

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

FAMILY COURT APPEAL NO. 48 OF 2008

“X” ... Appellant.

V/s.

“Y” ... Respondent.

Abhishek Deshmukh i/b.S.A.Sawant for the appellant.

Nikhi, Wadikar i/b. Nandu Pawar for the respondent.

CORAM : A.S. OKA AND C.V.BHADANG, JJ

DATED : 21st January 2016.

JUDGMENT : (Per A.S.Oka, J.)

Considering the nature of the dispute, the names of the parties are not mentioned in the cause title.

2. By this appeal, the appellant- wife has taken an exception to the judgment and decree dated 11th February 2008 passed by the learned Judge of the Family Court at Bombay. The marriage between the parties was solemnized on 9th June 1989 according to the Hindu Vedic rites. Admittedly, the parties are residing separately from the year 2004. The petition for divorce was filed by the respondent- husband on the grounds

set out in clauses (i)(a) and (i)(b) of sub-section (1) of section 13 of the Hindu Marriage Act, 1955 (“the said Act” for short). Various other prayers were made for recovery of movable and immovable properties. The petition was contested by the appellant by filing a written statement. Apart from refuting various allegations made against her, in paragraph-11 of the written statement, the appellant has stated thus:

“(11) The contents in the para 8 of the petition are totally denied by the respondent. The petitioner has narrated a false story against the respondent in the petition only with a intention to take a divorce from the respondent. Because petitioner has already establish illicit relationship with one lady at Abu Dhabi (U.A.E.). There are so many photographs of the petitioner alongwith the unknown lady from Abu Dhabi which are seen by the respondent. On the contrary, petitioner had made a false allegations with the character of respondent. However, respondent never knows who is a “A” and where he resides?”

(Underline supplied)

(By striking the name letter “A” is incorporated)

2. The learned Judge of the Family Court held that the allegations of cruelty were established by the respondent- husband. However, the ground for desertion was not established. Therefore, the learned Judge proceeded to pass a decree of divorce under section 13(1) (ia) of the said Act. The prayer of the respondent for grant of permanent custody of the son was rejected. The prayer for possession of the flat as well as return of gold was rejected. Certain amounts were ordered to be paid by the respondent to the appellant. Certain amount was made payable to the then minor son Nikhil. The challenge in the appeal is

confined only to the decree of divorce. There is no cross appeal or cross objections filed by the respondent.

3. We have already quoted the allegations made by the appellant against the respondent in paragraph-11 of her written statement. In paragraph- 41 of the judgment, the learned Judge has recorded a finding that the appellant failed to substantiate the said allegations. These were very serious allegations as regards the character of the appellant made by the respondent. The learned Judge recorded a finding that even the said allegations are also not proved.

4. We called upon the learned counsel appearing for the appellant to make submissions on the issue whether the allegations made in paragraph-11 of the written statement itself amount to cruelty. The submission of the learned counsel appearing for the appellant is that only finding recorded by the learned Judge of the Family Court is that the said allegations were not established by the appellant and that there is no specific finding that the said allegations amount to mental cruelty. He submitted that similar allegations affecting the character of the appellant were made by the respondent- husband which were not established. He also invited our attention to the other findings of the Family Court on various other allegations of cruelty. He submitted that the findings of cruelty recorded in paragraph- 41 of the judgment are completely unsustainable. His submission is that at the highest, the allegations made by the respondent constitute ordinary wear and tear of the married life. The learned counsel appearing for the respondent supported the impugned decree.

5. We have given careful consideration to the submissions. The first point which is required to be considered is whether the allegations made by the appellant against the respondent in paragraph-11 of her written statement were established. If the answer to the said question is against the appellant, the question is whether the said allegations amount to causing mental cruelty to the respondent.

6. We have already quoted paragraph-11 of the written statement of the appellant- wife. Not only that an allegation was made by the appellant against the respondent that the respondent has an illicit relationship with one lady at Abu Dhabi, but the appellant also alleged that there are many photographs of the respondent- husband along with an unknown lady at Abu Dhabi.

7. The respondent filed an affidavit in lieu of the examination-in-chief. We have carefully perused the cross-examination made by the advocate for the appellant of the respondent. The allegations made in paragraph-11 of the written statement were not put to the respondent in his cross-examination made by the Advocate for the appellant. Moreover, the respondent was not confronted with any photographs in the cross-examination.

8. We have perused the affidavit filed by the appellant in lieu of her examination-in-chief. Though in the affidavit filed in lieu of examination-in-chief, the appellant has not reiterated what has been stated by her in the written statement, in the cross-examination, her

attention was invited to paragraph-11 of the written statement. In response to the said suggestion, the appellant stated thus:

“31/- Shown para-11 of WS, What I have stated there in regarding petitioner establishing illicit relationship with one lady at Abudhabi is correct. I do not know the said lady or her name. The same was not a healthy relationship. I produce two photographs, the same are taken on record and marked as Exh.31 colly. I got those photographs from petitioner's album.”

(Underline supplied)

9. Thus, in her cross-examination, the appellant persisted with very serious allegations as to the character of the respondent- husband and about his alleged illicit relations with one lady at Abu Dhabi. However, no efforts were made by the appellant to establish the said allegations. As stated earlier, even the said allegations were not put to the respondent in his cross-examination to enable him to explain the same. The learned counsel appearing for the appellant submitted that the photographs were tendered on record and were marked as Exh.31 which support the allegations. We may record here our reservation for admitting the said photographs in evidence. The said photographs were produced by the appellant in her cross-examination. The said photographs were never produced by the appellant till her cross-examination and the respondent- husband was not confronted with the said photographs. Hence, he was denied an opportunity to deal with the said photographs. Even assuming that the said photographs were correctly exhibited, the photographs only show that the respondent is in

company of one woman. By no stretch of imagination, the said photographs, even *prima facie*, prove the allegation of illicit relationship made against the respondent. We may also note here that in one of the photographs, one woman is seen seated in between two men (one of which is the respondent). Thus, the only conclusion which can be drawn is that very serious and defamatory allegations were made by the appellant in her written statement affecting the character of the respondent. The allegations were of the respondent maintaining illicit relationship with one woman at Abu Dhabi.

10. The law on this aspect is well settled. We may make a reference to two decisions of the Apex Court. First is in the case of ***Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate***,¹ and, in particular, paragraph-7 thereof, which reads thus:

“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)(i-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 extramarital 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

1 (2003) 6 SCC 334

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.”

(Underline supplied)

The another decision on the point of the Apex Court is in the case of *K.Srinivas Rao v. D.A.Deepa*,². In the said decision, the Apex Court considered its earlier decision in the case of *Samar Ghosh v. Jaya Ghosh*,³ which lays down several grounds of cruelty by way of illustration. In the case of *K.Srinivas Rao* (supra) in paragraph-14, the Apex Court observed thus:

“14. Thus, to the instances illustrative of mental cruelty noted in *Samar Ghosh*, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court

² AIR 2013 SC 2176

³ (2007) 4 SCC 511

against the spouse would, in the facts of a case,
amount to causing mental cruelty to the other spouse.”

(Underline supplied)

11. Looking to the gravity of the allegations made by the appellant and the complete failure on her part to make an attempt to substantiate the said allegations, in our view, it was a fit case for passing a decree on the ground of cruelty.

12. It is true that the findings recorded in paragraph-42 of the judgment may not be happily worded. Nevertheless, the Family Court recorded a finding that the said allegations made by the appellant have not been proved by her. In that context, the learned Judge has observed that there is a failure of the marriage and the parties have no respect for each other. The parties are residing separately for last more than 12 years.

13. As we are satisfied that the decree of divorce deserves to be confirmed on the aforesaid ground, it is not necessary to deal with the other facts of the case.

14. Hence no interference is called for with the impugned decree of divorce passed on the ground of cruelty.

15. The appeal is accordingly dismissed. No order as to costs.

(C.V. BHADANG, J)

(A.S.OKA, J)..