06.2006, the appellant not only slapped the respondent but asked him to leave the house. She also caught hold of kerosene can and opened its lid threatening the respondent that she would immolate herself and implicate the respondent and his family in a dowry case. The respondent also established that he reported this incident to his in-laws, but only his brother-in-law Rahul came on 29.06.2006 at about 12:30 p.m. and advised the respondent to transfer his property in favour of the appellant to secure peace. She left the matrimonial home on 05.07.2006 with her jewelry and belongings, and gave an ultimatum to the respondent that he should transfer his property in her name if he desired that she lives like a devoted wife. The incident of 31.10.2006-when the parents and other people from Ghaziabad came and fought with the respondent; abused him and even assaulted him is also a serious incident, and each of this aforesaid incidents are grave and weighty matrimonial offences/misconducts by the appellant, which cannot be described as events relating to normal wear and tear

of a marriage. Such events are clearly destructive of the matrimonial bond and would naturally give rise to a bona fide and genuine belief and apprehension in the mind of the respondent that it is not safe for him to peacefully and mentally continue the relationship with the appellant. Pertinently, it has not even been urged by Mr. Mehta that if the allegations made against the appellant are accepted as established, the same would not constitute mental cruelty in law.

50. For all the aforesaid reasons, I am of the view that there is no merit in the present appeal and the same is, accordingly, dismissed leaving the parties to bear their respective costs.

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