

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

FIRST APPEAL NO.2762 OF 2016

Vivek s/o Kailash Shukla

Age : 37 years, Occupation : Service,
Residing presently at 17 – B, Sangam Nagar,
Indore – Madhya Pradesh.

.. Appellant

VERSUS

Mrs. Minal w/o Vivek Shukla

Age : 40 years, Occupation : Service,
Residing at c/o Babubhai Devchand Patel,
243, Baliram Peth, Taluka & Dist. Jalgaon

.. Respondent

...

Advocate for Appellant : Shri. Hemant Surve

Advocate for Respondent : Shri. Kishor C. Sant

...

CORAM : PR. BORA, J.

RESERVED ON : 05.07.2017

PRONOUNCED ON : 11.09.2017

JUDGMENT :

01. Aggrieved by the Judgment and decree passed in Special Marriage Petition No.06 of 2009 by the Court of District Judge-1, Jalgaon on 22.04.2016, the respondent therein has filed the present appeal.

02. The present respondent had filed the aforesaid petition under section 22 of the Special Marriage Act seeking restitution of conjugal rights. In the said petition, the present appellant filed a

counter claim thereby praying for grant of divorce against the petitioner. The learned District Judge has granted the decree of restitution of conjugal rights in favour of the respondent and has dismissed the counter claim filed by the present appellant, seeking a decree of divorce. Aggrieved by, the present appeal is filed.

03. Heard the learned Counsel appearing for the parties. Perused the impugned Judgment and the evidence adduced before Court below.

04. It is not in dispute that, the appellant and the respondent got married on 12th September, 2008 and their marriage was registered under the provisions of Special Marriage Act, 1954. It is also not in dispute that, it was the love marriage.

05. It was the case of the respondent before the Trial Court that, though her marriage with the present appellant was a love marriage and was registered under the provisions of the Special Marriage Act, 1954, the appellant and the other relatives of the appellant insisted for performing the customary marriage according to the hindu rituals and though her parents had agreed for the same, and have made all arrangements for the said function, the appellant

and his parents in the meanwhile raised the demand of Rs.2,50,000/- in cash, 200 grams of gold ornaments and 2 Kg silver utensils and since she and her parents expressed their inability to comply with the said demand, the appellant and his parents unilaterally cancelled the said function and informed her that, her marriage performed with the appellant stood cancelled. It was further alleged by the respondent that, for non – fulfillment of the aforesaid demand of dowry, the appellant caused physical and mental torture to her and though she made all honest efforts to resume his company, the appellant refused to cohabit with her and thus deprived her from the conjugal rights without any sufficient cause.

06. The petition so preferred by the respondent was opposed by the appellant. While denying the allegations made against him by the respondent, the appellant raised counter claim seeking divorce on the ground of cruelty from the respondent. It was the contention of the appellant that, the respondent filed a false criminal complaint against him, his parents and brother for the offences under sections 498-A, 420, 323, 504 & 506 r.w. 34 of I.P.C. It was the further contention of the appellant that, in the aforesaid criminal case, he, his parents and his brother were subjected to great harassment and humiliation, they were arrested and required to obtain bail and

were under trauma till the said criminal case ended in acquittal. According to the appellant lodging false criminal case by the respondent against him and his relatives caused them agony and therefore constitute cruelty as defined under the law making the appellant entitled for seeking divorce on the said ground. The appellant on the aforesaid ground had prayed for dismissal of the petition filed by the respondent seeking decree of restitution of conjugal rights and has prayed for decree of divorce in his favour by allowing his counter claim on the grounds raised by him in the counter claim.

07. It was the specific plea raised by appellant, while opposing the petition for restitution of conjugal rights and in support of his counter claim for grant of divorce that, the respondent had filed a false complaint alleging offences under Section 498-A, 420, 323, 504 & 506 read with 34 of I.P.C., in which, he and his family members got acquittal. It was the contention of the appellant that filing of a false criminal complaint by the respondent constitutes matrimonial cruelty and would entitle the husband to claim the divorce.

08. The learned District Judge has turned down the plea so

raised by the appellant. The learned District Judge has observed that, the trial Court which acquitted the appellant and his relatives from the offences under Sections 498-A, 420, 323, 504 & 506 r.w. 34 of I.P.C. has not recorded any such finding that, the allegations made by the respondent in the said complaint were false, but has acquitted the appellant, his parents and his brother on the ground that, the prosecution has failed to prove the charges levelled against them beyond reasonable doubts. The learned District Judge has also held that, in the petition before her, the respondent had produced on record sufficient evidence, which corroborates and sufficiently proves the allegation made by her against the appellant and his relatives in regard to demand of money.

09. The learned Judge in para no.18 of the impugned Judgment has carved out the legal principles from the judgments, which were relied upon by the parties. It is observed by the learned District Judge that, “the concept of proof 'beyond the shadow of doubt', is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife”. It is further observed by the learned District Judge that, “ultimately it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on

complaining spouse". Referring to the principles as aforesaid, the learned District Judge has held that, the allegations made against the appellant and his relatives though have not been proved in the criminal trial beyond the shadow of doubt, the evidence which has been brought on record in the proceeding before her, the respondent has sufficiently proved that, there was an illegal demand by the appellant and his relatives and for non – fulfillment of the said demand, the respondent was being treated cruelly and on that illegal ground the husband has deprived the wife from enjoying the conjugal rights.

10. Now, it has to be seen whether the observations made by the learned District Judge and the conclusions accordingly recorded by her can be sustained on the touch stone of law as well as facts. As was deposed by the respondent, cash amount of Rs.2,50,000/-, 200 grams of gold and 2 Kg silver utensils were demanded by the appellant and his parents from her parents by way of dowry at the time of *faldan vidhi*, which, according to the contention of the respondent was to be performed at Indore at the house of appellant. Respondent has further deposed that, since she and her parents were unable to satisfy the demand of dowry as aforesaid, the appellant and his parents unilaterally declared the marriage to have been

broken. The respondent has further testified that, thereafter though she made all honest efforts to cohabit with the appellant, he refused to cohabit with her and insisted for fulfillment of demands made by him and his parents. The respondent has also deposed that, the appellant abused her, beat her and gave her all physical and mental torture on account of non – fulfillment of his dowry demand and refused to cohabit with her. The respondent has also deposed that, in the circumstances she was constrained to file the criminal complaint against appellant, his parents and brother under sections 498-A, 420, 323, 504 & 506 r.w. 34 of I.P.C.

11. The material on record reveals that, in her cross - examination the respondent filed one document on record alleging the same to be written in the handwriting of the appellant containing the demands therein allegedly made by the appellant and his parents at the time of *faldan vidhi*. The said document is marked as Exh.54. During the course of the argument, my attention was invited to the said document by both the learned Counsel appearing for the respective parties. According to learned Counsel for the respondent, the said document clearly demonstrates the demand of Rs.Two Lakhs, gold ornaments and silver utensils. The perusal of the impugned Judgment shows that, the learned District Judge has relied

upon the said document to arrive at a conclusion that, a demand was made by the appellant and has accordingly recorded a finding that, the respondent has reasonably proved that such demands were made from the side of the appellant. The learned District Judge has further drawn an inference on the basis of the said evidence that, the appellant refused to cohabit with the respondent for non - fulfillment of the aforesaid demand. The conclusion so recorded has ultimately resulted in granting decree of restitution of conjugal rights in favour of the wife.

12. After having carefully perused the entire evidence on record, it is difficult to agree with the conclusions recorded by the learned District Judge. It has to be stated that, the document at Exh.54 which has been heavily relied upon by the learned District Judge could not have been relied upon for many reasons. Admittedly, the said document was not placed on record by the respondent either at the time of filing petition before the District Court or before adducing her evidence before the said court. There is no explanation from the respondent as to why such an important document was not produced by her at the time of filing of the petition or before adducing her oral evidence before the Court.

13. I have carefully perused the cross - examination of the respondent. She has given a categorical answer that, she was not having any documentary evidence to show that, the appellants had demanded from her Rs.2.5 Lakhs, 2 Kg of silver utensils and 200 grams of gold. Immediately thereafter, a suggestion was put to her that, she was not having any documentary evidence to show that, the father of the appellant cancelled the date of the customary marriage and the *faldan vidhi* scheduled to be held on 08.02.2009. Respondent, though denied the said suggestion, further volunteered that, she possesses such evidence and she was ready to produce it on record and according to her, the said document was in the hand writing of the respondent. I deem it appropriate to reproduce herein below the said portion in the cross - examination of the respondent as it is in verbatim, which reads thus :

"सा.वाल्याने माझ्याकडून 2 || लाख रु., दोन किलो चांदीचे सामान व 200 ग्रॅम सोन्याची मागणी केली हे दाखविण्यासाठी माझ्याकडे कागदोपत्री पुरावा नाही. हे म्हणणे खरे नाही की माझ्याकडे सा.वाल्याच्या वडीलांनी लग्नाची तारीख रद्द केली व दि.8.2.09 रोजी लग्नाचा फलदान विधी होईल असे दाखविण्यासाठी कागदोपत्री पुरावा नाही. साक्षीदार सांगते की माझ्याकडे पुरावा आहे व तो मी दाखल करण्यास तयार आहे व तीचे म्हणणे आहे की ते सा.वाल्याच्या हस्ताक्षरात आहे."

14. Perusal of the further cross – examination does not reveal whether any such document was filed by the respondent and

whether such document was permitted to be filed by the learned District Judge. There is nothing more on record showing that, such document was in fact filed, was shown to the witness and was admitted by her to be the same document. Only in the last line of the cross - examination of the respondent it is mentioned that, "फलदान विधीचा दस्त नि.54 ला आहे." It is really surprising that, on such vague evidence the learned District judge has placed her reliance. First of all, it was the unknown procedure followed of allowing the witness to produce any document in the cross – examination without giving any opportunity of opposing such production of the document to the opposite side. Further a total go - bye is given to the procedure of proving the contents of the said document. It has to be stated that, the contents of the said document are not legally proved and in such circumstances the exhibition of the said document can only be considered for limited purpose of identification of the said document.

15. Question arises why such a vital and important document, when it was in custody of the respondent, was not produced by her during the course of the trial for the offences under section 498-A of I.P.C. I reiterate that, unless the circumstances are explained why the said document was not filed at the initial stage i.e. at the time of filing of the petition its production could not have been

allowed. It is really surprising that, an observation has been made by the learned District Judge that, it is nowhere suggested to the respondent by the appellant that, the said document was not in his hand writing. The learned District Judge has failed in appreciating that, when the said document was not legally proved, the learned Counsel for the appellant cleverly did not refer to the said document even for giving a suggestion that, the said document was not in the hand writing of the appellant or else the said document would have been validly read in evidence. No such inference therefore can be drawn that, since the appellant did not give any such suggestion it shall be deemed that the said document is in his handwriting. Further even if we prefer to rely upon the said document, assuming that it is in the hand writing of the respondent, without any further evidence, it is difficult to record any such conclusion that, the said document contains the demands made by the appellant and his family members from the respondent.

16. Further, the learned District Judge does not seem to have properly appreciated the Judgment in the case of Regular Criminal Case No.712/2009 filed on the complaint of the respondent against the appellant and his relatives. In the said case, it was deposed by the respondent that,

“Vivek asked me on a phone call to give a cash of Rs.2.5 Lakhs, 200 grams gold ornaments, 2 Kg silver utensils as dowry. I tried to convince Vivek that, we have performed a love marriage and therefore it is not proper to demand anything, but he was not ready to listen me. Thereafter Vivek made a phone call to my father and made same demand to him.”

The discussion made by the learned Magistrate in the Judgment delivered by her in Regular Criminal Case No.712/2009 reveals that, the father of the respondent had admitted in his evidence before the Court that, accused Vivek did not make any demand of any ornament or cash from him. I deem it appropriate to reproduce the observations made by the learned Magistrate in that regard in para no.27 of the said Judgment, which read thus :

“Babubhai (PW6) has admitted that the accused Vivek did not make any demand of any ornaments or cash from him, though the informant states that after telling her about their demand for the Phaldan, Vivek immediately conveyed about the same to her father on phone.”

Thus, there was no corroboration to the fact stated by the respondent that dowry was demanded by the appellant and that was the reason that, the learned Magistrate has recorded a finding that, the prosecution has failed in proving the charges levelled against the

accused therein.

17. As noted earlier, the learned District Judge has observed in the impugned Judgment that in absence of any such finding recorded by the criminal Court while acquitting the appellant and his family members from the offence under Sections 498-A, 420, 323, 504 & 506 r.w. 34 of I.P.C. that a false case was filed against them by the complainant, filing of such complaint, would not amount to cruelty and thus cannot be a ground for the husband to seek a decree of divorce.

18. In the case of **Anil Yashwant Karande Vs. Mangal Anil Karande [2016 (2) Mh.L.J.] 166**, a similar question was raised, which I deem it appropriate to reproduce herein below :

“Whether for the act of filing complaint under section 498-A of Indian Penal code, to amount to mental cruelty on the acquittal of husband and family, it is essential that judgment of acquittal must find that the complaint filed was false and with an intention to defame?”

19. The facts involved in the aforesaid case were quite similar to the facts of the present case, except that, the aforesaid petition was under the provisions of the Hindu marriage Act, whereas

the instant proceeding is under the provisions of the Special Marriage Act. While deciding the aforesaid issue, the Learned Single Judge has referred to various judgments of this Court and also of the Hon'ble Apex Court. In the said matter also, the lower Appellate Court had held that, the criminal Court has nowhere stated that, the false complaint was lodged and thus the said ground cannot be canvassed for seeking divorce.

20. In the aforesaid Judgment, the learned Single Judge has referred to the judgement of the Division Bench of this Court in case of **Mr. M. Vs. Mrs. M. 2014 (2) Mh.L.J. 825**, wherein it has been held that,

“In a given case depending upon the evidence on record, even if acquittal is on the ground that, charge could not be substantiated and even if there was no finding recorded by the criminal court that, the prosecution case was false, there can be a case of cruelty. The division bench has further observed that, it depends upon the manner in which the complaint has been filed and prosecuted.”

21. Perusal of the order passed in Regular Criminal Case No.712/2009, based on the complaint filed by the present respondent, demonstrates that, the said complaint has been dismissed on merits and not on the ground that, the prosecution has failed to

prove the case beyond reasonable doubt.

22. As I have noted earlier, the learned Magistrate has specifically observed that, though the informant had stated that, the husband had conveyed the monitory demands for the *faldan vidhi* to her father on phone, the father namely Babubhai (PW-6) had admitted that, the accused – husband did not make any demand of any ornaments or cash from him. It is worth to note that, the learned Magistrate has candidly observed that, the evidence of all the aforesaid prosecution witnesses is replicate of material contradictions rendering the same not worthy of credence raising reasonable doubts about allegations levelled against the accused. The learned Magistrate has further observed that, the informant has failed to produce on record the copy of the notice allegedly sent by her to her husband on 17.07.2014 and the e-mails sent by her to him. The learned Magistrate has also observed that, the FIR was lodged belatedly after 25 days of occurrence of the alleged incident.

23. The criminal Court while acquitting the appellant and his family members has considered the evidence of several witnesses and thereafter had recorded a clear finding that, the prosecution has failed to prove the material ingredients against the accused under

section 498-A read with 34 of I.P.C. and that the prosecution evidence is absolutely insufficient to prove the allegations against the accused. The learned Magistrate thus has rejected the complaint on merits after evaluating the evidence of prosecution witnesses. It has to be stated that the criminal complaint was seriously prosecuted by the respondent by adducing evidence of several witnesses. It has also come on record that the bail application of the appellant was also seriously opposed by the respondent. It is also a matter of record that the passport of the appellant was sought to be seized in the matter by the respondent.

24. The copy of the Judgment in the case of R.C.C. No. 712/2009 was indisputably placed on record by the appellant. The learned District Judge has, however, observed that, since in the aforesaid criminal case the learned Magistrate has not recorded any such finding that the criminal prosecution initiated on complaint of the present respondent was false, the acquittal of the accused i.e. present appellant and his family members from the said case would not provide a cause to the appellant to seek divorce on the said ground.

25. The observation so made and the conclusion so recorded by the

learned District Judge is wholly unsustainable. I have elaborately discussed herein above that, the acquittal recorded of the appellant and his family members by the learned Magistrate in R.C.C. No.712/2009 is on merits and with an observation that, the prosecution evidence was absolutely insufficient to prove the allegations against the accused. The observations made by the learned Magistrate that the evidence of the prosecution witnesses was not worthy of credence means that, there was no truth in the case of prosecution. In a way the observations made by the learned Magistrate lead to the inference that, the prosecution case was false though such wording not been expressly used by the learned Magistrate.

26. Moreover, as has been held by the Division Bench of this Court in the case of **Mr. M. Vs. Mrs. M.** (cited supra) even if the acquittal of the husband and his family members has been recorded on the ground that, the evidence adduced by the prosecution was wholly insufficient and though there is no such finding recorded by the trial Court that, the prosecution case was false, there can be a case of cruelty.

27. I reiterate that, though the criminal Court has not

expressly said that the prosecution case was false, the entire discussion made by the learned Magistrate and the conclusions recorded by it reasonably suggest that, the said case was false and would therefore amount to cruelty.

28. The petition filed by the respondent for restitution of conjugal rights was opposed by the appellant mainly on the ground that, the respondent filed a false case against him and his family members and subjected all of them to tremendous mental pain and agony. On the same ground decree of divorce was also sought by the appellant by raising a counter claim.

29. As held by the Hon'ble Apex Court in the case of **K. Srinivas Vs. K. Sunita, (2014) 16 SCC 34** it is beyond cavil that, if a false criminal case is preferred by either spouse, it would invariably and indubitably constitute matrimonial cruelty and as such would entitle to the other spouse to claim a divorce.

30. In case of **Vishwanath Sitaram Agrawal Vs. Sau. Sarla Vishwanath Agrawal 2012 (6) Mh.L.J. (S.C.) 1** the facts were that, the wife had filed a complaint under section 498-A of I.P.C. against the husband, her father-in-law and other relatives, who were

acquitted in that case and the said decision of the acquittal was not assailed before the higher forum and thus the conclusion recorded by the trial Court that allegations on that count were incorrect and untruthful had become final. In light of the facts as aforesaid, the Hon'ble Apex Court observed that, the act of filing false complaint under section 498-A of I.P.C. by the wife created mental trauma in the mind of the husband. The Hon'ble Apex Court has further observed that, no one would like to face a criminal proceeding of this nature on baseless and untruthful allegations.

31. The Hon'ble Apex Court in the case of **V. Bhagat Vs. D. Bhagat (1994) 1 SCC 337** has held that, 'a mental cruelty under Section 13 (1)(i-a) can 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.'

32. In the case of **Anil Vs. Mangal** (supra) the learned Single Judge has referred to the Judgment of the Division Bench of this Court in the case of **Nagesh Dhanapp Chilkanti Vs. Sau. Manisha Nagesh Chilkanti** in Family Court Appeal No.158 of 2008, wherein the division bench had considered a similar case where the husband and his family members were acquitted in the complaint

filed under section 498-A of I.P.C. The Division Bench has held that, filing of false criminal against the husband and his family members would very much constitute mental cruelty. The Division Bench has further held that, in the circumstances, the husband was entitled to a decree of divorce on the ground of cruelty.

33. The learned Single Judge in the case of **Anil Vs. Mangal** (supra) after having referred to the aforesaid Judgments has held thus :

“36. The judgments referred to aforesaid clearly indicate that if the complaint filed by the wife against the husband under [section 498-A](#) of [IPC](#) and other related provisions was dismissed on merits and the husband and his family members are acquitted, it was clear that the complaint filed by the wife against the husband was a false complaint. In my opinion, filing of such complaint itself which create mental trauma on the husband and the complaint which was seriously prosecuted by the wife by leading evidence of several persons and bringing the said complaint to its logical conclusion which ultimately resulted in acquittal of the husband and his family members clearly amounted to the cruelty committed by the wife upon the husband.

37. The judgments of the Supreme Court and this Court which are referred to aforesaid squarely apply to the facts of this case. I am respectfully bound by those judgments. There is no dispute that the husband and his family members were ultimately acquitted in such complaint made by the respondent. It was not the case of the respondent before the trial Court as well as before the lower appellate Court that the finding rendered by

the learned Magistrate First Class were erroneous and such allegations were not independently proved by the respondent before the learned trial Court as well as before the lower appellate Court. A perusal of the order passed by the lower appellate Court indicates that the evidence led by the respondent and other witnesses in the said criminal proceedings and the findings rendered by the learned Magistrate First Class have been totally ignored by the learned trial Court.

38. *The Supreme Court as well as this Court in the aforesaid judgments have consistently held that if the false criminal complaint is preferred by either spouse it would invariably and indubitably constitute matrimonial cruelty, such as would entitle the other spouse to claim a divorce. In my view, the respondent having filed a false complaint alleging offence under [section 498-A](#), [323](#), [504](#) and [506](#) of IPC in which the appellant and his family members were acquitted and thus the appellant was entitled to seek divorce on the ground of cruelty under [section 13\(1\)\(i-a\)](#) of the [Hindu Marriage Act](#).”*

34. The present respondent filed the petition for restitution of conjugal rights on 07.09.2009. The material on record reveals that, pending the said petition, the respondent lodged the report against the appellant and his family members, on the basis of which, the criminal case was registered against them for the offences punishable under section 498-A and other relevant provisions of I.P.C. The said criminal case was decided on 13.05.2014 whereby the appellant and his family members were acquitted. The appellant filed his written - statement to the petition for restitution of conjugal

rights thereafter i.e. on 20.09.2014 and also raised a counter claim seeking divorce.

35. The petition for restitution of conjugal rights was thus further prosecuted by the respondent after decision of the criminal case. As I have noted earlier, the criminal complaint was seriously prosecuted by the respondent by adducing evidence of several witnesses. The bail application was also seriously opposed by the respondent. An application was also filed by the respondent for seizure of the pass port of the appellant. In the light of the facts as aforesaid, it has to be examined whether in the aforesaid circumstances, the petition filed by the respondent for restitution of conjugal rights was liable to be decreed. Section 22 of the Special Marriage Act clearly indicates that, the application for restitution of conjugal rights can be filed under the said provision only if either of the spouse has without reasonable excuses withdrawn from the society of the other. The question arises whether the respondent could have maintained the petition filed by her seeking restitution of conjugal rights after the complaint filed by her under section 498-A of I.P.C. against the appellant and his family members was proved to be false and hence ended in acquittal of the appellant and his family members. I need not to repeat the earlier finding recorded by me

that, the criminal case filed by the respondent against the appellant under section 498-A of I.P.C. amounted to cruelty committed by the respondent upon appellant. In the circumstances, as has been held by the learned Single Judge in the case of **Anil Vs. Mangal** (supra), no spouse can be allowed to urge that, he or she would treat other with cruelty and at the same time would also force other to cohabit with him or her by filing an application for restitution of conjugal rights.

36. After having considered the entire material on record, unhesitatingly it can be said that, the appellant has sufficiently proved the allegation of cruelty on part of the respondent and as such, no decree of restitution of conjugal rights was liable to be granted in favour of the respondent and at the same time, there was no reason for refusing the decree of divorce in favour of the appellant. The learned District Judge has committed an error in allowing the petition filed by the respondent for restitution of conjugal rights and in rejecting the counter claim filed by the appellant seeking divorce on the ground of cruelty. The impugned Judgment, therefore, deserves to be set aside. In the result, the following order is passed.

ORDER

1. The order dated 22.04.2016 passed by the District Judge -1

Jalgaon in Special Marriage Petition No.06 of 2009 is set aside.

2. Special Marriage Petition No.06 of 2009 for grant of restitution of conjugal rights is dismissed.
3. The counter claim filed by the appellant seeking decree of divorce is allowed.
4. No order as to costs.
5. The first appeal stands allowed in the aforesaid terms.
6. Pending civil application, if any, stands disposed of.

(P.R. BORA, J.)