

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.869 of 2012

Rohit Bhimsen Khurana
age 39 years, Occ :Service, R/o. Flat
No.201, Simran Plaza Society,
Sec.44, Plot No.144, Karave, Nerul
(W), Navi Mumbai.

...Appellant
(original Petitioner)

Versus

1.Advocate Neha Rohit Khurana
Age-37 years, Occ: Housewife
2. Ms. Rashika Rohit Khurana
Age 10 years, Occ: Student
3.Krish Rohit Khurana,
Age 5 years, Occ: Student

Nos.2 and 3 being Minor Through
their Legal Guardian Mother No.1
All R/o J-1203, Nargis Building,
Jalvayu Defence Enclave, Sec 20 Plot
20, Kharghar,
Navi Mumbai-410210

...Respondents
(Original Respondents)

Mr. A.S. Khandeparkar, i/b Mr. Amogh Karandikar
for the Appellant.
Mr. Nitin P. Deshpande for Respondents.

CORAM:-M.L. TAHALIYANI, J.

**DATE ON WHICH THE JUDGMENT IS
RESERVED : 8th MAY, 2015.**

**DATE ON WHICH THE JUDGMENT IS
PRONOUNCED : 9th JULY, 2015.**

ORAL JUDGMENT :-

This second appeal has been admitted by this Court (Coram : R.Y. Ganoo, J.) on 21st January, 2013 as following substantial questions of law are involved :

“a) Whether the Appellate Court seriously erred in ignoring the allegations of adultery made by the Respondent wife, which could not be proved by her and that making of such allegation amounts to cruelty?

b) Whether the Appellate Court is correct in ignoring the evidence brought on record by the Appellant husband which rightly proves that the Respondent wife has treated the Appellant husband in cruel manner?

c) Whether the Appellate Court is correct in setting aside the Decree passed by the Trial Court when the findings and observations recorded by the Trial Court in respect of Issue No.1 i.e. Whether Petitioner proves that Respondent has treated him with cruelty? and Issue No.2 i.e. Whether petitioner is entitled for divorce from respondent? has not been challenged by the Respondent wife in her Memo of Appeal filed before the Appellate Court?

d) Whether the Appellate Court was correct in setting aside the decree for divorce passed by the Trial Court, when the Respondent wife in the Memorandum of Appeal has not given a single ground for challenging the said decree of divorce. The entire appeal memo is only regarding Alimony.

e) Whether the Appellate Court is right in coming to conclusion that if the parties led a normal sexual life even after a series of acts of cruelty by one spouse strongly showed that the parties had condoned their grievances which they had against each other?

2. The Appellant had filed a petition under section 13 (1) (i-a) of the Hindu Marriage Act 1955 for grant of decree of divorce on the ground of cruelty. The petition was heard by Jt. Civil Judge, Senior Division, Panvel and was finally decided as HMP No.82/2008 on 17-2-2011. The Trial Court passed the following order :-

- “1.The petition is partly allowed.
2. The marriage between the petitioner and opponent solemnized on 28th April, 1999 at Delhi, is hereby dissolved.
3. The prayer of possession of Flat No.J-1203, JalVayu Vihar Nargis Building, Sector 20, Plot No.20, Kharghar, Nave Mumbai, and re-entry in that flat, is dismissed.
4. In the peculiar circumstances of this petition, no order as to costs.
5. Decree be drawn up accordingly.”

3. The Respondent took up the matter in appeal before the District Court, Raigad. The appeal was heard by the Ad-hoc District Judge vide Appeal No.72 of 2011 and was decided on 18-7-2012. The appeal was allowed and judgment and decree passed by the Trial Court was set aside. The Appellant (original Petitioner) has moved this Court by way of the present second appeal.

4. Before I deal with the law points framed by this Court it is necessary to state the facts in brief that gave rise to the divorce petition and the evidence of both the parties. The Appellant -Rohit and Respondent-Neha got married on 28-4-1999. After the marriage

they lived together at matrimonial home at Delhi. She had delivered two children out of the said wedlock. One on 6-8-2000 and another on 10-2-2006.

5. It was alleged by the Appellant before the Trial Court that the Respondent No.1 was in habit of attending late night parties in Delhi. She used to ignore the advice given by the Petitioner and used to create scenes, if prevented from her attending the parties. It is alleged that the Respondent No.1 is very short tempered and she has no respect for marriage and the family of the Petitioner. She used to become aggressive and abusive frequently. Few of the incidents have been mentioned by the Petitioner in para 3 of the petition indicating that Respondent No.1 was of abusive nature and she was very short tempered.

6. The Appellant was holding Diploma as a Mariner and lateron he had obtained a degree as Masters Mariner. It is thus, obvious that his duty was on the ship. It is stated by him in the petition that on 29-5-1999 he took the Respondent No.1 on the ship as she insisted for the same. There was no improvement in her behaviour on the ship also. She used to publicly insult the Appellant and the Appellant had to suffer severe humiliation and embarrassment

due to misconduct on the part of Respondent No.1. It is alleged that Respondent No.1 had demanded US \$ 3000 for spending to purchase gifts for her mother when the ship had reached Ukrain. Even after returning to India she had been spending most of her time with her mother at her mother's house. It is further alleged that the Appellant had to leave his examination at Calcutta as Respondent No.1 insisted that he should come immediately after delivery of a female child on 6-8-2000. The Appellant therefore, rushed back to Delhi. However, he was not treated well in the Hospital by the Respondent No.1 and her mother. It is alleged that Respondent No.1 and her mother wanted the Appellant to stay separately from his parents. The Appellant decided to put an end to the dispute and therefore, he shifted to a rented house at Vikaspuri, Delhi on 20-9-2000. After settling in the house he went to Kolkata to attend remaining Masters examination. However, when he returned to Delhi he found that Respondent No.1 was at her mother's house. The Appellant went there to bring her back to their house at Vikaspuri, Delhi. At that time also he was humiliated and not treated well by Respondent No.1 and her mother. It is alleged that on one occasion she even went to the extent of tearing her clothes as the Appellant was intending to shift back his parents' house. It is stated that Respondent No.1 had apologised for

her misdeeds in the month of August, 2002 and therefore, the Appellant decided to have a fresh married life with Respondent No.1. However, within a very short time she started creating scenes in the house.

7. On 21-9-2003 the Appellant booked a flat in Kharghar, Navi Mumbai because of continuous demand on the part of Respondent No.1. Father supported the Appellant and paid 50% of the purchase price. The Appellant took possession of the Flat on 15-6-2014. The Appellant and Respondent started living together in the said house. However, change in the nature of Respondent No.1 did not last longer and she started attending late night parties on the pretext that she had to meet her clients till late in the evening. She also neglected her children due to her extravagant behaviour. It is alleged that in the month of December-2005 mother of the Respondent started staying at Kharghar and she started interfering in the internal affairs of the Appellant and Respondent No.1. There used to be frequent misdemeanors on the part of Respondent No.1. Respondent No.1 started sleeping with her mother. The Appellant alleges that he was alone. He was deprived of food also. Respondent No.1 and her mother used to leave house for long hours in the

absence of the Appellant and were not available when the Petitioner was returning home. On 6-2-2006 she had a quarrel with parents of the Appellant and she had crossed all the limits of decency and ultimately hit father of the Appellant and broke his spectacles. The Appellant was required to make separate arrangement for his parents. Because of continuous alleged mental torture on the part of Respondent No.1, the Appellant suffered from severe depression and he was advised complete bed rest. Few more incidents of this nature have also been stated in the appeal to demonstrate that Respondent No.1 had treated the Appellant with extreme cruelty and he was entitled for decree of divorce on the ground cruelty.

8. The Appellant had later on taken up the job in another company. It is alleged that the Appellant was removed from the house forcibly by Respondent No.1. Respondent No.1 had also been visiting office of the Appellant and used to create scenes in the office.

9. As such the cruelty alleged against Respondent No.1 is mainly mental cruelty. It is stated by the Appellant that the misbehaviour of Respondent No.1 on many occasions, her frequent late night parties and outburst on smaller issues had made the life of the Appellant miserable.

10. Learned Trial Court framed the following issues and gave finding recorded against the said issues which can be reproduced as under :-

Issues	Findings
1. Whether petitioner proves that respondent has treated him with cruelty?	In the affirmative
2. Whether petitioner is entitled for divorce from respondent?	In the affirmative
3. What order and decree	As per final order.

11. Learned Trial Court found the evidence of the Appellant reliable and he also found the allegations made by Respondent No.1 against the Appellant baseless and came to the conclusion that the Appellant was treated with cruelty and therefore, he was entitled for decree of divorce. He allowed the petition to that extent. The final order of the Trial Judge has already been reproduced hereinabove.

12. The Appellate Court framed the following issues after hearing the Appellant (original Respondent) and the Respondent (original Petitioner) :-

Points	Findings
1. Whether the opponent treated the petitioner with cruelty?	In the negative.
2. Whether petitioner is entitled	In the negative.

for decree of divorce?		
3. Whether the impugned judgment and decree need to be interfered with?		In the Affirmative.
4. What order		Appeal is allowed.

13. Before proceeding further it is necessary to be noted here that the affidavit of the Appellant and Respondent No.1 both submitted in the Trial Court by way of examination-in-chief appeared to have been prepared by the parties themselves and therefore, they are too verbose and contained lot of irrelevant material. It is also necessary to be stated here that cross examination of the Appellant was only full of suggestions and therefore, the learned Trial Judge has given finding that the evidence given by the Petitioner before the Trial Judge had remained unchallenged. The Appellate Court in my view had taken correct view of the matter and has stated that the Court should have taken into account the entire evidence and conduct of the parties. The Appellate Court while examining the evidence of the Appellant and Respondent No.1, particularly the Appellant has segregated some irrelevant portion of the evidence which has consumed a large portion of the examination-in-chief of the Appellant. The Appellant has stated in his evidence that when the relatives of Respondent No.1 had come with a marriage proposal they were

accompanied by a boy, who was stated to be their nephew and lateron it turned out that he was classmate of Respondent No.1. He has further stated that Respondent No.1 was from a broken family background as her parents were separated after a long legal battle. The Appellant has further stated that Respondent No.1 had also a broken love affair and therefore, she never wanted to marry. It has also come in his evidence that her sister got married to her own Rakhi brother and lateron settled in USA to avoid social embarrassment. This portion of evidence found to be irrelevant to the proceeding.

14. In my opinion, learned Appellate Court has taken a right note of the irrelevant portion of the evidence. The learned Appellate Court has also stated that above said alleged background of Respondent No.1 was repeated by the Appellant at many places in the evidence. That has resulted into unnecessarily lengthy examination-in-chief of the Appellant. Same is the case with the evidence of Respondent No.1 also. As far as physical violence is concerned the Appellant had cited two incidents on the part of Respondent No.1. It is stated by the Appellant that soon after the marriage when they were sailing on the ship, Respondent No.1 had slapped him in presence of his colleagues. The Appellate Court has disbelieved this evidence

because there is no corroboration. It is to be noted that corroboration is not a rule. However, in the circumstances of the case the evidence has become doubtful without corroboration. There is no incidental repercussions of the said incident which may lend credence to the evidence of the Appellant.

15. It is also stated by the Appellant that on one of the evenings when he came back home he had seen Respondent No.1 going in a car with a gentleman sitting beside her. The Appellant tried to indicate Respondent No.1 to stop but she did not listen and drove away the Car. This evidence is neither corroborated by any direct evidence or circumstantial evidence. There is no evidence that the Appellant had ever questioned this behaviour of Respondent No.1 after her arrival at home.

16. The Appellant further alleges that mother of Respondent No.1 frequently interfered in their married life and she used to instigate Respondent No.1 to behave indifferently with the Appellant. These are the allegations made generally and there is no specific incident or series of incidents which may lead to a conclusion that mother of Respondent No.1 did not want Respondent No.1 to live peacefully with her husband. It is possible that there may be some

frictions in the married life and it is also possible that mother of Respondent No.1 might have intervened in the situation. However, that does not lead to a conclusion that the mother of Respondent No.1 was against the Appellant and she wanted to create any ripples in the married life of the Appellant and Respondent No.1. On the contrary there was no reason for mother of Respondent No.1 to create a situation where her own daughter's life will be in peril.

17. The Appellant further states that his father was once assaulted by Respondent No.1 and in the process spectacles of his father had broken and ultimately he had to keep his parents away from his own house. This evidence could have been supported by the evidence of father or mother of the Appellant. No reasonable explanation is given as to why the father or mother of the Appellant could not be deposed in support of evidence of their own son. The Court had noted that both the parents of the Appellant had been attending this Court throughout the hearing of the present Second Appeal. In the circumstances it was expected that either father or mother could have given evidence in support of the evidence of the Appellant.

18. The next allegation against Respondent No.1 is with regard to her behaviour in the office of the Appellant. It is stated by the Appellant in his evidence that Respondent No.1 frequently visited his office and created scenes in the office. This evidence is supported by one of the colleagues of the Appellant. Even if the evidence with regard to the alleged scene created in the office is believed, it does not lead to the conclusion that it amounted to mental cruelty inflicted upon the Appellant by Respondent No.1. It appears that Respondent No.1 was interested to know the income of the Appellant so that she can claim appropriate maintenance from him in the proceedings filed by her. There was series of litigations between the Appellant and Respondent No.1. The Petition under Protection of Women from Domestic Violence Act was filed by Respondent No.1. A petition under adoption and maintenance Act was filed by Respondent No.1. A petition was filed by the Appellant for restitution of conjugal rights and the present petition for divorce was filed by the Appellant. Therefore, it is possible that Respondent No.1 might have misbehaved in the office but the intention was not to be cruel with the Appellant but to get the figure of real income of the Appellant, so that she could be in a position to claim proper maintenance.

19. Apart from this, there are lot of stray incidents mentioned by the Appellant in his evidence to demonstrate that he was subjected to cruelty. I have examined all the stray incidents. Such incidents, in my opinion, take place in many of the families. Only thing is that since the marriage between the Appellant and Respondent No.1 was disturbed, the frequency of incidents could be more.

20. The Appellant had also alleged that Respondent was in habit of attending late night parties. But there is no evidence to come to the conclusion that on a particular date Respondent No.1 was drunk or had excess liquor and had come to the house at a particular time. Socialising to some extent in the present society is permissible. In this regard it may be noted here that Respondent No.1 has also given evidence that the Appellant was once found in a company of female friend, who was extremely drunk and she was brought at house of the Appellant because she was unable to go alone. This indicates that life of the Appellant and Respondent No.1 was not a normal life of conservative married couple. Both of them appeared to be in the nature of socialising and were in habit of enjoying parties. Therefore, it cannot be concluded that Respondent No.1 had subjected the Appellant to cruelty, either physical or mental.

21. It is further necessary to be noted here that despite disturbed married life, both of them had come together after some time and had a normal married life. It was contended on behalf of Respondent No.1 that the Appellant had therefore condoned the earlier behaviour of Respondent No.1 and that evidence in respect of behaviour of Respondent No.1 earlier to the re-union cannot taken into consideration. I do not want to dwell much upon this aspect of the appeal. Suffice is to say that even if earlier conduct is taken into consideration, element of mental or physical cruelty is not proved even by probabilities. In my opinion learned Appellate Court has taken right view of the evidence. Learned Trial Court has believed the evidence of the Appellant only because he was not effectively cross examined.

22. Now let me deal with the law points one by one on the basis of which, the second appeal has been admitted by this Court. Point one is with regard to the allegation of adultery made against the Appellant by Respondent No.1. In this regard it may be noted that the Appellant had also made similar allegations against Respondent No.1, which have been discussed by this Court at para Nos.13 and 15 of the

present judgment. Therefore, it cannot be said that the Appellate Court has ignored the allegation of adultery and has therefore, come to incorrect conclusion that there was no mental cruelty.

23. Second point is that the first appellate Court ignored the evidence of the Appellant. The perusal of judgment of second appellate court would clearly indicate that the second appellate court has taken objective view of the matter and has come to the right conclusion. I have given little more details of the judgment of first appellate court in the earlier paragraphs of this judgment.

24. Third point raised by the Appellant is that there was no prayer for setting aside the decree of divorce. This is not correct in as much as the first appeal was filed to challenge the whole judgment of the trial court.

25. Fourth point in fact merges into the third point and does not require any separate answer.

26. As far as fifth point is concerned it may be stated here that the Appellant and Respondent No.1 lived reasonably normal life after

resumption of their marital relations. I have already stated in my earlier portion of the judgment that there were allegations and counter allegations. If one goes through the evidence of the Appellant and Respondent No.1 recorded by the Trial Court, it will demonstrate that equally serious allegations have been made by the Appellant against Respondent No.1. The allegation on the basis of which the Appellant claims that he was subjected to cruelty by his wife, have been made by the Appellant also against his wife-Respondent No.1. It therefore, appears that both of them were in habit of socialising and it is possible that they misunderstood each other. There is no concrete evidence that the Appellant was treated with cruelty by Respondent No.1 and therefore, he is not entitled for a decree of divorce on the ground of cruelty.

27. In the circumstances the Second Appeal must fail. The second appeal is therefore, dismissed. No order as to costs.

(JUDGE)