

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

**FAMILY COURT APPEAL NO. 205 OF 2007
AND
FAMILY COURT APPEAL NO.206 OF 2007**

A .. Appellant

V/s.

B .. Respondent

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Mr. Shardul Singh i/b. Mr. R. A. Kale and Mr. Gajendra S. Kadam,
Advocate for the Applicant – Appellant (Husband).

Mr. Y. S. Bhate, Advocate for the Respondent (Wife).

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CORAM : A.S. OKA AND P.D. NAIK, JJ.

DATED : APRIL 13, 2016.

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

Considering the allegation and counter allegations made, we direct that names of the parties to the Appeal will not be uploaded and, therefore, we are describing the parties to the Appeal as “A” and “B”, respectively.

2 Both the Appeals arise out of the common judgment by the learned Judge of the Family Court at Bandra, Mumbai in Petition No. A-1867 of 1998 and Petition No. C-206 of 1998. Petition No. A-1867 of 1998 was filed by the husband against the

wife for dissolution of marriage on the ground of cruelty. Petition No. C-206 of 1998 was filed by the wife seeking maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956.

3 The marriage between the parties was solemnized on 27th November, 1994 as per the Hindu Marriage Act, 1955 (for short “the said Act of 1955”). It appears that at least from the year 1998, the parties are residing separately. By the impugned decree, the petition for divorce filed by the husband was dismissed. The petition filed by the wife for maintenance was decreed. The husband was directed to pay maintenance at the rate of Rs.7,000/- per month to the wife with effect from 29th August, 2007. Hence, these are the two Appeals preferred by the husband.

4 We may note here that when these Appeals were taken up for hearing in November 2013, an application being Civil Application No.388 of 2014 was made by the husband seeking permission to amend the petition for divorce on the basis of subsequent events. The subsequent event was of the acquittal of the husband and his other family members by judgment and

order dated 15th April, 2014 passed by the learned Additional Chief Metropolitan Magistrate, 9th Court Bandra, Mumbai. The husband and his relatives were prosecuted for the offences punishable under Section 498A, 406, 354 read with Section 34 of the Indian Penal Code. By order dated 12th November, 2014, the said Civil Application was allowed. Additional issue was framed which reads thus:

“Whether the petitioner proves the ground of cruelty as set out in paragraph 19A of the petition?”

Parties were permitted to lead evidence on the additional issue and a finding of the learned Judge of the Family Court thereon was called for on the said issue. Accordingly, parties appeared before the Family Court. Additional written statement was filed by the wife to the amended petition for divorce. By the judgment and order dated 13th April, 2015 the learned Judge of the Family Court came to the conclusion that the husband has failed to substantiate the allegation of cruelty on the basis of the judgment of acquittal dated 15th April, 2013.

5 We may note here that the said judgment and order dated 13th April, 2015 has been challenged by the husband by filing a memorandum of objection.

6 It is not necessary for us to reproduce in detail the allegations and counter allegations made by the parties, considering the nature of the submissions made by the learned counsel appearing for the parties. The first submission of the learned counsel appearing for the husband – appellant is that considering the findings recorded by the learned Magistrate while acquitting the husband and his other family members, the allegations of cruelty stand established. His submission based on the judgment of the learned Magistrate is that the case of the wife was found to be false. He pointed out that apart from the husband, his parents and sisters were prosecuted. The case went on from 1999 till 15th April, 2014. In the meanwhile, the husband's mother died. He submitted that though an Appeal preferred by the wife under Section 372 of the Code of Criminal Procedure, 1973 against the order of acquittal may be pending in the Sessions Court, the said Appeal is not a continuation of the proceedings of the trial. He submitted that the findings recorded by the learned Magistrate show that the wife could not substantiate her allegations of commission of crime and in fact, an inference is drawn that the allegations are false. He urged that the said findings are themselves sufficient to come to a conclusion that due to the said prosecution, mental cruelty was caused to the

husband. He, invited our attention to the law laid down by the Apex Court in the case of ***K. Shrinivas Rao Vs. D.A. Deepa***¹. He submitted that in the facts of the case before the Apex Court though Appeal was pending against an order of acquittal of the husband and other relatives for the offence punishable under Section 498A of the Indian Penal Code, the Apex Court on the basis of the conclusions recorded in the order of acquittal came to the conclusion that prosecuting the husband amounts to causing mental cruelty to him.

7 He invited our attention to the averments made by the husband in paragraph 14 of the petition wherein he has alleged that the wife used to make all sorts of allegations including the allegation about bad character of the husband. He pointed out that in paragraph 14, it is averred that the wife used to make such allegations in presence of the friends of the husband. Thereafter, he invited our attention to the averments made in the written statement while dealing with the paragraph 14 of the petition. In paragraph 12 of the written statement, the wife denied the said allegation but came out with the specific allegation that the husband is of a loose character. He pointed

¹ (2013) 5 SCC 226

out the affidavit in lieu of the examination-in-chief of the wife in which she has repeated the said allegation. He invited our attention to the evidence of witness Shri Ajit Marathe examined by the husband in support of his case that the wife used to make allegations against the husband that he is of a loose character and that he is addicted to vices. He submitted that the said allegations pertaining to the character were made in the written statement of the wife which have not been substantiated at all and, therefore, this itself is sufficient to prove the allegations of mental cruelty. As far as the Appeal against decree of maintenance is concerned, he submitted that though the wife could not substantiate the allegations regarding the income of the husband, the Family Court has granted maintenance of Rs.7,000/- per month. He submitted that in absence of any specific finding about the income of the husband, such a decree could not have been passed especially when there is a material on record to show that even the wife was earning at one stage and that she is capable of earning.

8 The learned counsel appearing for the wife supported the decree of maintenance. He also supported the finding recorded by the learned Judge of the Family Court on the

additional issue framed by this Court by contending that mere acquittal is no ground and in any case, a substantive Appeal against the order of acquittal is pending before the Sessions Court. So far as the allegations made in the written statement of the wife are concerned, he submitted that there is no specific ground urged that making such allegations amounts to mental cruelty. He invited our attention to the affidavit in lieu of examination-in-chief of the wife and urged that there is no challenge in the cross-examination of the wife to the specific allegations made by her in her affidavit-in-lieu of the examination-in-chief. He submitted that, therefore, it cannot be said that the allegations made by the wife remain unsubstantiated. He submitted that apart from the fact that this is not the ground taken before the Family Court, even in the Memorandum of Appeal, this ground is not agitated.

9 We have given careful consideration to the submissions. The first issue is regarding the legality and validity of the decree of maintenance passed by the learned Judge of the Family Court. The first issue framed by the learned Judge of the Family Court was whether the wife was able to maintain herself. This was in the context of the allegation that the wife was

working. We have perused the evidence of both husband and wife on this aspect. The case made out by the respondent - wife seems to be that the husband was doing business as a contractor and was earning income of Rs.20,000/- per month and in addition, he has having a Tours and Travels business. The contention of the husband was that at present he is unemployed. As far as the alleged income of the wife is concerned, what was brought on record was that the company in which the wife was working has closed down. The learned Judge of the Family Court recorded a finding that the husband could not establish that the wife has any source of income. In the absence of any specific evidence to show that on the date of filing of the petition or even thereafter, the wife had a source of income, we find nothing wrong with the finding recorded by the Family Court that the wife was unable to maintain herself. After considering the evidence of the husband, the learned Judge of the Family Court held that the husband was working as a contractor and was having Tourist business. Moreover, in the cross examination, the husband admitted that an Ambassador Car was registered in his name in the year 1998 and the said car was sold by him in the year 2001. He also admitted that there are two other vehicles available for running the business of tour and travels. Considering this material on record,

the Family Court has granted maintenance of Rs.7,000/- per month as of the year 2007. We finding nothing wrong with the said finding.

10 Now, we turn to the submissions made by the learned counsel appearing for the husband on the additional issue based on the order of acquittal of the husband and his family members in a prosecution before the learned Magistrate. Paragraph 19A was added to the petition for divorce. Paragraph 19A incorporates a statement of fact regarding the order of acquittal. Secondly, it is alleged that the wife failed to establish or substantiate the allegations of cruelty before the criminal Court. It is stated that the mother of the husband died during the pendency of the trial.

11 There is no allegation made about the manner in which the trial proceeded from the year 1999 to 2014. We have perused the affidavit in lieu of examination-in-chief of the husband which is at Exhibit-48 which is nothing but a reproduction of paragraph 19A of the petition. There is a short cross-examination made by the wife. Only documentary evidence produced by the husband was a certified copy of the judgment

and order dated 15th April, 2015 of the acquittal. Even a copy of the Roznama of the proceedings was not produced. Certified copies of depositions were not produced. The wife also deposed by filing an affidavit in lieu of examination-in-chief which contains denials. She was cross-examined by the husband. Only material suggestion given is that due to the said criminal case, the husband and his family members suffered mental and physical agony as the criminal case was a hanging sword. The suggestion given in paragraph 3 of the cross-examination of the wife is that the mother died on 18th September, 2003 due to brain hemorrhage. Further suggestion was given that the mother died due to pendency of criminal case. The correctness of the said suggestion has been denied. We must note here that that is not the ground pleaded in paragraph 19A of the petition for divorce. It is not the case made out by the husband that due to any default on the part of the wife that the trial prolonged and it remained pending from 1999 to 2014.

12 The learned counsel appearing for the husband relied upon a decision of the Apex Court in the case of ***K. Shrinivas Rao (Supra)*** by submitting that in the facts of the case before the Apex Court, the Appeal against order of acquittal for the

offences punishable under Section 498A of the Indian Penal Code was pending. The law laid down by the Apex Court in paragraph 16 reads thus:

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

13 The factual aspect of the case before the Apex Court is considered in paragraph 28. Paragraph 28 reads thus:

“28. Pursuant to this complaint, the police registered a case under Section 498-A of the IPC. The appellant-husband and his parents had to apply for anticipatory bail, which was granted to them. Later, the respondent-wife withdrew the complaint. Pursuant to the withdrawal, the police filed a closure report. Thereafter, the respondent-wife filed a protest petition. The trial court took cognizance of the case

against the appellant-husband and his parents (CC No. 62/2002). What is pertinent to note is that the respondent wife filed criminal appeal in the High Court challenging the acquittal of the appellant-husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence punishable under Section 498-A of the IPC. She filed criminal revision seeking enhancement of the punishment awarded to the appellant husband for the offence under Section 498-A of the IPC in the High Court which is still pending. When the criminal appeal filed by the appellant-husband challenging his conviction for the offence under Section 498-A of the IPC was allowed and he was acquitted, the respondent-wife filed criminal appeal in the High Court challenging the said acquittal. During this period respondent-wife and members of her family have also filed complaints in the High Court complaining about the appellant-husband so that he would be removed from the job. The conduct of the respondent wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant-husband, in filing appeal questioning the acquittal of the appellant-husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. We have no

manner of doubt that this conduct has caused mental cruelty to the appellant-husband."

14 Thus, in the facts of the case before the Apex Court, it was not merely an acquittal in the criminal case. In this case, the wife and members of her family filed complaints with the employer of the husband so that he would be removed from the job. In the complaint, unfounded indecent defamatory allegations against the mother-in-law were made. All that the Apex Court holds by the said decision is that filing of complaints which may have adverse impact on the other spouse and especially on his employment, filing of repeated false complaints and the cases in the Court against the spouse may in the facts of a given case amount to causing mental cruelty.

15 The said decision of the Apex Court was considered by a Division Bench of this Court to which one of us (A.S. Oka, J.) is a party in the case of **Mr.M vs. Mrs. M.**² Paragraph 27 of the said decision reads thus:

"27. As held by the Apex Court, whether a particular act will constitute cruelty or not will depend upon the facts and circumstances of each case. Whether an

² 2014(2) Mh.L.J. 825

order of acquittal in criminal prosecution lodged at the instance of the spouse amounts to cruelty will depend upon the facts and circumstances of each case. Whether the criminal Court has recorded a finding that the prosecution case was false is again not a clinching factor. Considering the evidence on record, the Matrimonial Court will have to decide whether the prosecution which resulted into acquittal will amount to an act of cruelty. In a given case, depending upon the evidence on record, even if the acquittal is on the ground that the charge could not be substantiated and even if there is no finding recorded by the Criminal Court that the prosecution case was false, there can be a case of cruelty. It depends on the manner in which the complaint is filed and prosecuted."

(Underlines supplied)

16 What is held by this Court is that mere acquittal in a criminal case by itself will not amount to cruelty. Whether the criminal court has recorded a finding that prosecution case was false is not a clinching factor. This Court observed that all this depends on the facts and circumstances of each case.

17 Coming back to the facts of the case, as far as additional evidence is concerned, it is only in the form of a certified

copy of the judgment of the acquittal of the criminal Court. Even true copies of notes of evidence in the criminal case are not filed on record. Therefore, we are of the view that only on the basis of the judgment of acquittal, in the facts of the present case, it cannot be held that cruelty was established by the husband.

18 Now, we turn to the other ground canvassed by the learned counsel appearing for the husband. It will be necessary to make a reference to the assertions made in the petition for divorce. In paragraph 14, the husband has stated thus:

14. The petitioner states that for the last two years she has been making all sorts of allegations against the petitioner. She personally met his friends and made allegations that (1) That Hemant the petitioner herein is addicted to alcohol, (2) that he is a womaniser, (3) Girls visit the Zaveri Niwas Flat, (4) Keeping bad character as paying guests, (5) indulging in illegal activities. The respondent made these allegations against the petitioner to his friends. Some of them are (1) Mr. Ajit Marathe, (2) Mr. Kamlesh Dalvi, (3) Mr. Milind Kachare, (4) Mr. Rakesh Matchar, (5) Sudesh Thakur. The abovesaid friends personally appraised the petitioner about the allegations made by the respondent."

19 In response to paragraph 14, in paragraph 12 of the written statement of the wife, she has stated thus:

“12. With reference to para 14, the Respondent denies all allegation made therein. The Respondent puts the Petitioner to have strict proof thereof. The Petitioner is a loose character person, when the Respondent used to obstruct of it, he used to abuse and assaults the Respondent mercilessly.”

(Underline supplied)

20 Thus, in the petition for divorce itself a specific case was made out by the husband that the wife was making all sorts of allegations against him including the allegation pertaining to his character which were reproduced in paragraph 14. In fact, the specific case made out is that such allegations are being made by her when she personally meets the husband's friends. Thus, making allegations of loose character against the husband is the specific case made out in the petition for divorce. In the written statement, in paragraph 12 which is quoted above, the wife reiterated the said allegations by stating that the husband is “a loose character person”. We have carefully perused the evidence. In the affidavit in lieu of examination-in-chief of the husband, he has reiterated in paragraph 19 what he has stated in

paragraph 14 of the petition. In Clause (c) of paragraph 25 of the affidavit in lieu of examination-in-chief, he has stated that the wife has indulged in various illegal activities and/or matrimonial wrongs. As far as the cross-examination of the husband by the advocate for the wife is concerned, we find that there is no specific cross-examination made on what is stated in paragraph 19 of the affidavit in lieu of examination-in-chief. In fact, in paragraph 40, a suggestion appears to have been given that the husband has alleged that the wife is of a loose character. The correctness of the said suggestion has been denied by the husband.

21 In support of what is averred in paragraph 14 of the petition, the husband examined Shri Ajit Shankar Marathe as his witness. In paragraph 8 of his examination-in-chief, he has stated thus:-

“8. I state that the said “Y” then started telling me that the said “X” is addicted to alcohol and he is womanizer. She further told me that many Girls visit the Zaveri Niwas flat he is indulge in illegal activities and how he is keeping bad character. I further state that as I know that the said “X” is not having any bad habits. I did not believe her and she is making such

allegations out of frustration as she failed in obtaining the premises at Zaveri Niwas. From the conduct of the said "Y" I can easily tell that the said "X" was not leading happy married life and his life is messed by the said "Y" due to her misbehaviour and she had only intention to grab the premises at Zaveri Niwas and the huge amount from his family members."

(the name of the parties are marked as "X" & "Y", respectively)

In paragraph 9 of the cross-examination, it is brought on record that the said witness knew the wife from 1990. In fact, he stated that the wife was working with him for six months in the year 1990. A suggestion given in the cross-examination was that the wife worked only for two months. The correctness of the said suggestion is denied by the said witness. He denied the correctness of the suggestion that the allegations made by him in the examination-in-chief against the wife were false.

22 The wife examined herself by filing her affidavit in lieu of examination-in-chief. She did not examine any other witnesses. In paragraph 21, she reiterated what she stated in her written statement. It appears that there is an obvious typographical error in her affidavit in lieu of examination-in-chief, instead of saying that the petitioner is a person of loose

character, she has stated that the respondent is a loose character person. She was herself the respondent in the matrimonial petition. In short, a very serious allegation made by her in her written statement about the loose character of the husband is reiterated by her in her examination-in-chief.

23 In the cross-examination of the husband, nothing is put to the husband on this aspect. The same is the case with the cross-examination of the witness Shri Ajit Marathe. There is absolutely no effort made by the wife to substantiate the said allegation affecting the character of the husband.

24 As stated earlier, the fact that the wife was making such allegations is very much pleaded in the petition for divorce. It is a part of the conduct amounting to cruelty pleaded by the husband.

25 We have already reproduced what is held by the Apex Court in paragraph 16 of the decision in the case of ***K. Shrinivas Rao (Supra)***. Making of unfounded, indecent, defamatory allegations against the spouse in the pleading is an instance of causing mental cruelty. In the facts of the case, apart from

making unfounded allegations about the loose character of the husband in the pleadings and evidence, the evidence of witness Ajit Marathe proves that such allegations were made by the wife in presence of the said witness.

26 We have also make a reference to the decision of the Apex Court in the case of ***Vijay Kumar Ramchandra Bhate Vs. Neela Vijay Kumar Bhate***³, wherein the Apex Court has taken a view that allegations of extra marital relationship is a grave assault on the character, honour, reputation and status of the rival spouse. The Apex Court held that such allegations are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the cruelty in matrimonial law.

27 As pointed out earlier, the wife has miserably failed to substantiate the said allegations of loose character made against the husband and, therefore, this is a fit case to pass a decree of divorce on the ground mentioned in Clause (i-a) of Sub-section (1) of Section 13 of the said Act of 1955.

3 2003 (6) SCC 334

28 Hence, we pass the following order:

:: ORDER ::

- (i) The Family Court Appeal No.205 of 2007 is allowed and decree of dismissal of petition No. A-1867 of 1998 is hereby quashed and set aside;
- (ii) The Petition No. A-1867 of 1998 stands decreed and the marriage solemnized between the parties on 27th November, 1994 stands dissolved under Clause (ia) of Sub-section 1 of Section 13 of the Hindu Marriage Act, 1955;
- (iii) There will no order as to costs.

:: FAMIL COURT APPEAL NO.206 OF 2007 ::

- (i) Family Court Appeal No.206 of 2007 stands dismissed;
- (ii) There will no order as to costs.

29 At this stage, the learned counsel appearing for the wife prays for stay of the decree of divorce passed in Appeal No.205 of 2007. The said prayer is opposed by the husband.

30 To enable the wife to approach the higher Court, we direct that the decree of divorce will remain stayed for a period of 12 weeks from today.

(P.D. NAIK, J.)

(A.S. OKA, J.)