

BDPPS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
FAMILY COURT APPEAL NO.58 OF 2015  
WITH  
CIVIL APPLICATION NO.104 OF 2015  
AND  
CIVIL APPLICATION NO.279 OF 2016  
IN  
FAMILY COURT APPEAL NO.58 OF 2015  
ALONGWITH  
FAMILY COURT APPEAL (ST) NO.27753 OF 2016  
WITH  
CIVIL APPLICATION (ST) NO.27754 OF 2016  
IN  
FAMILY COURT APPEAL (ST) NO.27753 OF 2016**

Suresh Bhandary )  
Aged about 52 years )  
Occupation: Business, )  
Residing at Flat No.126/127, )  
Pandurang Sadan, Ground Floor, )  
10<sup>th</sup> Road, Khar (West), )  
Mumbai – 400052 ) ..... Appellant.

V/s

Mrs Sushma Bhandary )  
Aged about – 36 years, )  
Indian Inhabitant, )  
Occupation – House Wife, )  
Residing at Flat No.5, Mignonett )  
Apartment, L.G. Road, 1<sup>st</sup> Cross )  
Road, Mahim (West), Mumbai-16 ) ..... Respondent.

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Mr. Manoj Prajapati a/w Mr. Mayur Sapkale for the Appellant.  
Ms. Sonal a/w Mr. Filji Fedrick, Mr. Yash Choksi, Mr. Ankit Tripathi  
i/b FF & Associates for the Respondent.

**CORAM: V. M. KANADE &  
MRS. SWAPNA S. JOSHI, JJ**

**DATE: 15<sup>th</sup> October, 2016**

**ORAL JUDGMENT: *(Per V.M. Kanade, J.)***

1. The learned counsel for the Appellant has invited our attention to a letter dated 9/10/2015 written by an advocate on record in the Supreme Court, informing him that the Appellant is taking urgent steps for filing an SLP against an order passed by this Court dated 2/9/2016. In the said letter, it is therefore, requested that an adjournment may be taken for hearing of the appeal. It is submitted that Appellant may seek adjournment on this ground.

2. In our view, so far as order dated 2/9/2016 is concerned, we had already granted leave to the wife to file an application seeking enhancement of maintenance. We had made it clear to both the parties that we do not propose to hear an application for enhancement of maintenance, and that we would like to hear the main appeal first.

3. This is a peculiar case where the husband is not ready to give divorce, though consent terms were filed and practically Respondent/wife had almost agreed to all the terms and conditions, which are imposed by the husband, because she had no other option

but to do so. The wife, therefore, did not claim custody of the son or even access, since he is almost 16 years of age and very soon he will attain 18 years of age, and he would be in a position to decide whether he would like to meet his mother or not. Secondly, since wife was seeking divorce on the ground of cruelty, she agreed to withdraw all the allegations, which were made in the petition. The husband, however, insisted that record should be clear. However, the husband insisted that wife should make a statement that the allegations which were made by her in the petition for divorce were false. She did not accept this condition. Lastly, she had also agreed that she will not claim past or future maintenance and that she will also not claim share in the property, and the consent terms were exchanged. We had suggested that both parties should withdraw allegations against each other because if a statement is made by wife that the allegations, which were made by her in the petition, were false that would create a problem for her in future because the husband may again prosecute her for making false allegations. We explained both the parties that standard formula in such cases is that both parties should withdraw the allegations made against each other. Thereafter again a new contention was raised by the husband, and he insisted that wife should make a statement that she does not have any claim in the husband's property, and she would not create any right, title and interest in the property of her husband or his family members. It needs to be pointed out that the father of the wife is the maternal uncle of the husband, which relationship is permitted under the Hindu Law, and there is a

custom of giving maternal uncle's daughter in marriage to the sister's son in India. In this case, however, the Appellant and the Respondent had love affair when the wife was just 18 years of age and the husband, at that time, was 35 years of age. It is a matter of record that wife's father is comparatively in much more better financial position than the Respondent, as has been transpired during the course of submissions, made by the parties. The husband's mother has filed a suit against her brother claiming share in the property of her father. In the said suit, allegations are made that signatures of his mother are forged by the Respondent's father. We are informed that the husband proposes to file a similar suit.

4. It appears that, therefore, husband is not keen to file the consent terms. The parties, of course, cannot be forced to coaxed or threatened to enter into the consent terms and they have to do so only at their own volition. It is duty of this Court to pursue the parties to sit together and find out an amicable solution. If the solution cannot be arrived at, the Court has no other option but to hear the matter on merits. Since we have made it clear that the application for maintenance will be heard later on, we do not find any reason to adjourn hearing of the family court appeal. Hence, request for adjournment is refused.

5. Both these appeals can be conveniently disposed of by this common judgment.

6. Heard the learned Counsel appearing on behalf of the Appellant/husband and the learned Counsel appearing on behalf of the Respondent/wife.

7. Appellant/husband has filed two appeals. The first appeal is filed against the common judgment and order passed by the Family Court dated 28/11/2014 whereby Divorce Petition filed by Respondent/wife was allowed and divorce was granted to her on the ground of cruelty under section 13(1)(ia) of the Hindu Marriage Act, 1955. Appellant/husband had filed a Petition under section 9 of the said Act for restitution of conjugal rights which was also dismissed by the said common judgment and order passed by the Family Court. The second appeal is therefore filed by the Appellant challenging the same common judgment and order.

8. Both the learned Counsel made lot of attempts to settle the dispute. However, despite several attempts being made, for one reason or the other, the Appellant/husband backed out from the Consent Terms. We found that on number of occasions, on one pretext or the other, Consent Terms could not be filed. Initially, Appellant/husband made a suggestion that the Respondent/wife should admit in the Consent Terms that she had made false allegations against the husband. This obviously was not accepted by the wife since, according to her, the said allegations were not false be she was withdrawing the allegations so that decree by consent under section

13-B of the said Act could be passed. Thereafter, husband raised an objection that the wife should also make a statement that she would not claim any past, present or future maintenance or interest in the husband's property or his family members' property. The wife was ready to make statement that she would not claim any past, present or future maintenance or any claim or interest in the business of the husband. However, now the Appellant/husband wants to extend the scope and include even his family members. Appellant's mother has also filed a suit claiming share in the wife's father's property and it has also been alleged that the wife had forged signature of the Appellant's mother.

9. Despite several efforts being made, parties were not ready to file Consent Terms. Respondent/wife felt that she had not claimed maintenance only on the condition that husband was ready to give her divorce by mutual consent and since the husband was not giving her divorce by mutual consent, she again filed an application seeking maintenance.

10. We felt that since the parties cannot be compelled to settle the matter, it would be appropriate to dispose of these appeals and accordingly, today, we have heard the learned Counsel appearing on behalf of the Appellant/husband and the learned Counsel appearing on behalf of the Respondent/wife at great length.

11. The learned Counsel appearing on behalf of the Appellant/husband has not only taken us through the pleadings viz. Petition, Written Statement but also through the Examination-in-Chief of the wife, husband and cross-examination of the wife by the husband's advocate. We find that the wife was cross-examined at length for almost eight full days. Most of the cross-examination is in the nature of suggestions.

12. The learned Counsel for the Appellant/husband then went through the written submissions which he has submitted. We permitted him to go through the written submissions. It is submitted that no case of cruelty has been made out by the wife. Secondly, it is submitted that there is no material on record to show that wife was actually beaten up by the Appellant/husband. Thirdly, it is submitted that the Respondent/wife has not produced any medical evidence or record in support of her case that she was assaulted. It is then submitted that photograph which has been produced is fabricated photograph. It is then contended that in the cross-examination, the wife has admitted that she had withdrawn the complaint which was filed by her in 2011 and which is at Exhibit-41. He submitted that therefore statement of the witness could not be relied upon. He submitted that on the other hand the Appellant/husband has established that the Respondent/wife had abandoned the child and she was negligent in performing her duties and husband was never financially dependent on her father. He submitted that there were

statements made in the Petition that the Appellant/husband was having a good income. He therefore submitted that all these admissions falsify the case of the Respondent/wife. He submitted that the learned Family Court Judge has not considered all these admissions and has not considered the material on record in its proper perspective.

13. On the other hand, the learned Counsel appearing on behalf of the Respondent/wife has submitted that the Appellant/husband had made the life of the Respondent/wife miserable to the extent that she had no other option but to leave the house to protect herself. She submitted that the the Appellant was subjected to mental and physical cruelty by the husband and was literally treated as his slave. She submitted that there was no reason to disbelieve the said testimony of the wife regarding continuous abuse and assault by the husband and his mother. She then submitted that apart from establishing the ground of cruelty on account of treatment meted out to the wife, there was another ground on which the Respondent was entitled to get divorce. She submitted that it is a well settled position in law that if allegations are made in the pleadings by the husband which are not true and proved to be false then such allegations also amount to an act of cruelty. She invited our attention to the Written Statement filed by the husband. She submitted that number of false allegations have been levelled against the wife. Firstly, it was alleged that she was a woman of loose character. Secondly, it was alleged that she was

mentally unsound. Thirdly, it was alleged that she used to come to house at late hours in the night. She submitted that all these averments in the Written Statement are instances of derogatory statements and allegations made against the wife. She submitted that therefore these allegations itself amounted to cruelty. She submitted that similarly in the Petition filed by the Appellant/husband for restitution of conjugal rights under section 9, similar allegations were made against the wife. In support of the said submission, she has relied on the Judgment of this Court in *Mrs. Manisha Sandeep Gade vs. Sandeep Vinayak Gade*<sup>1</sup>. She relied on paras 3, 4, 6 and 16 of the said judgment. She has then invited our attention to the Judgment of the Apex Court in *Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate*<sup>2</sup>. She relied on paras 1, 7 and 11 of the said judgment. She has then relied on the judgment of the Apex Court in *V. Bhagat vs. Mrs. D. Bhagat*<sup>3</sup>. She invited our attention to paras 7, 10, 11, 17 and 20 of the said judgment.

14. On the other hand, the learned Counsel appearing on behalf of the Appellant also placed reliance on number of Judgments. He has relied on the Judgment in *Sumathi vs. Palanichamy*<sup>4</sup>. He has also relied on the judgment of the Apex Court in *Savitri Pandey vs. Prem Chandra Pandey*<sup>5</sup>. He then invited our attention to the Judgment of the

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1 AIR 2005 Bombay 180

2 AIR 2003 SC 2462

3 AIR 1994 SC 710

4 I (2009) DMC 375

5 (2002) 2 SCC 73

Division Bench of this Court in *Hemali Bindesh Kelaiya vs. Bindesh Jayantial Kelaiya*<sup>1</sup>. He has also relied upon the judgment of the Apex Court in *Dr. N.G. Dastane vs. Mrs. S. Dastane*<sup>2</sup>. He submitted that the Apex Court in *Dr. N.G. Dastane* (supra) has clearly held that the acts which have been condoned cannot be re-agitated and cited as circumstances of cruelty. He submitted that the wife had filed a complaint against the husband in 2011 and which is at Exhibit-41 and she having later on withdrawn the same, it could not be relied on as an instance of cruelty. He submitted that Apex Court has held that common wear and tear in family life cannot be considered as a ground of cruelty.

15. After having heard both the parties at length, we are of the view that there is sufficient material on record to establish that the Appellant/husband has continuously treated the wife with physical and mental cruelty. His conduct can also be seen from the circumstances which are narrated in the evidence of the wife. We are therefore of the view that the Respondent/wife has established that the Appellant/husband has treated the wife with cruelty within the meaning of section 13(1)(ia) of the said Act and therefore she is entitled to get decree of divorce on that ground alone. We concur with the finding which is given by the learned Family Court Judge in her Judgment wherein she has held that Respondent/wife has established her case of cruelty.

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1 I (2014) DMC 243 DB (BOM)

2 AIR 1975 SC 1534

16. It has to be borne in mind that the principles of appreciation of evidence are quite well settled. In a dispute between the husband and wife, it is not possible to bring documentary evidence on record and, very often, the case has to be decided on the word of the wife against the word of the husband. A judicial trained mind, however, can very well examine the facts and circumstances of the case and then draw its own inference from the material on record. Most of the time acts of cruelty take place in close room or bedroom of the couple where neither the parents nor children are privy to what happens inside the four walls of the bedroom. It is also quite well established that the women in India normally do not like to bring the dispute between the husband and wife in open and very often do not disclose to their parents extreme cruelty at the hands of the husband because she feels that if such a disclosure is made, it would make her parents unhappy. The situation in India is therefore such that the husband plays a dominating role in the house despite the fact that wife is educated, working and belongs to affluent family.

17. In the present case, the facts are quite interesting. The wife is a cousin of the husband. Wife's father is the maternal uncle (Mama) of the Appellant/husband and such marriages are permitted in India according to Hindu Law and it has also been the tradition and custom in Southern part of India. It is common ground that the husband and wife belonged to Shetty Community which is mainly in the hotel

business. It is also common ground that wife and the husband fell in love and at the relevant time the wife was 18 years old and the husband was 35 years old. There was a big difference of age between both of them. We have no reason to disbelieve her version of regular assault by the husband, though it has been strenuously urged that instead of going to medical clinic, the wife went to photo studio to create the fabricated record. We do not accept this submission. If the wife is interested in maintaining good relations with the husband and his family members, she would conceal several cases of assault by the husband rather than choose to go to Police Station and lodge a complaint. It is a matter of record that, initially, in 2003, she had left the house and gone back to her father. However, after she was persuaded by the husband, she returned to the matrimonial house. Second time however she left in the year 2006 when things became intolerable, even leaving her only son with the husband.

18. The consistent evidence given by the wife therefore echoes her trauma which she had suffered continuously at the hands of the husband. The contention of the Appellant/husband that because she has not produced medical certificate, her evidence should be discarded cannot be accepted. We are therefore of the view that the Respondent/wife has established that husband had treated her with physical and mental cruelty by constantly assaulting her and by mentally torturing her.

19. The second ground which has been taken in the Petition is that the Appellant/husband was demanding money from the wife's father. Both the parties have led evidence on this point. There is no material on record to establish that such demand was made. Moreover, in the later part of her testimony, the Respondent/wife at one stage had stated that the husband's hotel known as Curi Club was doing very well. We are therefore not satisfied that the said ground which has been taken by the Respondent/wife can be said to be established and for want of further material on record we are of the view that the said ground is not established.

20. Thirdly, however, from the perusal of the Written Statement filed by the husband and also from the averments made by him in the Petition for restitution of conjugal rights, it is evident that the husband had tried to tarnish the image of Respondent/wife in various ways and from the material on record we do not find that he has established all these allegations which are made by him in the Written Statement as well as in the Petition under section 9.

21. It is quite well settled that definition of cruelty now has been held to include all unwanted allegations made by the husband against wife. The Apex Court in *Mrs. Manisha Sandeep Gade vs. Sandeep Vinayak Gade*<sup>1</sup> has observed in paras 3, 4, 6 and 16 as under:-

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1 AIR 2005 Bombay 180

“3. The respondent husband raised various grounds to substantiate his case for cruelty. As enumerated by the learned Family Court Judge, there were in all six instances of cruelty, they being as follows:-

- (i) Refusal to do domestic work.
- (ii) Insulting and abusing.
- (iii) Insisting on having a separate residence.
- (iv) To visit the matrimonial home and not to return on a number of days every week.
- (v) Threatening and terrorising the husband and his parents.
- (vi) Not disclosing that she had some gynecological problem prior to marriage and concealing her miscarriage which took place sometime in December 1998.

The appellant wife denied these allegations, but over and above the denials, she made certain allegations of her own in para 5(K) and (L) of the written statement. In para 5(K), she mainly made three allegations; (i) the respondent behaved with her perversely and harassed her sexually; (ii) he would indulge in obscene talks with his girl friends on phone and in person and would behave immodestly with the girl friends to torture the appellant, (iii) he had illicit relationship with one Leena, wife of Vivek, and in fact he wanted to marry her. In para 5(L), she made allegations against her father in law that his behaviour with her was improper and in that she alleged that (i) he would touch her unnecessarily and (ii) he would barge into the kitchen if she was changing her clothes.”

“4. The respondent examined himself and then led the evidence of a few supporting witnesses, including his mother. The appellant examined herself and a few supporting witnesses. The examination-in-chief was by way of filing affidavits on the basis of which the cross-examination was conducted. After recording this evidence, the learned Judge

came to the conclusion that the appellant had failed to establish the six specific instances of cruelty. He, however, took the view that the allegations made by the appellant in her written statement were baseless and amounted to cruelty. The learned Judge noted that with respect to the allegations about relationship between the respondent and Leena, except the bare words in the affidavit of appellant, there is no other evidence on record. He commented that it was her duty to examine Vivek. Similarly with respect to the allegations against the father of the respondent, the learned Judge noted that the allegations were vague and she should have given some details about the same. He, therefore, allowed the petition filed by the respondent husband on the ground of cruelty and granted the decree of divorce. Sine he was granting the decree of divorce, he examined the question as to whether the appellant wife was entitled to permanent alimony under Section 25 of the Hindu Marriage Act. Having however noted that the income of the appellant wife was more, he held that she was not entitled to permanent alimony."

"6. It is material to note that whereas the wife has filed FCA No. 49 of 2004 to challenge the order of divorce which is granted in view of her baseless allegations, the respondent husband has not filed any cross objection to the extent the learned Family Court held that the six instances of cruelty claimed by him were not established. Therefore, the question as to whether those items specifically pleaded by the respondent husband constituted cruelty or not no longer survives. The respondent husband not having challenged the finding on those six items, it will have to be held that he has accepted that he has failed to establish the allegations of cruelty on those grounds. We may as well add that the counsel for the respondent also did not press any of those instances in argument."

"16. Analysis of the above referred two judgments of the Apex Court makes it clear that where serious allegations are made in pleadings, the consequent irretrievable break down of the marriage (though not a ground by itself) will be a very important circumstance to be considered while deciding whether divorce should be granted or not. Once such serious allegations are made, it becomes clear that there is no

chance of parties coming together or living together again. As observed in para 22 of judgment in V. Bhagat v. Mrs. D. Bhagat (supra), making of the allegations and yet opposing divorce would mean a resolve to live in agony only to make the life miserable for both the parties. Para 23 records a clarification that there must be some extraordinary feature to warrant the grant of divorce on the basis of pleadings and other admitted material without a full trial. While scrutinising the evidence, the said circumstance indicating an irretrievable break down of marriage can be borne in mind to determine whether the ground alleged is made out. In Chanderkala Trivedi's case (supra) also, it is held that once serious allegations are made in the pleadings of husband and wife, it is obvious that the marriage between the parties is dead and continuing the litigation further is nothing but an exercise in futility and continuing the agony."

The Apex Court in *Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate*<sup>1</sup> has observed in paras 1, 7 and 11 as under:-

"1. The above appeals have been filed by the husband, who lost before both the courts, challenging the orders granting dissolution of the marriage solemnized between parties on 10<sup>th</sup> June, 1973 at the instance of the respondent wife and dismissing the petition filed by the appellant seeking for the relief of restitution of conjugal rights and custody of the two daughters. The wife filed M.J. Petition No. 832 of 1983 under Section 13(1)(1-a) of the Hindu Marriage Act, 1955, seeking for dissolution of the marriage and grant of divorce on the ground of cruelty said to have been meted out to the wife. In support of her claim, the wife narrated several instances of harassment and nagging attitude, which caused her mental agony and serious set back in health. These were ultimately considered and viewed by the learned Family Court Judge to be mere normal wear and tear of marital life. But at the same time, the allegations made by the husband,

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1 AIR 2003 SC 2462

extensively with enumeration of instances and incidents against wife branding her as an unchaste woman, keeping illicit relations - sexually and otherwise with one Ramesh Sawant, the son of a neighbour, though subsequently withdrawn by seeking an amendment of the written statement, weighed with the court to uphold the claim of the wife for divorce. The manner of narration and claims of such allegations in the written statement was also considered to be per se indicative of the fact that he made such allegations against her not only when they were living together but also to her relatives, friends and persons whom he had contacted for reconciliation. The learned trial judge was also of the view that notwithstanding the withdrawal, in a reply filed on 17.1.90 also, those allegations were considered to have been substantially reiterated by the husband. Consequently, the Family Court allowed M.J. Petition No. 382 of 1983 on 7.4.1994. As a sequel to the same, the application in M.J. Petition No. 66 of 1988 filed by the husband for restitution of conjugal rights and custody of the daughters tried simultaneously with the other petition came to be rejected by a separate order on that very date of judgment granting dissolution of marriage between parties.”

“7. The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1)(1-a) of the Act. The position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extra marital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and

cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law has also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High Court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible.”

“11. That apart, in our view, even the fact that the application for amendment seeking for deletion of the accusations made in the written statement was ordered and amendments carried out subsequently does not absolve the husband in this case, from being held liable for having treated the wife with cruelty by making earlier such injurious reproaches and statements, due to their impact when made and continued to remain on record. To satisfy the requirement of Clause (i-a) of Sub-section (1) of Section 13 of the Act, it is not as though the cruel treatment for any particular duration or period has been statutorily stipulated to be necessary. As to what constitute the required mental cruelty for purposes of the said provision, in our view, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct, but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches

are of ordinary nature only, the Courts perhaps need consider the further question as to whether their continuance or persistence over a period time render, what normally would, otherwise, not be a so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer. A conscious and deliberate statement leveled with pungency and that to placed on record, through the written statement, cannot so lightly be ignored or brushed aside, to be of no consequence merely because it came to be removed from the record only. The allegations leveled and the incidents enumerated in the case on hand, apart from they being per se cruel in nature, on their own also constitute an admission of the fact that for quite some time past the husband had been persistently indulging in them, unrelated and unmindful of its impact. That the husband in this case has treated the wife with intense cruelty is a fact, which became a fait accompli the day they were made in the written statement. They continued on record at any rate till 5.10.1988 and the indelible impact and scar it initially should have created, cannot be said to have got ipso facto dissolved, with the amendments ordered. Therefore, no exception could be taken to the courts below placing reliance on the said conduct of the appellant, in this regard, to record a finding against him.”

Similarly, the Apex Court in *V. Bhagat vs. Mrs. D. Bhagat*<sup>1</sup> has observed in paras 7, 10, 11, 17 and 20 as under:-

“7. In this application (I.A. No. 1 of 1993), this Court directed on May 3, 1993, both the parties to be present in person in the Court with a view to explore the possibility of a settlement. On the next date, i.e., May 7, 1993, the

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<sup>1</sup> AIR 1994 SC 710

respondent was not present. The matter was adjourned to July 19, 1993. On July 19, 1993, the parties were heard for some time and the Court suggested to the parties to find a via-media to settle the matter. The parties sought for an adjournment. The matter was adjourned to August 6, 1993. On 6th August, the matter was again adjourned to 16th August on which date we were told that the parties could not arrive at any settlement, whereupon the arguments of the counsel for the parties were heard. In the background of the orders of this Court made in this I.A., referred to above, learned Counsel for the petitioner reiterated his plea to grant a divorce on the ground of cruelty evidenced by the averments in her counter and the questions put to him in the cross-examination. Counsel submitted that the marriage between the parties has broken down irretrievably. Having regard to the nature of allegations and counter allegations made by the parties against each other, there is hardly any room for their coming together. The petitioner has been trying to obtain divorce right from the year 1980. For five years he tried to get it by consent, failing which he approached the Court. Eight years have passed by and in spite of the repeated order of this Court, even the trial is not yet over. The petitioner is now 55 years old. A good part of the life of both the parties has been spent in rancour and litigation. De hors the allegations of adultery originally made in the petition for divorce, the petitioner is entitled to divorce on the basis of the additional ground put in by way of amendment viz., cruelty - mental cruelty by wife. The averments made in her counter and the question put by her counsel in the cross-examination of the petitioner do constitute clear acts of cruelty. In view of the said averments/questions, no further material is necessary to establish the said additional ground. In her written statement, the respondent has alleged that the petitioner is "suffering from mental hallucination" that his is a "morbid mind for which he needs expert psychiatric treatment" and further that "the petitioner is suffering from paranoid

disorder. He needs expert psychological treatment.... He is in coherent in his thinking....The Petitioner is a mental patient. The petitioner needs treatment by a psychiatrist to whom he was directed by his own sister....He is a patient and needs treatment and restoration of normal mental health....The petitioner needs psychological treatment to make him act a normal person" and so on and so forth. In the cross-examination of the petitioner, the Senior Advocate appearing for the respondent-wife put several questions suggesting that the petitioner and the several members of his family including his grandfather are lunatics and that a streak of insanity is running in the entire family. When he protested against the said questions, the learned Senior Advocate made the following statement in the Court - "all of your (petitioner's) family including your grandfather and other are lunatics with streaks of insanity running in the entire family; this is the respondent's case; and that is why these questions have been asked. " The said questions were put and the said statement was made by her Advocate at the instructions of the respondent. Notwithstanding the dismissal of a similar application by the Delhi High Court and the dismissal of a special leave petition there against by this Court, this is a fit and proper case - and this is the most appropriate stage at which - the petitioner should be granted divorce on the ground of cruelty. The situation has become intolerable, says the counsel."

"10. That this is a rather unusual case can hardly be disputed. The divorce petition has been pending for more than 8 years. With a view to expedite its disposal it was transferred from the District Counter to the High Court. This Court repeatedly requested (in 1987 and 1991) the High Court to try the matter on a day-to-day basis and dispose it of expeditiously. The petition is still at the stage of trial. It is not possible for us to apportion the blame. Each side attributes it to the other. Five learned Judges of the

High Court have tried their hand at the case, but it still remains at the stage of trial. The cross-examination of the petitioner alone took one full year. The cross-examination of the respondent is yet to begin. Having regard to the number of allegations made by the petitioner in his divorce petition and the material relied upon by him, it may safely be presumed that the cross-examination of the Respondent would take as much time as the cross-examination of the petitioner, if not more. Each party, it appears, is out to punish the other for what the other is supposed to have said or done. This appears to be the single thought ruling their lives today. A good part of the life of both the parties is consumed in this litigation and yet the end is not in sight. The assertion of the wife that she wants to live with the husband even now, appears to be but a mere assertion. After all the allegations made against her in the petition and the allegations levelled by her against the petitioner, living together is out of question. Rapprochement is not in the realm of possibility. For the parties to come together, they must be super humans, which they are not. The parties have crossed the point of no return long ago. The nature of the allegations levelled against each other shows the intense hatred and animosity each bears towards the other. The marriage is over except in name. The desirability of allowing the continuation of the divorce proceedings in the particular facts and circumstances of this case, is open to grave doubt. The matter may take more than a year - at the minimum - to conclude in the High Court and then there is the right of appeal to the losing party. Both the parties are well-settled. The children are grown-up and are on their own."

"11. The question, however, is whether the allegations made by the respondent-wife do constitute mental cruelty. The allegations in her written statement and her counsel's explanatory statement in Court have already been set out

hereinabove. The respondent has asserted in her written statement that she "has every right to make correct statement of facts to defend herself against the wanton, imaginary and irresponsible allegations".

“17. Mental cruelty in Section 13(1)(1-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations regard must also be had to the context in which they were made.”

“20. In *Smt. Chanderkala Trivedi v. Dr. S.P. Trivedi* (1993(3) SCALE 541) the husband sued for divorce on the ground of cruelty by wife. The wife filed a written statement wherein she attributed adultery to the husband. In reply thereto the husband put forward another allegation against the wife that she was having undesirable association with young boys. Considering the mutual allegations, R.M. Sahai, J., speaking for Division Bench, observed:

“Whether the allegation of the husband that she was in the habit of associating with young boys and the findings recorded by the three courts are correct or not but what is certain is that once such allegations are made by the husband and wife as have been made in this case then it is obvious that the marriage of the two cannot in any circumstance be continued any further. The marriage appears to be practically dead as from cruelty alleged by the husband it has turned out to be at least intimacy of the husband with a lady doctor and unbecoming conduct of a Hindu wife.””

22. In the present case, we find that all these allegations which are made by the husband in the Written Statement and in the Petition under Section 9 clearly amount to cruelty and would have to be treated as instances of cruelty. On both these grounds therefore, Respondent/wife has established her case against her husband and therefore the learned Judge of the Family Court after going through the evidence has rightly held that the Respondent/wife has proved her case and therefore granted decree of divorce in her favour.

23. It is quite surprising that on the one hand, Appellant/husband wants to stay with the wife and has contested divorce petition and pursued the appeal which is filed by him and has also filed a Petition

for restitution of conjugal rights and on the other hand in the said Petition as well as in the Written Statement allegations have been made by him against her which are truly scandalous to say the least. From all the circumstances which have come on record, the only inference which can be drawn is this that the husband only wishes to harass the wife till the end and is really not interested in happily residing with her.

24. So far as the judgments on which the reliance is placed by the learned Counsel for the Appellant are concerned, there is no dispute regarding the ratio of these judgments. It is well settled that the judgment of either High Court or Apex Court cannot be treated as a precedent unless facts in that case and the facts in the case in hand are identical. The Apex Court in *Zee Telefilms Ltd. and another vs. Union of India and others*<sup>1</sup> has observed that the judgment should not be read as a statute book and even if there is a slight difference in the facts of the case or situation and circumstances under which the judgment was delivered, it is not permissible to take out some stray sentences from the judgment and apply them to the facts of the case in hand. Therefore, though there is no dispute regarding ratio of those judgments on which reliance is placed by the learned Counsel for the Appellant/husband, we are of the view that the said judgments will not apply to the facts of the present case.

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1 (2005) 4 SCC 649

25. We must take note of another disturbing feature which we have noticed in this case is that for the purpose of gaining her freedom from an oppressive husband who apparently has chosen to treat the wife as his slave displaying male chauvinistic tendency by continuously harassing her and treating her like a dog on a leash, she had begged to let her go and live independently and for that purpose she withdrew the written complaint which she had filed with the police which is at Exhibit-41 only because the husband had promised her that he would give her divorce by mutual consent and only on that assurance the said complaint was withdrawn. In the cross-examination when this question was asked to her, she had given her explanation as to why she had withdrawn this complaint. She even made a statement that she would not claim any maintenance; past, present or future or any share in the property and would also resign from the partnership firm where she was a partner alongwith her husband. However, husband's heart did not melt down by this offer made by the wife. The wife did not stop there. She even gave up her right to see her only son which normally no mother would accept but she even chose to give up her rights over the custody of her only son. The question which falls before us is, why would this woman would go to such an extent of forgiving every thing to get freedom? In spite of this, the husband was not moved and he has chosen to again raise fictitious and imaginary objections in the Consent Terms and finally put his foot down. Parties always are at liberty to litigate and no one can compel a party to file Consent Terms. We have therefore heard both the

learned Counsel appearing on behalf of both the parties at length.

26. For the reasons stated above FCA No.58 of 2015 is dismissed. Since the Family Court Appeal No.58 of 2015 is dismissed and disposed of, Family Court Appeal (Stamp) No.27753 of 2016 filed by the husband for restitution of conjugal rights does not survive and it is also disposed of. However, we do not propose to impose any cost on the Appellant/husband since imposition of cost will not change the mental attitude of the Appellant/husband.

27. In view of dismissal of both these appeals, Civil Application filed by the wife for maintenance and for other reliefs will not survive. It is accordingly disposed of. However, it is clarified that the Respondent/wife is at liberty to take out appropriate separate proceedings before the appropriate forum seeking the relief which she has claimed in the Civil Application

28 The learned Counsel appearing on behalf of the Appellant/husband requests for stay of this judgment for a period of six weeks. In our view, question of granting stay does not arise since both the appeals have been dismissed. The learned Counsel for the Respondent/wife submitted that there was no stay operating till today. Moreover, no stay has been asked for in the High Court.

29. Both these appeals are accordingly disposed of. Since both these Appeals are disposed of, Civil Applications taken out therein do not survive and they are also disposed of accordingly.

**(MRS. SWAPNA S. JOSHI, J. )**

**(V.M. KANADE, J.)**