

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 06.01.2011

Judgment delivered on: 08.04.2011

MAT.APP.52/2009

Smt.Kavita

.....Appellant

Through: Mr.S.K.Bhalla, Adv.

Vs.

Shri Rakesh Raman

.....Respondent.

Through: Mr.V. K. Khurana, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

KAILASH GAMBHIR, J.

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1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 the appellant seeks to challenge the

judgment and decree dated 02.05.2009 whereby the petition filed by the respondent for divorce under Sections 13(1) (ia) and (ib) of the Hindu Marriage Act was allowed by the learned trial court in favour of the respondent and against the appellant.

2. Brief facts of the case relevant for deciding the present appeal are that the parties got married on 16.4.94 in Delhi according to Hindu rites and ceremonies. It is the case of the respondent husband that the appellant wife started harassing him on one pretext or the other like demand for a separate residence, getting her pregnancy aborted without the consent of the respondent, alleging that her life has been ruined by marrying a simple clerk and other such imputations. It was also the case of the respondent that the appellant used to leave the matrimonial home time and again and hassled by the conduct of the appellant, the respondent filed a petition for divorce on the ground of cruelty and desertion which vide judgment and decree dated 2.5.09 was

granted in favour of the respondent. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Assailing the finding of the learned trial court in para-15 of the impugned judgment, Mr.Bhalla, learned counsel for the appellant submitted that the civil suit referred to in the said para i.e. Ex.PW-1/A filed by the respondent for mandatory injunction was wrongly taken into consideration by the learned trial court as it was filed by the respondent just to create an evidence in his favour, as in the said suit the appellant was never served with the notice/summon and no evidence was produced by the respondent before the trial court to prove the fact that the appellant was served with the notice or had appeared in the matter. Assailing the finding of the learned trial court in para-16 of the impugned judgment, Mr.Bhalla stated that the order dated 11.06.2003 Ex.PW-1/C passed by the learned Magistrate in the criminal complaint filed by the appellant under Section 323/324/34 IPC is still under challenge before this Court in the petition under Section 482 Cr.P.C. filed by the appellant being

Crl.M.C.No.696/2010 challenging the order of the learned trial court dismissing the application moved by the appellant under Section 319 Cr.P.C. to seek re-trial of the respondent. Counsel, however, admitted the fact that the petition under Section 482 Cr.P.C. was filed by the appellant after the passing of the impugned judgment. Counsel also admitted that even the order of the learned Magistrate came to be passed after the passing of the impugned judgment. The contention of counsel for the appellant was that this order dated 11.06.2003 has not attained finality yet.

4. So far the institution of Kalandra Ex.PW-1/D dated 17.06.1999 by the appellant is concerned, as referred to in para-16 of the impugned judgment, counsel submitted that the appellant was well within her right to lodge/institute the Kalandara as the respondent, his father and brother came to the parental house of the appellant and committed the act of breach of peace and created a scene at that place, against which the police had taken action. Counsel thus submitted that the appellant-wife committed no wrong in lodging the

said complaint against the respondent and the said accomplices. Counsel also submitted that the said kalandara proceedings were dropped by the Magistrate on 12.7.2000 on the technical ground that the Magistrate had failed to take a decision within the mandatory period of six months from the date of registration of the kalandara and therefore for the said dropping of the kalandara proceedings no fault can be attributed to the appellant. Counsel further submitted that the proceedings against the respondent and his family members are still pending trial under Section 498-A IPC in the court of Smt. Twinkle Wadhwan, M.M. and therefore even if the respondent and his family members were discharged under Section 406 of the IPC on 13.9.2000, the same would not have the effect of absolving them for the acts of cruelty committed by them. Counsel also submitted that simply because of the fact that there was acquittal of the respondent and his family members in a criminal case, that would not lead to the conclusion that an act of cruelty was committed by the appellant in getting the FIR registered against the

respondent and his family members as it is the right given to a citizen under the law that whenever any criminal act is committed by the other party, to take recourse to filing of a complaint. Counsel also submitted that the learned trial court failed to appreciate the dictum of law laid down by this Court in *Krishan Kumar Vs. Shankari II (2007) DMC 367*, on the wrong analogy that filing of more criminal cases by the wife will amount to cruelty unlike in the case of *Krishan Kumar (supra)* where there was only one criminal case instituted by the wife against her husband.

5. Assailing the finding of the learned trial court in para 18 of the impugned judgment where it has held that the appellant said that her life was ruined by marrying a clerk and it caused cruelty to the respondent, the counsel submitted that the respondent failed to prove that any such utterances were made by the appellant. The contention of the counsel was that no independent witness was produced by the respondent to prove that any such allegation was leveled by the appellant against the respondent. Counsel also submitted

that in the written statement, this allegation has been duly refuted by the appellant. Counsel also submitted that the learned trial court wrongly gave weightage to the evidence of the respondent while ignoring the evidence of the appellant. The contention of the counsel was that if there is an evidence of one party against the other party i.e. oath vs. oath then in the absence of any corroboration, the evidence of one party cannot be accepted over the other. Further assailing the correctness of the finding given by the learned trial court in para 19 of the impugned judgment, the counsel submitted that the learned trial court has not given the details of the documentary evidence in the said para based on which the court made the observation that it is not the quantity but the quality of the witnesses which is to be weighed. Counsel further submitted that the documentary evidence which was placed on record by the respondent was manipulated by him and the same was self serving evidence and therefore the learned trial court ought not to have placed any reliance on

such manipulative and self serving documentary evidence placed on record by the respondent.

6. Counsel for the appellant further submitted that the respondent admittedly failed to pay the amount of maintenance as granted by the learned trial court despite the grant of decree under Section 18 of the Hindu Adoption and Maintenance Act but this fact was not considered by the learned trial court which fact would clearly prove that the respondent husband was trying to take advantage of his own wrongs and therefore he was not entitled to the grant of decree of divorce in terms of Section 23(1) of the Hindu Marriage Act. Counsel further submitted that the learned trial court in the said case under Section 18 of the Hindu Adoption and Maintenance Act vide judgment dated 31.10.2002 took a view that the appellant in that case was able to show in her evidence that the respondent had illicit relationship with another woman and which fact became a cause of irritation between the parties and due to which the appellant was forced to leave her matrimonial house. The

contention of the counsel was that the said finding of the court in the Hindu Adoption & Maintenance Case has a binding effect in terms of Section 11 of CP.C and such an observation in the judgment in a case between the parties is also a relevant fact under Section 6 & 13 of the Indian Evidence Act. Counsel for the appellant in this regard invited attention of this court to paras 22, 33 & 34 of the judgment dated 31.10.2002 and submitted that perusal of the said paras would clearly reveal that the conduct of the respondent is out of bounds of the expected and reasonable conduct and based on the said observations of the court, he was not entitled to the grant of decree of divorce. Counsel further submitted that the appellant had also proved on record before the trial court that the respondent failed to pay the maintenance amount despite repeated applications moved by her before the concerned court in Section 18 proceedings and this deliberate act on the part of the respondent in not paying the maintenance amount even despite directions given by the maintenance court would clearly demonstrate the mala fide

conduct of the respondent who wanted to pressurize the appellant to succumb to his dictates and to come under pressure to agree for divorce. Counsel also submitted that the appellant had placed on record the relevant order dated 15.04.2008 of the said court before the trial court by which direction for increase in the maintenance amount to Rs.4,000/- along with direction to clear the arrears of maintenance was given. Counsel also submitted that the judgment of the Apex Court cited by the appellant in the case of *Hirachand Srinivas Managaonkar Vs. Sunanda (2001) 4 SCC 125* was ignored by the learned trial court where the Apex Court held that non-payment of maintenance would lead to striking off the defence of the petitioner seeking divorce. Counsel also submitted that a separate application was moved by the appellant before the trial court under Section 24 of the Hindu Marriage Act but no maintenance under the said provision was granted by the court in favour of the appellant on the ground that already an interim maintenance was allowed in her favour by the other court under Section

18 of the Hindu Adoption and Maintenance Act proceedings. Counsel also submitted that the appellant had also moved three applications for dismissal of the divorce petition filed by the respondent on account of persistent defaults committed by him in paying the maintenance amount under Section 18 proceedings. (1st application dated 19.04.07 at page 731, 2nd application dated 13.7.07 at page 739 and the 3rd application dated 7.05.08 at page 759). Counsel also submitted that the conduct of the respondent is apparently offending even before this court as he had not been timely paying the maintenance amount to the appellant.

7. Counsel further submitted that the appellant has always been ready and willing to join back the company of the respondent and this fact can be borne out from the orders dated 05.10.2004, 08.10.2004 and 10.11.2008 passed by the learned trial court. Counsel further submitted that even now also the appellant is prepared to forgive the respondent for his past misconduct and can join the company of the respondent.

8. Mr.Khurana, learned counsel appearing for the respondent opposing the present appeal submitted that a number of false and vexatious complaints were lodged by the appellant against the respondent and his family members with the sole object to unnecessarily harass them due to which the respondent and his family members had to appear before various authorities. In so far as the complaint made by the appellant under Section 498-A/406 IPC is concerned, the respondent, his parents and his brother were arrested. Counsel also stated that cancellation of bail of the brother of the appellant was sought by the appellant when he was yet to be released from Tihar Jail after the grant of bail to him by the Court vide order dated 18.12.1998. Counsel further submitted that the appellant went to the extent of assailing the dismissal of cancellation order by way of filing a revision petition before the Sessions Court. Counsel also submitted that the appellant has filed a criminal complaint against the respondent invoking the provisions of the Domestic Violence Act, besides filing a civil suit for recovery of the dowry

articles. Counsel also submitted that for all these the respondent had proved on record various orders passed by the respective courts and also all these acts were committed by the appellant after 29.11.1998 from which date the parties have been living separately. Counsel also submitted that by filing a petition under Section 482 Cr.P.C. by the appellant challenging the order passed by the learned trial court on the application of the appellant moved by her under Section 319 Cr.P.C. would further show that the appellant was still chasing the respondent with the sole motive to harass him and to cause mental agony and tension to him. Counsel also submitted that the spate of criminal complaints filed by the appellant would clearly show that the offer made by her before the learned trial court as well as before this Court of joining back the company of the respondent was false and contrary to her conduct. Counsel for the respondent also submitted that the complaint lodged by the appellant which led to the registration of a Kalandara under Section 107/150 Cr.P.C. and proved on record as Ex.PW-1/D is based on

entirely different facts than what has been represented by the counsel for the appellant before this Court. Counsel also submitted that with the lodging of all these complaints by the appellant the previous acts of cruelty committed by the appellant would also get revived in view of the settled legal position.

9. Counsel for the respondent further submitted that the appellant failed to cross-examine the respondent to refute the statement given by him in his examination-in-chief stating that the appellant used to taunt the respondent by saying that her life was ruined by marrying a clerk. Counsel thus stated that the learned trial court in para-18 of the impugned judgment has correctly observed that such taunts of the appellant caused cruelty to the respondent.

10. Explaining the conduct of the respondent on the aspect of maintenance, counsel submitted that no order under Section 24 of the Hindu Marriage Act was passed by the learned trial court and, therefore, the appellant could not have any grievance so far the non-payment of maintenance

amount in the related proceedings filed by the appellant under Section 18 of the Hindu Adoption and Maintenance Act was concerned. Counsel for the respondent also submitted that the learned trial court in the execution proceedings had directed attachment of the salary of the respondent and the maintenance amount from the salary of the respondent has already been deducted. Counsel also submitted that the respondent has also cleared/paid the upto-date amount of maintenance to the appellant and, therefore, no fault can be found by this Court so far the payment of maintenance amount by the respondent is concerned. Counsel also submitted that all the three applications filed by the appellant before the learned trial court seeking dismissal of the case of the petitioner or striking off his defence were dismissed by the court and those orders were not challenged by the appellant and thus attained finality. Counsel thus stated that the respondent cannot be accused of not paying the maintenance amount to the appellant. Counsel also submitted that as per the deposition of RW-2, father of the appellant, he

has admitted the fact that the appellant was getting the maintenance amount from the salary of the respondent as per the orders of the court.

11. Counsel for the respondent also submitted that the observation made by the learned trial court in para 22 in Section 18 proceedings judgment dated 31.10.2002 cannot have any binding effect and the said observations cannot be treated as final between the parties. The contention of the counsel for the respondent was that the principle of res judicata will not be attracted because the learned court in the said case was dealing with an entirely different subject matter, being concerned with the limited question of grant of maintenance to the appellant and any observation made by the learned trial court in the said order cannot be treated as res judicata between the parties. Counsel thus stated that in the impugned judgment, the learned trial court has correctly dealt with the issue on this aspect. Counsel also submitted that the appellant failed to prove any kind of illicit relationship of the respondent as alleged with a lady named

Pinki in the present proceedings and therefore such serious allegations leveled by the appellant in itself amounts to causing cruelty upon the respondent husband.

12. I have heard learned counsel for the parties at considerable length and taken into consideration the contentions raised by them and have also gone through the records of the case.

13. The respondent-husband had filed a divorce petition on the ground of cruelty and desertion as envisaged under Section 13(1) (ia) and 13(1) (ib) of the Hindu Marriage Act, 1955 and his petition was allowed by the learned trial court on both the grounds vide judgment dated 2.5.2009.

14. So far the decree passed by the learned trial court on the ground of desertion is concerned, learned counsel for the respondent very fairly conceded to the fact that the impugned judgment cannot sustain on account of the fact that the respondent failed to prove on record the ground of desertion by satisfying the necessary ingredients of Section 13 (1) (ib) of the Hindu Marriage Act. It is a settled legal

position that to claim a decree on the ground of desertion so far the deserting spouse is concerned, two essential conditions required to be proved are (i) factum of separation and (ii) intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two ingredients are essential so far the deserted spouse is concerned i.e. (i) absence of consent and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The learned trial court has granted the decree of divorce on the ground of desertion in favour of the respondent only due to the fact that the appellant did not give any cogent ground to desert the respondent and thereafter of not returning back. The learned trial court failed to deliberate on issue No.2 in a proper perspective and has given the said finding in favour of the respondent without appreciating the said essentials required to be proved before granting a decree of divorce on the ground of desertion. It is a settled legal position that the onus is on the petitioner to not merely prove the factum of

desertion on the part of the deserting spouse but also to establish the fact that the said desertion on the part of the deserting spouse is with a view to bring co-habitation permanently to an end. Mere fact that the appellant did not allow the respondent to enter in his own house on 29.11.1998 would not prove the fact that she had the intention to bring the cohabitation permanently to an end. Thus, the findings of the learned trial court on issue No.2 are clearly perverse and illegal and, therefore, the decree granted by the learned trial court on the ground of desertion is hereby set aside.

15. The other ground, on which the learned trial court has granted the decree of divorce in favour of the respondent and against the appellant is the ground of cruelty as envisaged under Section 13(1) (ia) of the Hindu Marriage Act. Before I deal with the rival submissions of learned counsel for both the parties, it would be desirable to decipher the foundation on which the learned trial court granted the said decree on the ground of cruelty in favour of the respondent and against the appellant. The learned trial court did not

consider the allegations leveled by the respondent in paras 6,7,8,9 and 10 of the petition, as these paragraphs were found to be vague with no date, month and year of the incidents mentioned therein. The learned trial court also came to the conclusion that with the cohabitation of the parties till 29.11.1998 the respondent had condoned the acts of cruelty of the appellant-wife till the said date. The learned trial court then went on to examine the acts of cruelty committed by the appellant on or after 29.11.1998 and also revival of the previous acts of cruelty due to the said subsequent acts of cruelty committed by the appellant after 29.11.1998. The first act of cruelty committed by the appellant as per the finding of the learned trial court is that on 29.11.1998 the respondent was not allowed to enter his own house by the appellant which led to the filing of the civil suit for mandatory injunction on 01.12.1998 and such an act on the part of the appellant not permitting the respondent to enter in his own house has been treated as an act of cruelty on the part of the appellant. Filing of various complaints by the appellant and

also her taking other legal remedies were also taken as cruel acts committed by the appellant towards the respondent. Filing of complaint by the appellant under Sections 323/324/34 IPC against the respondent, his parents and his brother on 17.03.1999; registration of a Kalandra under Section 107/150 Cr.P.C. on 17.6.99 at the instance of the appellant against the respondent, his brother and father; registration of an FIR at the instance of the appellant against the respondent and his family members under Sections 498A/406 IPC; filing of an application by the appellant to seek cancellation of bail of the brother of the appellant while he was still in custody and filing of a revision petition against the dismissal of such an application; all these acts of filing of complaints and registration of cases by the appellant were treated by the learned trial court as serious acts of cruelty perpetrated by the appellant. The learned trial court also held that such acts of cruelty committed by the appellant also revived the previous acts of cruelty committed by her. The learned trial court also distinguished the judgment of this

Court in *Krishan Kumar Vs. Shankri II (2007) DMC 367 Delhi* on the analogy that in the said case there was only one criminal proceeding while in the present case there were many such cases filed by the appellant and also the fact that in the former case the revision petition against the order of discharge was allowed by the Sessions Court and in the facts of the present case no such revision was filed by the appellant. The learned trial court also found that the taunt of the appellant that her life was ruined by her family by marrying her with a clerk was an act of cruelty committed by the respondent. The aforesaid findings formed the genesis to grant the decree of divorce by the learned trial court on the ground of cruelty in favour of the respondent and against the appellant.

16. Institution of criminal case/cases by a wife against her husband and other family members of the husband would by itself constitute cruelty or not is a subject matter of discussion in various decisions of this High Court and various other Courts. It is also a matter of discussion whether such

criminal proceedings if result into an acquittal, then, whether such acquittal by itself would prove cruelty or not. Criminal proceedings which are usually filed from the side of the wife in matrimonial proceedings are either under the provisions of Sections 498-A/406 of the Indian Penal Code or under the relevant provisions of the Domestic Violence Act. It cannot be denied that it is the legitimate right of the wife or of the husband to resort to various legal remedies as available to them under various statutes to seek redressal of their grievances and to take necessary action against the culpability of other spouse and/or his/her family members. Mere resort to institution of criminal proceedings by either of the spouse thus cannot be taken to be an act of cruelty on the part of such a spouse. Filing of such criminal proceedings either can result in the discharge/acquittal or in conviction of one or the other members of the family of the spouse or the spouse himself/herself. Then there can be a challenge to such orders/judgments by the aggrieved party. The acquittal in the criminal proceedings can also take place due to several

factors as before a criminal court the prosecution has to establish the case beyond reasonable doubt. Most of the criminal cases result into acquittal due to host of factors such as the witnesses turning hostile or due to the non-availability of the eye-witness or due to inefficient handling of the investigation by the Investigating Officer of the case and for various other factors. In matrimonial offences, the acquittal rate is comparatively higher because usually no outsider is a witness to various disputes and in-fighting between the husband and wife and their respective family members generally happens within the four walls of the matrimonial home. In this backdrop it would be difficult to accept the proposition that filing of criminal cases by the wife or even the criminal cases resulting into acquittal by itself would constitute cruelty on the part of such spouse.

17. Undoubtedly, in the facts of the present case, a number of criminal cases were filed by the appellant, but merely because of number of cases filed by the appellant are more therefore, this factor of quantity of more cases should

go against the appellant. The pivotal question should be that in what circumstances the appellant had filed such cases and whether the given background afforded any justifiable reason to the appellant to file such cases or not and if it is found that filing of such cases is on absolutely false and baseless grounds tainted with ulterior motives, then certainly it can be held that filing of such criminal cases would constitute cruelty on the part of such spouse.

18. FIR No.379/1998 was registered at the instance of the appellant under Sections 498-A/406 IPC against the respondent and his family members based on the allegations levelled by the appellant that the respondent and his family members refused to return the jewellery and other dowry articles and also she was being subjected to harassment on account of insufficient dowry and also because of the further dowry demands. DD No.57 A was lodged by the appellant as she complained that on 16.02.1998 the respondent along with his parents and his brother Ravinder Singh had assaulted her and in fact inflicted injuries on her. The appellant even got

herself medically examined with the help of her sister-in-law (*bhabhi*) at Anand Parbat Dispensary on 19.02.1998. A complaint case under Sections 323/324/34 IPC was filed by the appellant and the said complaint was based on the reported incident of assault by the respondent and his family members on 16.02.1998 and the incident relating to the alleged attempt of the accused persons named therein to kill the appellant on 29.09.1998. The said complaint filed by the appellant was supported with the MLC prepared by the Doctors of Ram Manohar Lohia Hospital wherein the injury suffered by the appellant was diagnosed as a 'blunt injury' upon the abdomen. The learned Metropolitan Magistrate, however, directed framing of charges against the accused persons only under Sections 323/34 IPC after finding that the nature of injury opined by the doctor was simple and the weapon used by the accused persons in the commission of the alleged offence was opined as 'blunt'. The final order passed by the learned Metropolitan Magistrate vide order dated 11.06.2003 in the matter relating to FIR No.306/2000

directing discharge of accused persons under Sections 323/34 IPC which was challenged by the appellant by moving an application under Section 319 Cr.P.C. which was dismissed and was further challenged by the appellant under Section 482 Cr.P.C. and is pending consideration before this court. The appellant has also given due explanation for the registration of Kalandra against the accused persons vide Ex.PW-1/D as the respondent, his father and brother allegedly came to the parental house of the appellant where they had made an attempt to breach the peace of the appellant and also created an ugly scene warranting action against them.

19. The dictum of law as laid down by this court in the case of ***Krishan Kumar (supra)*** and ***Harish Chander Drall vs. Suresh Wati II (2007) DMC 450*** is that the mere fact that the criminal proceedings have been instituted by one spouse against the other the same would not constitute cruelty by itself, even if such criminal proceedings end up in acquittal. It would also be pertinent to refer to the recent judgment of the Madras High Court in the case of

Jayakumari vs. Balachander 2010(TLS) 1243604 where it

has been held that:

"30. The term 'cruelty' consists of unwarranted and unjustifiable conduct on the part of defendant causing other spouse to endure suffering and distress thereby destroying peace of mind and making living with such spouse unbearable, completely destroying real purpose and object of matrimony. It would of course be difficult to define the expression 'cruelty'. There cannot be any hard and fast rule in interpreting the same. As pointed out, the word "cruelty" cannot be put in a strait-jacket of judicial definition. It must be judged on the facts of each case having regard to the surrounding circumstances. Whether one spouse is guilty of cruelty is essentially a question of fact and previously decided cases have little, if any, value. The term 'cruelty' is not defined in the Act. It is to be judged by taking into consideration the status of life, the standard of living, the family background and the society in which the parties are accustomed to move because particular behaviour may amount to cruelty in one set of circumstances and may not be so in other set of circumstances.

Observing that merely because criminal proceedings under Sec.498A IPC initiated by wife against her husband and his parents ended in acquittal and it cannot be treated as an instance which goes infavour of the husband to substantiate the plea of cruelty, in AIR 2006 AP 269 [Chiranjeevi v. Lavanya], the Division Bench of Andhra Pradesh High Court held as follows:-

"22. Much arguments have been advanced by the learned counsel appearing for the appellant-husband and his parents that a criminal case on a full fledged trial is an incident which constitutes cruelty on the part of the respondent-wife who initiated criminal proceedings. We have gone through the judgment, which has been marked as Ex.B-6. The criminal case ended in acquittal on the ground that the prosecution failed to prove the case against the accused beyond all reasonable doubt. The acquittal of the case is not on the ground of no evidence. It is settled law that nature of evidence required in a criminal case is of different standards and the same standards and proof is not required in civil proceedings. Therefore, mere acquittal of the appellant-husband and his parents in criminal case cannot be treated as instance which goes in favour of the

appellant-accused to substantiate the plea of cruelty, on which a decree of divorce has been sought for."

33. Similar view was taken in AIR 2007 (NOC) 2205 (Del.) [Vishnu Dutt Sharma v. Manju Sharma].

34. The trial Court took the view that accusations and allegations of dowry harassment amounts to cruelty. In our considered view the approach of the trial Court is erroneous and cannot be endorsed with. While considering the accusations, regard must be had to the context in which they are made. When there was demand of dowry and ill-treatment, on that account necessarily Respondent has to lodge a complaint. If that is to be taken as cruelty, it would amount to allowing the Petitioner to take advantage of his own wrong. As per Sec.23(a) for granting any relief under the Hindu Marriage Act, the party should not be allowed to take advantage of own wrong."

(emphasis supplied)

Therefore, as per the settled position of law, looking into the background of the aforementioned criminal cases filed by the appellant, it is difficult to accept the argument of the counsel for the respondent that the same were filed by the appellant just with a view to harass the respondent and the same were without any basis. This Court, therefore, does not find any merit in the reasoning given by the learned trial court that since there were more criminal cases filed by the appellant, therefore, filing of such criminal cases would constitute cruelty to the respondent.

20. The concept of cruelty is of very wide amplitude and has not been defined in the Act and rightly so as it is not possible to put it down in a strait jacket formula. However, the benchmark evolved through judicial pronouncements is that the conscience of the court should be satisfied that it is not possible for the parties to live together without mental agony and pain anymore. But the conduct complained of should be such that there is a reasonable apprehension in the mind of the complaining party that there is danger to limb or life or mental health in living together. The conduct should be something much more than the ordinary wear and tear of married life and should touch a certain pitch of severity. What may be cruelty in one case may not be cruelty in the other case and each case has to be seen from the prism of its own peculiar fact situation. Here it would be useful to refer to the judgment of the Apex Court in the case of ***Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511*** where the Apex Court after analyzing the entire law on the aspect of mental cruelty gave a treatise enlisting non exhaustive situations which can be

treated as mental cruelty, out of which the following extract reproduced seems germane in the present context:

"On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

73. Human mind is extremely complex and human behavior is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behavior in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

74. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

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

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

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

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

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

(vi) Sustained unjustifiable conduct and behavior 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 behavior 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."

Thus while appreciating the law as settled by the Apex court in the above, alongwith a catena of other judgments the present case has to be evaluated. The filing of criminal cases will not amount to mental cruelty as already discussed above, but the other acts alleged to have caused mental cruelty or not have to be analysed.

21. The prime ground which impressed the learned trial court to treat it as an act of cruelty was that the appellant did not allow the respondent to enter his own house on 29.11.1998 when he had returned from his office. This finding was given by the learned trial court primarily by

getting influenced from the fact that due to his alleged ouster from his own house on 29.11.1998 the respondent had to file a civil suit for mandatory injunction in which the respondent also made a statement to the effect that he got his belongings back with the help of the police. This finding of the learned trial court is clearly perverse as the learned trial court did not appreciate the fact that the appellant was never served with any notice/summon in the said case and, therefore, the appellant had no opportunity to rebut the averments made by the respondent in the said civil suit. Filing of the civil suit and its withdrawal by the respondent could not have been taken as adverse against the appellant to believe that the respondent was actually ousted by the appellant from the matrimonial house.

22. So far the allegation of the respondent that the appellant used to say that her family had ruined her life by marrying her with a clerk and the same constituted as an act of cruelty, this Court is of the view that such a circumstance by itself cannot be taken as a grave act on the part of the

appellant to entitle the respondent to claim a decree of divorce on the alleged assertion of the appellant. Even otherwise, no evidence was led by the respondent to show that in whose presence such an accusation was made by the appellant.

23. The learned trial court also returned yet another wrong finding in paragraph-22 of the impugned judgment by taking a view that the allegations leveled by the appellant in the petition filed under Section 18 of the Hindu Adoption and Maintenance Act attributing illicit relationship of the respondent with a concubine named Pinki resulted in causing cruelty to the appellant in the absence of any cogent evidence led by the appellant to prove the same before the Matrimonial Court. It is no doubt a settled legal position that leveling of false, baseless and defamatory allegations by one spouse against the other regarding illicit relations would constitute an act of cruelty on the part of such spouse but that is not the case here as the respondent neither in his petition nor in his evidence made any such grievance that such allegations

leveled by the appellant in Section 18 proceedings caused cruelty to him. The observations made by the Court in the judgment dated 31.11.2002 in Section 18 proceedings observing that the respondent had illicit relationship with another woman, which became a further cause of irritation to the appellant could not be taken adverse against the appellant, if not favourable to her. Although I do not agree with the argument of the counsel for the appellant that the said observation of the Civil Court in the said judgment under Section 18 of the Hindu Adoption and Maintenance Act will operate as res judicata but at the same time the finding of the learned Trial Court to hold such an observation against the appellant is equally unacceptable.

24. Mental cruelty indeed is not as easy to establish as physical cruelty but the impact of the alleged cruel incidents on the mind of the complaining spouse has to be deliberated upon. However an isolated or stray incident, an angry look, a random quarrel, a sugar coated insult or a taunt cannot lead the court to grant a decree of divorce. The question that

needs to be addressed is that whether the cruelty alleged is antithetic to love and affection, the two basic pillars of matrimony and whether it has poisoned and polluted the bond of conjugal kindness to such an extent that marriage itself has become a Damocles' sword for the parties? In the present case, the constant harping of the respondent of the torture and mental agony caused by the institution of criminal proceedings cannot be amplified to strain the matrimonial chord to the extent that it is broken down. The other acts alleged, are the unuttered flutters of married life and hence cannot be given the sanction of cruelty as envisaged under section 13(1) (ia) of the Hindu Marriage Act.

25. Now dealing with the argument of the counsel for the appellant that the respondent was not entitled to the grant of the decree of divorce as by his persistent default in the payment of the interim maintenance the grant of decree in favour of the respondent would be against the principles of law envisaged under Section 23(1) of the Hindu Marriage Act. Counsel for the respondent, on the other hand, contended

that no order under Section 24 of the Act was passed by the learned trial court and, therefore, there was no default on his part in the payment of any maintenance amount so far the matrimonial proceedings were concerned. The contention of the counsel for the respondent was that non-payment of any interim maintenance in the related proceedings would not defeat the right of the respondent, if otherwise he had sufficiently proved on record his case, based on which the decree of divorce was sought by the respondent.

26. It is not in dispute between the parties that no order under Section 24 of the Hindu Marriage Act was passed by the learned trial court. It is also not in dispute that the said order was not passed by the learned trial court considering the fact that a similar order for the grant of maintenance was passed by the civil court in a related matter filed by the appellant under Section 18 of the Hindu Maintenance and Adoption Act. It is also not in dispute that the respondent-husband was a persistent defaulter in the payment of the said maintenance amount which led the appellant to move

applications before the learned trial court to seek striking off of the defence of the respondent. Although the said applications filed by the appellant were dismissed by the learned trial court taking into account the fact that since no order for maintenance was granted by the matrimonial court under Section 24 therefore, the defence of the respondent could not be struck off. There was no justification on the part of the respondent not to pay the maintenance amount as order under Section 24 of the HMA was not passed by the Maintenance Court only because the Civil Court has passed a similar order in Section 18 proceedings. Grant of interim maintenance during the pendency of the proceedings has been recognized as an indefeasible right of the non-earning spouse and the non-payment of the same by the earning spouse that too for no justifiable reason, should have been viewed seriously by the Trial Court. The appellant had moved an application bearing C.M.No.7697/2009 under Section 24 of the Hindu Marriage Act to seek maintenance amount from the respondent @ Rs.6,000/- per month and this Court vide order

dated 29.09.2010 gave direction to the respondent to pay the entire arrears of the maintenance amount at the first instance while revising the earlier maintenance amount from Rs.4,000/- to Rs.6,000/- per month. In compliance with the said directions given by this Court, the respondent had paid an amount of Rs.1,21,000/- to the appellant by way of two demand drafts and then again a sum of Rs.23,350/- by way of a cheque. Taking into account the aforesaid development, this Court is of the view that since the respondent has cleared the entire outstanding dues towards the arrears of the maintenance amount, so the argument of the counsel for the appellant of striking off the defence of the respondent would not be available to the appellant any more. I may also observe here that the appellant had also failed to challenge the orders passed by the learned trial court dismissing her applications seeking striking off of the defence of the respondent due to his failure to pay the maintenance amount and therefore the said plea would not be available to the appellant any more. It also cannot be lost sight of the fact that the appellant took

independent remedy by filing an execution petition on account of the failure of the respondent to pay the arrears of the maintenance amount granted in her favour by the civil court in Section 18 proceedings. The Argument of learned counsel for the appellant that the learned Trial Court ought to have strike off the defence of the respondent due to the non-payment of the amount of interim maintenance will thus not sustain in the light of the above discussion.

27. Thus, taking a panoramic view of the case at hand, this court is of the considered view that the learned trial court failed to appreciate the pleadings of the parties and the evidence adduced by them in support thereof including the applicable law both on the ground of cruelty and desertion in the right perspective. While adjudicating matrimonial cases, the courts have to be cautious and conscious of the fact that the holy bond of matrimony involves delicate human emotions and complex situations and often there gets created a chasm which if fortified by the court can lead to irredeemable destruction.

28. In the light of the aforesaid discussion, the present appeal is allowed and the impugned judgment and decree dated 02.05.2009 passed by the learned trial court is hereby set aside.

April 08, 2011
dc/mg

KAILASH GAMBHIR, J