

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FAMILY COURT APPEAL NO.123 OF 2007

Sheetal Santosh Chavan
C/o. Shivaji Bajarao Patole
B/9, Bhavani Prasad Co-op.
Housing Society, Bhavani
Mata Road, Amboli Hill,
Andheri (W),
Mumbai 400 058 .. Appellant.

Vs.

Santosh Atmaram Chavan
13/940, Abhudaya Nagar,
Heramb Co-op. Housing Society,
Parel Tank Road, Kalachowki,
Mumbai 400 033. .. Respondent.

Mr. Sushil Inamdar for the Appellant.
Mr. V.S. Kapse for the Respondent.

CORAM : A.S. OKA & A.K. MENON, JJ.

RESERVED ON : 29TH JANUARY, 2015

PRONOUNCED ON : 10TH FEBRUARY, 2015

ORAL JUDGMENT (PER A.K. MENON, J.)

1. The present appeal arises out of the judgment and decree dated 18.4.2007 passed by the Family Court No.5, Mumbai in Petition No.A-157 of 2004 granting a decree of divorce under section 13(1) (ia) of Hindu Marriage Act, 1955. The facts in brief revealed that both the Appellant and Respondent were Hindu, domiciled in Mumbai

and were married on 27.12.2002, according to Hindu Vedic rites and customs. The marriage has not been registered but there is no dispute as to the factum of marriage. There are no issues out of the said marriage.

2. The first ground of cruelty alleged is that after marriage, the Appellant did not consummate the marriage inter alia for the reason that she did not want to conceive. According to the Respondent, he was the only son and was staying with his parents. He expected the Appellant to behave with love and affection towards him and with his parents specially since his parents treated the Appellant like their own daughter. However, she never appreciated this.

3. The next ground of cruelty which is set out in the petition is that after the marriage with the Appellant, she took up employment and did not disclose the address and phone number to the Respondent nor did she disclose the nature of work she was engaged in. She used to leave at 8.30 am and return at 8.30 pm. The third ground is that the Appellant always complained about her health and frequently quarreled with the Respondent and his parents and thereby disturbed the otherwise peaceful atmosphere in the matrimonial law. The Respondent contends that he requested, the Appellant to undergo a check up at Sion hospital but she refused. The next ground pleaded is that the Appellant had threatened to

commit suicide without any reason.

4. According to the Respondent due to aforesaid reasons, the Respondent was faced with continuous physical and mental torture by the Appellant. The Respondent contends that he was ready to stay separate with her but there was no response from the Appellant. The Appellant was frequently visiting her parents house without informing the Respondent and it is the Respondent's case that on 17.10.2003 the Appellant quarreled with the Respondent and left the matrimonial home without any just and reasonable cause taking with her ornament and other belongings. The Respondent apparently visited his in-laws and told them about the incident but he received no support from them. After the said incident the Respondent had requested the Appellant to join him but she remained adamant and declined despite several attempts made of reconciliation were of no avail. Ultimately, the Respondent issued a legal notice calling upon her to do so. It is on these grounds that the Respondent claims that he was entitled to a decree of divorce.

5. The Appellant wife filed her written statement in which she admitted the marriage and contended that various items gifted at the time of marriage including jewellery were in custody of the Respondent. Her version taken up by her in reply to the Respondent's Advocate notice, has remained uncontroverted. Cohabitation was admitted and it is contended that the Respondent

was earning income of Rs.10,000/- per month. The marriage was admittedly consummated after 15 days. It was contended by the Appellant on one occasion she had visited her neighbour and her mother-in-law warned her against meeting with the neighbours. On another occasion, it seems that the father-in-law informed her parents that she would not be allowed in the matrimonial home unless she starts eating non-vegetarian food. Attempts were made by the Appellant's brother to pacify the Respondent and his parents. Apparently, the Respondent suggested to the Appellant that they would stay separately. Despite all this it appears that on 17.10.2003 her in-laws quarreled with her and insulted her on a trivial issue of having made small chapattis. This incident led to a severe quarrel at which point the Appellant left the matrimonial home leaving behind jewellery and luggage. It is contended that she had decided to forget the incident and return to the matrimonial home after Diwali festival. However, then she received Advocate's notice on or about 28.10.2003. A reply was then sent on 1.11.2003 and thereafter no further intimation was received, except for a telephone call from father-in-law that she was not welcome in matrimonial home. All attempts at reconciliation failed. It is contended that the Respondent and his parents were always aware that she was vegetarian and that she would be taking up a job. Despite which the complaints were made that she does not eat non-vegetarian food. She has contended that she has performed all household chores as duty of the wife and daughter.

6. The Appellant contends that she was ill treated and that she is entitled to maintenance. She also contends that she is entitled to stridhan which is in custody of the Appellant. She has denied the allegations that marriage could not be consummated or that she had denied cohabitation and continue with marital relations. She has also denied having kept secret from the Respondent the fact of her employment, addresses or telephone number. She has made a specific statement that both the Appellant and Respondent used to leave house together at 8.30 am while she was employed in BSNL and the salary cheque was handed over to the Respondent and he was fully aware of the same. She admits of having visited Sion hospital at the instance of the Respondent. However, there was nothing wrong with her health. She has also denied that she threatened to commit suicide. She has further held that the parents of the Respondent quarreled with her without any reason and she was willing to co-habit with the Respondent.

7. Given this factual background, the Respondent examined only himself by filing an affidavit dated 15.2.2006 in lieu of examination in chief which is a repetition of the facts pleaded in the Petition. One additional statement is made that the Appellant was very attached to her family members than the Respondent and that she was threatening him with dire consequences including of dragging him and his parents by filing false cases. He deposed that

she refused to cohabit with her. The evidence does not reveal that the Appellant did not in fact, file any case at all. In the cross examination, he deposed that his monthly salary was between Rs.2000/- and 5400/-. He admitted that the Appellant secured employment with BSNL on her own and before she join BSNL she was in private employment which she secured with help of Respondent's friends. He further contended that during the period of cohabitation she used to complain of body ache and other symptoms for which he took her to Sion hospital since his sister-in-law was working there. What is evident from her deposition is that she enjoyed good health and did not require any medical attention. This appears to be correct, especially since the record shows that the Respondent has not examined any other witness although she could have examined sister-in-law in support of his case. He contended that even she is willing to cohabit with but he was not willing to accept her.

8. In support of his case the Respondent also examined his father, however, his evidence seems to be more of hearsay and relates to what his son had stated as far as medical check up is concerned. There is not much to be gained by the Respondent relying upon this evidence of the father. In the cross examination he admitted that no case had been filed against him his son. He admitted that his contentions in paragraph 5 of the evidence regarding the Appellant having refused to undergo medical check up was on the basis of

information given by the Appellant. We have no doubt that the father's deposition does not carry much evidenciary value.

9. The evidence of the Appellant is also specific. In the cross examination she has denied that she avoided going to doctor. She denied allegations of non consumation of marriage or cohabitation. She also denied allegations that she threatened to commit suicide. The record reveals that the Respondent also made an application for maintenance under section 24 of the Hindu Marriage Act claiming for Rs.5000/- for maintenance and Rs.300/- for travelling expenses and other costs. This was resisted by the Respondent. He contended that his net pay is Rs.2633/-.

10. On 18.4.2007 the court proceeded to frame the following issues :

Issues	Findings
1. Whether the marriage of the Petitioner with the respondent is proved ?	Affirmative
2. Whether this Court has the jurisdiction to try and entertain this Petition ?	Affirmative
3. Whether the Petitioner has proved that the Respondent-wife treated him with cruelty ?	Affirmative
4. Whether the Petitioner deserves to be granted the relief of divorce u/s.13(1)(ia) of the Hindu Marriage Act ?	Affirmative
5. Whether the Respondent-wife is entitled to maintenance, return of her streedhan property ?	Affirmative

6. What order ?

As per
final order

The Family Court thus held that the respondent has proved that the Appellant wife had treated him with cruelty and granted relief of divorce while declining maintenance and/or return of streedhan. The trial Court has also held against the Appellant on the aspect of her having declined to undergo a medical check up and not having accepted the offer that they could live separately. It is further held that the reason of the quarrel arising out of size of chapattis cannot be a major issue so as to justify that the Appellant leaving matrimonial home.

11. According to the trial Court, the Appellant left the matrimonial home for trivial reasons and also found that there is no challenge to the main case of the Respondent relating to non consumation of the marriage. The allegations of not showing affection to the Respondent apparent failure of and the Appellant to submit to medical check up and the threat to commit suicide were also held against the Appellant. The trial Court has relied upon definition of mental cruelty referred in case of *Samar Ghosh Vs. Jaya Ghosh (2007) 4 SCC 511* and the decision of *Sheldon Vs. Sheldon (1966) 2 ALL ER 257* and contended that persistent refusal to sexual intercourse may amount to cruelty. In the present case it was observed that on review of the evidence it cannot be construed that

the Appellant declined normal marital relations including sexual intercourse.

12. In our view no case of cruelty has been made out in the evidence. There was no occasion for the Court to arrive at affirmative finding to issue no.3 which is not justified by the evidence on record. As far as issue of maintenance is concerned, the same is declined by the trial Court as there was no prayer for maintenance in the written statement. The trial Court has, however, dealt with the interim application for maintenance and has proceeded to dissolve the marriage. In our view the evidence on issue no.3 and the consequential affirmative findings on issue No.4 are not sustainable. It is admitted by the Respondent that his friend had assisted the Appellant to get a job and subsequently she herself had obtained new employment on her own. It is an admitted fact that the Respondent and the Appellant left for work together and her pay check was also handed over to him. The evidence on behalf the Appellant does not justify the findings of the trial Court. It is pertinent to note that in the written argument filed by the Respondent none of the set out in the judgment were set out.

13. Mr.Kapse relied upon the decision of the of the Apex Court Court in *Parveen Mehta Vs. Inderjit Mehta (2002) 5 SCC 706* in support of his contention that mental cruelty is state of mind and feelings and is therefore necessarily a matter of inference to be

drawn from the facts and circumstances of the case. In our view, in the facts and circumstances of the present case it did not reveal that the Respondent was treated with cruelty. Mr.Kapse urged that in the above case the Apex Court affirmed that the cumulative effect of the facts proved by respondent husband such as frailty and apparent ill health of appellant wife and her refusal to undergo medical tests and treatment, or to disclose nature of illness for which she was being treated since before marriage, her inability or lack of cooperation in establishing normal cohabitation and repeatedly causing social embarrassment to respondent husband, taking false plea that she is had suffered miscarriage and making false complaint to the police would be to cause such mental depression, anguish, disappointment and frustration as to amount to mental cruelty.

14. In our view the burden of proving mental cruelty even on these principles has not been discharged by the Respondent husband. As far as illness is concerned, the Respondent husband did not make any effort to lead evidence as to whether illness or medical condition which caused her to avoid normal marital relations. In fact it was necessary for him to examine his sister-in-law and the doctor to whom she paid a visit at his instance. However, this having not been done, an adverse inference will have to be drawn in this behalf.

15. In our view the respondent has not proved any instance of cruelty. Accordingly, we find that the impugned judgment and order

is not sustainable and same deserves to be set aside and is hereby set aside. The divorce petition stands dismissed. As far as the issue of maintenance is concerned, after dismissal of the petition for divorce, a decree under section 25 of the Hindu Marriage Act, 1955 cannot be passed. We refrain from making any observation on merits of the claim except that the Appellant may file separate proceedings for grant of maintenance before the Family Court, if so advised.

16. In the result, the appeal is allowed in the above terms. No order as to costs.

(A.K. MENON, J.)

(A.S. OKA, J.)