

H Vs. W and anr.

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Court : Delhi

Decided On : Mar-30-2007

Reported in : 2007(97)DRJ609

Judge : S. Muralidhar, J.

Acts : Hindu Marriage Act, 1959 - Sections 9 and 13(1); Evidence Act - Sections 112 and 122; Guardian and Wards Act, 1908 - Sections 25

Appeal No. : M.A.T. APP. 16 of 2005

Appellant : H

Respondent : W and anr.

Advocate for Pet/Ap. : Gayan Prakash Upman, Adv

Disposition : Appeal Allowed

Judgement :

S. Muralidhar, J.

1.1 This appeal is directed against the judgment dated 20.12.2004 passed by the Additional District Judge, Delhi dismissing the appellant's petition HMA No. 303 of 2003 for dissolution of his marriage with Respondent No. 1 under Section 13(1)(ia) of the Hindu Marriage Act, 1959 (Act') inter alia on the ground of cruelty.

1.2 There are two respondents in the appeal. Since the office report indicated that both respondents were avoiding service the appellant was permitted to serve them by publication. The respondents 1 and 2 were served through publication as recorded in the orders dated 20.7.2006 and 28.8.2006. Despite service, neither respondent appeared in these proceedings and were accordingly set ex parte by this Court by the Order dated 27.9.2006. The appellant was directed to file a synopsis and the arguments of the appellant were heard finally on 14.2.2007.

Background facts

2. Both the appellant and Respondent No. 1 were studying in Rohtak Medical College in 1984. While the Respondent No. 1 was studying in the MBBS course, the appellant was pursuing the degree course in Bachelor of Dental Surgery. The parties became acquainted and intimate and got married on 19.12.1988 at the Arya Samaj Mandir, Rohtak against the wishes of their respective parents. A daughter was born on 28.12.1989. The appellant, after graduation, shifted to Jaipur in 1992 and commenced private practice. In the same year, the Respondent No. 1 left for Bombay to pursue a Diploma Course in Gynaecology (CDGO). With the help of the appellant's uncle, the Respondent No. 1 managed to secure a placement in the Department of Neuro Surgery at the Bombay Hospital where Respondent No.2 was the head of the department.

3. The appellant states that his relationship with Respondent No. 1 was intimate and affectionate during the early years of marriage. According to the appellant when he used to visit Bombay he and the Respondent No. 1 would live in his uncle's house since he was not permitted to live with Respondent No. 1 in her hostel. The appellant states that the Respondent No. 1 avoided sexual relationship with him on some pretext or the other. She completed her DGO course in 1995 and returned to Jaipur on 13.11.1995 since the daughter was missing the company of her mother.

4. The appellant states that he got Respondent No. 1 appointed in a prestigious hospital in Jaipur in November 1995. He says that when she returned from Bombay she brought with her only a part of her luggage and left behind the rest in her hostel in Bombay. The appellant then offered to bring those articles from

Bombay and Respondent No. 1 gave him the keys of her hostel room. He states that when he went to Bombay to retrieve the articles from the locked almirah in the hostel, which he broke open with the permission of the hostel Superintendent, he chanced upon greeting cards with a few slips and letters which he suspected were exchanged between Respondent Nos. 1 and 2. On making enquiries at the said hostel and other hospitals where Respondent No. 1 had worked, he came to know that Respondent 1 and 2 were very close and together most of the time during her stay in Bombay. He states that when he returned to Jaipur and confronted Respondent No. 1 about her relation with Respondent No. 2 she answered in the affirmative and further stated that she would continue her relationship since she could not live without Respondent No. 2. He claims to have thereafter recovered some photographs of Respondent Nos. 1 and 2 from the luggage of respondent No. 1. The appellant claims that against his wishes and that of their daughter, Respondent No. 1 again left for Bombay on 22.12.1995 and all this caused him tremendous mental agony and pain. He also claims that there was no sexual relationship between the parties between 13.11.1995 and 22.12.1995.

Pleadings

5. The appellant on the basis of these contentions filed a petition against Respondents 1 and 2 in the Family Court at Jaipur on 5.1.1996 seeking divorce from Respondent No. 1 on the ground of cruelty. The grounds essentially were based on the adulterous relationship between Respondent Nos. 1 and 2 and her treatment of the child with cruelty. Along with the petition, the appellant placed on record the photographs showing Respondent Nos. 1 and 2 together, which he claims were objectionable, and the greeting cards which he claimed *were exchanged between them, and both of which were indicative of their adulterous relationship.

6. In her written statement Respondent No. 1 admitted that she and the appellant had met and married against the wishes of their respective parents. She denied that she had any adulterous relationship with Respondent No. 2 and maintained that the relationship was that of a teacher and student. She denied that there were any objectionable photographs of Respondents 1 and 2. Regarding the exchange

of greeting cards it was stated that it was commonplace in Bombay for students and teachers to exchange greeting cards. As regards the photographs, she denied that any such photographs were in fact taken and they were probably manipulated to make a false allegation of adultery against the respondent. She claimed that these photographs were in fact taken with the appellant himself and later manipulated to transpose the Respondent No. 2 in place of the appellant in the photographs only to defame and tarnish the image of Respondents 1 and 2. It is claimed that Respondent No. 2 in fact helped the appellant through his contacts.

7. In her written statement while the respondent No. 1 admitted that she returned to Jaipur on 13.11.1995, she denied that there was no sexual relationship between the parties between then and 22.12.1995 when she left for Bombay. She denied that she had left for Bombay voluntarily and without the consent of the appellant. According to her, the appellant persuaded the Respondent No. 1 to take up employment in the Bhatia Hospital in Bombay and stated that after few days he would join her and get employed in the Maruti Paints business which was being run by his uncle. With this assurance he put her on to a train for Bombay in a second class compartment despite knowing that she was under discomfort as she was by then pregnant. On reaching Bombay, she was compelled to call her parents and ask them to take her back, which they did by air. She specifically alleged that the real reason for the appellant sending Respondent No. 1 away to Bombay was that she had discovered the illicit relationship that the appellant was having with his sister-in-law and a staff nurse to which Respondent No. 1 had objected. She further alleged that there was a dowry demand of Rs. 10 lakhs which the parents of Respondent No. 1 could not fulfill.

8. Respondent No. 2 filed a written statement denying all the allegations. He stated that 'Respondent No. 2 was the professor of the respondent No. 1 and were having pure academic relations with each other.' He denied any adulterous relationship. As regards the photographs, respondent No. 2 in para 6 of his written statement stated as under:

6. With reference to para 5 of the Petition, the respondent denies the contentions therein as alleged and states that there are no such photographs as alleged by the

petitioner, however it appears that the petitioner is referring to the photographs shot by the friends of the respondents at several social and cultural events. The respondent submits that considering the liberal and free atmosphere in the medical field in the city like Mumbai which is always considered to be socially and culturally advanced in our country the said photographs are plain and sober, shot with absolutely good intentions and cannot be termed to be otherwise just to attribute bad relations between the respondents.' It was further stated by respondent No. 2 in his written statement that 'the petitioner in order to suit his convenience and since he has spoiled the relations with his wife i.e. the respondent No. 1 and under the influence and pressure from his parents has coloured the sober and' pure friendly relationship between the respondents and in haste thereof has tarnished the reputation and image of the respondent No. 2 in the society in general and in the medical fraternity in particular.

9. The trial court at Jaipur had framed the following issues on 6.10.1997:

(i) Whether while doing house job in Neurosurgery Department in Bombay Hospital in October, 1992 respondent No. 1 had developed illicit relations with respondent No. 2 who as head of that department and was living in adultery with him?

(ii) Whether the petitioner did not condone the aforesaid act of respondent No. 1 and did not have any physical relations with her?

(iii) Whether petitioner approached respondent No. 2 for seeking a job in gulf countries but when respondent No. 2 could not help him, he filed the present false petition?

(iv) Whether respondent No. 1 treated the petitioner with cruelty and left the child with him?

(v) Whether the petitioner married respondent No. 1 against the wishes of his family and therefore he has maligned the student teacher relationship of respondent No. 1 and 2?

(vi) Whether petitioner demanded Rs. 10 lakhs from respondent No. 1 and when the same demand was not met, he filed this petition?

Under Orders of the Hon'ble Supreme Court, the matrimonial proceedings were transferred from Jaipur to the court of the Additional District Judge,

Delhi.

10. The appellant examined himself as PW-1, his mother as PW-2, his uncle as PW-3 and a telephone kiosk operator as PW-4. The respondent examined herself as RW-1, her mother as RW-2 and her father as RW-3. Each of these witnesses filed their respective affidavits by way of examination-in-chief and were latter cross-examined in the trial.

Findings of the trial court

11. In the impugned judgment dated 20.12.2004, the Additional District Judge, Delhi (ADJ) treated issues 1 to 6 together since they were inter-connected and basically concerned the ground of cruelty. The findings of the trial court on the various issues, were as under:

(i) There was discrepancy in the explanation offered by the appellant as to how he had access to the almirah of respondent No. 1 in her hostel room in Bombay when admittedly he did not possess the keys of the almirah. At one stage he says that the hospital superintendent had permitted him to break the lock whereas at another place in his deposition he stated that the hostel superintendent gave him permission to break the lock.

(ii) The greeting cards Ex. P-1 to P-12, except Ex. P-3 were neither written nor signed by respondent No. 1 and even Ex. P-3 was not addressed to respondent No. 2. Therefore these greeting cards do not prove anything in support of the appellant.

(iii) The photographs did not lead to irresistible conclusion that the respondents were leading an adulterous life. Moreover they were not properly proved, the negatives were not produced. If the appellant did not click these photographs then

there was no explanation as to who had clicked the photographs.

(iv) The unsigned letter received by the appellant from Bombay, Ex.P-24, which according to him was sent by the wife of respondent No. 2, was also not properly proved.

(v) The facts regarding ascertaining the identity of the person with whom the respondent No. 1 was seen by the other colleagues in the hospital where she worked in Bombay, was also not convincing.

(vi) The appellant had failed to prove that the respondent No. 1 had treated the child with cruelty.

(vii) It was not clear what the appellant was trying to prove in denying that the respondent No. 1 had delivered a male child on 13.7.1996 while at the same time stating that they had not lived as husband and wife between 13.11.1995 and the second week of December, 1995. In any event in terms of Section 112 of the Evidence Act, the appellant had failed to establish non-access of the appellant to the respondent No. 1 during the period she might have conceived the second child.

(viii) Although the respondent No. 1 had not been able to prove her allegation that the appellant was having illicit relationship with his sister-in-law and a staff nurse, he too had treated her cruelly by alleging, based on hearsay, that she was having an adulterous relationship with Respondent No. 2.

(ix) The respondent No. 1 had failed to prove issue No. 3 that the appellant had filed a false case against Respondent No. 2 since the latter had not helped him to secure a job in Gulf countries and issues 5 and 6 that since the appellant had married respondent No. 1 against the wishes of her family, he had maligned the student-teacher relationship of respondent No. 1 and 2 and when his demand for Rs. 10 lakhs from respondent No. 1 was not met he had filed the petition for divorce.

12. It is thus seen of the six issues, issues (iii), (v) and (vi) were in fact held against Respondent No. 1 since those were the issues that required respondent

No. 1 to prove her case against the appellant. The findings of such issues have not been assailed by respondent No. 1 and therefore those need not be examined in this appeal. The three issues on which the trial court held against the appellant herein, were issues (i), (ii) and (iv). Issue (i) concerns the cruelty arising out of the alleged adulterous relationship between Respondents 1 and 2; issue (ii) is about the appellant condoning the act of Respondent No. 1 by continuing to have physical relationship with her and issue (iv) about the cruelty meted out by Respondent No. 1 to the appellant by leaving the daughter back with him.

The law on cruelty

13. The discussion of the evidence in the present case may be preceded by a brief recapitulation of the settled law on cruelty as explained by the Hon'ble Supreme Court. In *Dastane v. Dastane* : AIR 1975 SC 1534 it was observed (AIR p.1541):..what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.

The Court there also referred to the following passage in *American m Jurisprudence*, 2nd Ed., Vol. 24, p. 206:

The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances.

In *Shobha Rani v. Madhukar Reddi* : (1988) 1 SCC 105, the Hon'ble Supreme Court observed (SCC p. 108):..when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search

for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents.

And in Section Hanumantha Rao v. S. Ramani : AIR 1999 SC 1318, Court observed (AIR p. 1320):

Mental cruelty broadly means, when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and husband and as a result of which it becomes impossible for the party who has suffered to live with the other party.

Thus it is fairly well settled that the assessment of a behaviour or conduct that constitutes cruelty cannot be on the basis of objective criteria since the sensitivity of a person in a situation may vary depending on the make-up of that person. The court would have to be conscious that, considering that it is the life of that person that is involved, it cannot possibly step into the shoes of that person to ask if any 'reasonable' person would come to the same conclusion. Where one party to a marriage cites a series of events or incidents that constitutes mental cruelty, the court generally asks whether that person's explanation that it has become impossible for him or her to live with the other spouse on account thereof is convincing and acceptable. It is in the background of this position in law that this Court proceeds to examine the evidence in the instant case.

The photographs and the greeting cards

14. The trial court has made much of the statements made by the appellant in his deposition regarding his access to the almirah in the hostel room of Respondent No. 1. The trial court observed: 'on the one hand he stated that respondent herself gave him the keys of the almirah and on the other hand he stated that since he

was not given the keys by the respondent No. 1, the hospital superintendent suggested that he should break open the lock of the almirah.' In his examination in chief, what the appellant stated was as under:

I told her that I will go to Bombay and bring her remaining luggage. Since her course was over there, therefore she gave me her resignation letter and gave key of her hostel room. Though she was sharing the hostel room with another lady doctor, I gave her resignation letter to Superintendent of the hospital. He allowed me to take Mrs. Jyoti's luggage and also told me that it would be better if I also emptied the almirah so that the same could be allotted to another doctor. Since I was not having the keys of almirah because she did not give me the keys of the almirah, Dr. Sambargi, Hospital Superintendent suggested to me to break open the almirah and empty it.

It is thus clear that the appellant in fact had said that the keys given to him by respondent No. 1 was of her 'hostel room' and he is clearly categorical that he 'was not having the keys of almirah because she did not give him the keys of the almirah.' Therefore, the trial court committed an error in imputing to the appellant an inconsistency in his statement when there was none.

15. The trial court also dwelt at length on the inconsistency in the statement of the appellant regarding the so-called permission in writing which he stated he obtained from the hospital Superintendent for breaking open the almirah. This Court finds that the factum of the hospital Superintendent having given him the permission has been stated by him even in the first round of examination on 26.9.2000. One year later, on 12.10.2001, during his further cross examination the appellant said that this permission was given in writing. Nothing much can be made of this addition which does not in any way detract from the basic fact that the appellant had to break open the almirah since he did not have the keys. This was not a material discrepancy which would disprove the fact that the appellant had to recover the articles from the almirah by breaking it open.

16. The trial court also found inconsistency in the statement of the appellant as to where he recovered the photographs from. The trial court is no doubt right when it observes that the appellant in his examination on 26.9.2000 has stated that:

While I was removing the articles from the almirah I found some greeting cards and few slips and letters from beneath the papers which were exchanged between respondent No. 1 and respondent No. 2. I did not find any other article or photographs from there. The greeting cards are Ex. P-1 to Ex.P-12.

Whereas one year later in his cross examination on 12.10.2001 he states that:

I had come across the photographs Ex.P-13 to P-23 from the luggage of respondent No. 1 which she had brought at Jaipur. 4/5 photographs Ex. P-1 to Ex.P-6 had been found from the almirah which I broke open in Bhatia Hospital along with the some of the greeting cards already referred above.

It must be remembered that the cross-examination of the appellant was continuing after a break of over a year and some leeway had to be given to such discrepancy. Moreover, the photographs Ex.P-1 to Ex.P-6 and the photographs Ex. P-13 to P-23 have indeed been produced and their existence has not been doubted by the trial court. The trial court simply dismissed the entire set of photographs in the following manner:

I have seen the photographs, they do not in any way prove or lead to an irresistible conclusion that the respondents were leading an adulterous life. Moreover the photographs are not properly proved. Their negatives were not produced. Appellant admittedly did not click those photographs. Then who else could possibly do it? There is no explanation.

17. This Court finds that the trial court was not right in the approach it adopted to analyse the evidence on this aspect of the matter. The pleadings have indicated that there were two conflicting stands taken by Respondent Nos. 1 and 2. Respondent No. 1 had completely denied that there were any such photographs and in fact alleged that the photographs were 'manipulated'. On the other hand, Respondent No. 2 in his written statement admitted the existence of such photographs but explained it away saying that such photographs 'shot by the friend of the respondent on several social and cultural events are plain and sober, shot with absolutely good intentions and cannot be termed otherwise just to attribute bad relations between the respondents.' Clearly, therefore, Respondent

No. 2 had taken a contrary stand by admitting that such photographs of Respondents 1 and 2 did indeed exist.

18. The trial court failed to appreciate that these photographs were not available with the appellant to begin with. According to him they were recovered either from the almirah or from the luggage of respondent No. 1. The question of the appellant having to produce the negatives of these photographs did not arise since it was nobody's case that he had those negatives. From the written statement of Respondent No. 2 it was clear that the appellant had not shot these photographs. If it was the case of Respondent No. 1 that the appellant had manipulated these photographs then she had to prove such allegation, by adducing the evidence of any technical expert, which clearly she did not. The Respondent No. 2 also does not deny that the persons in the photographs are in fact Respondent Nos. 1 and 2. This important factor was completely lost sight of by the trial court. The appellant was in the circumstances, in the considered view of this Court, not required to prove anything more in respect of these photographs. Importantly, he denied the suggestions in his cross-examination that he himself had taken the photographs. He also denied that he had manipulated the photographs.

19. A perusal of the photographs at Ex.P-1 to P-6 and Ex.P-13 to ExP-23, indicates that the relationship between Respondents 1 and 2 was definitely not merely that of a student and a teacher as has been claimed by each of them in their respective written statements. While it would be a matter of subjective assessment if these photographs when viewed by the spouse of either of the persons in the photographs would be 'objectionable', it would be difficult to simply conclude that there was absolutely nothing in them that would perturb the spouse of either Respondent No. 1 or Respondent No. 2 (who too was married man). These are a series of photographs showing Respondents 1 and 2 sharing an intimate relationship over a period of time. They cannot be said to have been manipulated particularly since some of the photographs in Ex. P-1 to Ex.P-6 are also repeated in Ex. P-13 to Ex. P-23 although they are printed in a different format.

20. While it is true that these photographs by themselves cannot be expected to 'lead to an irresistible conclusion that the respondents were leading an adulterous life' as has been commented upon by the trial court, that was too simplistic an approach to adopt in the facts of the present case where the basic ground on which divorce was sought was not adultery but cruelty. The question that should have been asked was that whether these photographs when viewed by the appellant would have caused him mental anguish. This Court is unable to categorically state that they would not. It is one thing to say that these photographs do not prove adultery but quite another to completely rule out the possibility of the appellant being subject to mental cruelty if he viewed these photographs showing respondents 1 and 2 sharing an intimate relationship.

21. Turning to the greeting cards, the trial court again has merely gone by the fact that the Ex.P-1 to Ex.P-3 'are neither written nor signed by respondent No. 1.' This is too simplistic an analysis of the greeting cards. For instance, Ex.P-11 bears inscriptions 'To you dearest ***** from me!' and also bears a date inscription of December 1993. Ex.P-6 is addressed to 'Dearest **** (the name of Respondent No. 1)' and signed as 'Love, always. ****(the first name of the name of Respondent No. 2)' and bears the date of inscription as September, 1993'. So does Ex.P-8 which has the date of inscription of September, 1995 and is addressed as 'My Dearest *****' and signed by '**** (The first name of Respondent No. 2)'. Then we have Exs.P-10 and P-11 which are signed with the first letter (*) of the name of Respondent No. 2. Ex.P-4 is again addressed to 'Dearest *****' signed with the words 'never ending love, *' and the date inscribed is '12.11.1995'.

22. What the trial court also appears to have lost sight of is that neither Respondent No. 1 nor Respondent No. 2 have denied that these greeting cards exist. Their explanation is that greeting cards are normally exchanged between students and teachers and that there was nothing unusual about that. In fact in her cross-examination this is what the Respondent No. 1 has stated in this connection:

It is correct that there is tradition in Bombay to exchange greeting cards with the teacher and the students. It is correct that I, and respondent No. 2 exchange greeting cards on various occasions. I do not remember as to when the last

greetings were exchanged between me and the respondent No. 2. I do not know whether I and respondent No. 2 exchanged greeting cards after leaving Bombay hospital by me.

Her denial of the cards exhibited is in the following manner:

It is incorrect to suggest that I had sent a greeting card to the respondent No. 2 on 12.11.1995. To my knowledge the respondent No. 2 had not sent me any greeting card Ex. P-1 to P-11.

23. This Court does not find the denial either categorical or convincing. The greeting cards that have been exhibited have been viewed carefully by this Court. Given the pattern of the cards, their condition, the consistency of the writing and the language used, it cannot be said that the greeting cards 'do not prove anything'. The trial court was required to view these greeting cards along with the photographs and ask if the appellant's statement that, on viewing them, he underwent mental anguish which can tantamount to cruelty was convincing and acceptable. This Court is of the considered view that the answer to this question should be in the affirmative.

24. The trial court misdirected itself in asking whether the appellant had established a case of adultery. In fact the appellant had sought divorce on the ground of cruelty. If indeed, the appellant had to prove a case of adultery then perhaps something more would have to be established. Further, since his case is that the photographs and the greeting cards coupled with what he had gathered in the course of his enquiries in Bombay had caused him mental cruelty, the question that had to be asked in the present case was whether the appellant had established such a case on a preponderance of probabilities. As observed by the Altamas Kabir, J. (as His Lordship then was) in *Smt. Barnali Sen v. Debashish Sen* (2002) DMC 579 (DB) a case of cruelty would be made out where after a series of incidents, the marital fidelity of one of the spouses comes to be questioned and the marital ties come under severe strain. To the same effect is the Judgment in *Vimla Ladkani v. Dr. Chandra Prakash Ladkani* (1996) DMC 142. After considering the entire evidence in the instant case, this Court is inclined to answer that question in the affirmative.

25. This Court is conscious of the settled proposition merely because another view is possible, an appellate court should not lightly substitute its view for that of the trial court. Nevertheless, if the appellate court is able to come to a definite conclusion that by declining interference with the order of a trial court, which in the opinion of the appellate court is based on an incorrect appreciation of the evidence, injustice would be caused to the parties in appeal, then the appellate court would be failing in its duty, if it did not correct the error.

Other evidence

26. The trial court also has not at all adverted to the evidence of the uncle PW 3 whose affidavit by way of examination-in-chief and cross-examination supports the case of the appellant that the relationship between Respondents 1 and 2 during the stay of Respondent No. 1 in Bombay was not merely that of a student and teacher. That evidence appears cogent and convincing and fairly objective. A reading of that evidence does not indicate that it has been embellished only to support the case of the appellant. Likewise, Ex.P-24 the copy of the unsigned letter which is stated to have been received by the appellant does not appear to be a manipulated one. The same can be said of the two unsigned letters received by the appellant, which in his examination he says were possibly sent to him by the wife of Respondent No. 2. Some of these pieces of evidence may not have been 'proved' in the purely technical sense and by themselves cannot be relied upon to substantiate the case of the appellant. Nevertheless, it would not be safe to ignore them completely. It cannot be denied that they corroborate the broad pattern of evidence that goes to indicate that there was indeed a reasonable basis for the appellant to entertain the apprehension that Respondents 1 and 2 were carrying on an intimate relationship.

27. The trial court also has made much of the fact that the person who informed petitioner about respondent No. 1 being seen with another man could not place the identity of that man as respondent No. 2 although respondent No. 2 was a famous Neurosurgeon in Bombay. To this Court it appears that this again is not so material discrepancy if one views it in the overall context of the photographs, the greeting cards and the evidence of PW-3. In a situation where two people shared

a relationship, and definitely not to the open knowledge of close relatives of either, the evidence in regard to such relationship can possibly be only in the form of bits and pieces which will have to be assembled together to form a pattern. The approach of the Court has to be realistic keeping in mind that it is not always possible to come across eye-witness accounts in these matters. Of course, to what extent such bits and pieces can constitute a meaningful whole will vary from case to case.

28. The present case is also one where the Respondent No. 1 has not been candid in disclosing the complete facts. For instance, it was brought out in her cross-examination that even during the pendency of these proceedings she had approached the Court of the Additional District Judge in Rohtak with a petition under Section 9 of the Hindu Marriage Act, HMA case No. 8 of 1996 which had been decided ex parte on 12.3.1998. She also filed a Civil Suit No. 4 of 1996 on 26.9.1996 in the court of the Additional Civil Judge Ballabgarh under Section 25 of the Guardian and Wards Act, 1908 where again she obtained an ex parte judgment on 28.10.2002 requiring the appellant to handover custody of the minor child to her. This fact also emerged only during her cross-examination. There is no explanation as to why respondent No. 1 suppressed the fact of her having approached the Court in Haryana in her written statement filed in the court at Jaipur.

29. The question of the non-access of the appellant to the respondent during the time when she conceived the male child has also been dwelt upon by the trial court to suggest that the appellant herein should be presumed to have such access in terms of Section 122 of the Evidence Act. The appellant has pointed out that the male child born on 13.7.1996 was a full term baby whereas the period between 13.11.1995 and 13.7.1996 was about 8 months which means that the respondent No. 1 was already carrying the baby when she came to Jaipur. The appellant, therefore, claims that when she conceived the second child in September, 1995, the appellant did not have access to her. The criticism of the appellant that the trial court has not addressed itself to this aspect of the matter appears justified. The trial court appears to have failed to appreciate that there was no particular question to the uncle PW-3, in his cross examination that the

appellant had visited Bombay in September 1995. This aspect did require further examination in order to give a categorical finding in terms of Section 122 of the Evidence Act. However, this aspect need not be further probed because of the view taken by this Court that the evidence in record otherwise does fortify the case of the appellant that he has undergone mental cruelty. The fact that the Respondent No. 1 actually did not file any petition to seek custody of the daughter by filing a petition in Jaipur but did so later in Rohtak after the divorce petition was another factor that had to be considered to determine if the respondent left for Bombay on her own leaving behind the daughter.

Scandalous allegations against the appellant

30. Finally, there is one more aspect that is required to be adverted to. The trial court did conclude that the respondent No. 1 had failed to make good her allegations against the appellant that he had illicit relationship with his own sister-in-law and a staff nurse. But the matter does not end there since the allegations, if not proved, would indeed be scandalous. In the cross-examination of respondent No. 1 she was confronted with the visa stamp of Saudi Arabia of the passport of her sister-in-law which bears the date of 2.3.1995. It was also suggested to her that the sister-in-law was in fact in Saudi Arabia from March 1995 up to 16.9.1996. She does admit that the brother of the appellant herein, was in fact in Saudi Arabia. In those circumstances, the allegation that the appellant was having illicit relations with sister-in-law does constitute a scandalous allegation that can cause mental cruelty to the appellant. This also is to be examined from the point of view of the evidence of the father of Respondent No. 1 who, in a clear improvement over his affidavit by way of examination-in-chief even went to the extent of suggesting that they had caught the appellant with another woman 'in compromising position'. In fact, in his affidavit by way of examination-in-chief, this witness had only alleged that 'the petitioner was found in the company of other women. Further in para 10 of the said affidavit he makes only a passing reference to the fact that the appellant ousted respondent No. 1 from his matrimonial home with a view to perpetuate his illicit relationship with his sister-in-law whereas in the cross-examination he states that 'it may be in the month of November or December when I had come to Jaipur with my wife and had noticed the

attachment of the petitioner with (the sister-in-law)'. This was a totally untrustworthy witness whose sole purpose seems to have been to utilise the cross-examination to make further scandalous allegations against the appellant in a most distasteful manner.

31. Some of these answers by way of cross-examination by the father of Respondent No. 1 ought not to have been permitted to go on record particularly when those submissions were never made even in the affidavit by way of examination-in-chief. The trial court must guard against the tendency of the lawyers to continuously embellish the case of the, client by introducing fresh scandalous allegations as the case progresses. The trial court must ensure that the parties are made to stick to their written statements and their affidavits by way of examination-in-chief and ensure they are not allowed to improve their initial statements made in the Court. This rule should particularly be followed in matrimonial proceedings where scandalous allegations made in the pleadings and during the course of the trial can themselves constitute a ground for cruelty. Applying the tests laid down by the Hon'ble Supreme Court in V. Bhagat v. D. Bhagat : AIR 1994 SC 710, the conclusion in the present case is that the scandalous allegations made against the appellant by the respondent No. 1 and her witnesses both in their affidavits by way of evidence and in their cross-examination are scandalous enough to constitute mental cruelty of the appellant.

32. There is considerable merit in the submission of the appellant that the present case is one where the allegations of the illicit relationships by the appellant have been recklessly made by the respondent No. 1 and her parents, as a counter blast to the petition filed by the appellant herein for divorce in Jaipur on 5.1.1996. It is significant that the petitions in the court in Rohtak, which fact was suppressed by respondent No. 1, were filed subsequent to this date.

33. For all of the above reasons, this Court is of the considered view that the impugned judgment of the trial court is unsustainable in law and it is accordingly set aside. The appeal is allowed. The application HMA No. 303 of 2003 for dissolution of marriage of the Appellant with Respondent No. 1 under Section 13(1)(ia) of the Hindu Marriage Act, 1959 ('Act') on the ground of cruelty is

allowed. Since respondents 1 and 2 have been proceeded ex parte, there will be no orders as to costs. The names of the parties are not disclosed in the cause title of this judgment in order to protect their privacy. The Registry will ensure that this is maintained even when the certified copies of the judgment are issued or put on the net. The Registry will keep the Trial Court records in a secure condition in a sealed cover along with the records of the present appeal.

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