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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.148 OF 2008**

'H' ... Appellant

Versus

'W' ... Respondent

Mr. Shekhar Jagtap a/w Mr. Akshay Kapadia i/by J. Shekhar & Co., for the Appellant.

Ms. Sheeja John i/by M/s. M.P. Savla and Co., for the Respondent.

**CORAM : A.S. OKA &
SMT. ANUJA PRABHUDESSAI, JJ.**

DATE ON WHICH SUBMISSIONS WERE HEARD : 9th FEBRUARY, 2017

DATE ON WHICH JUDGMENT IS PRONOUNCED : 7th JULY, 2017

JUDGMENT (PER A.S. OKA, J.):

1 By this Appeal, the appellant - husband has taken an exception to the judgment and decree dated 16th February, 2008 passed by the learned Judge of the Family Court No.6, Bandra, Mumbai. We are directing that names of the parties in the cause title of the judgment shall be masked and accordingly, the appellant and the respondent have been described as “H” and “W” respectively. We have also masked the names appearing at various places in this judgment.

2 We had kept this Appeal pending with the hope that the parties will see the reason and will come out with amicable solution. But, so far, there is no settlement.

3 The marriage between the parties was solemnized on 6th July, 1994 in accordance with the Special Marriage Act, 1954 (for short “the said Act”). At the time of marriage, the respondent – wife was a spinster. However, the appellant – husband was a divorcee. He had two children from his first marriage. At the time of marriage, the age of his son was 15 years and the age of the daughter was 8 years. The appellant – husband filed a Petition No.A-507 of 2000 of 2nd May, 2000 seeking a decree of divorce on the grounds set out in clauses (d) and (e) of Sub-Section (1) of Section 27 of the said Act. The first ground was of cruelty and the second ground was that the respondent has been suffering intermittently from mental disorder of such kind and to such an extent that the appellant – husband cannot be reasonably be expected to live with her. A decree of injunction was prayed for by the appellant – husband in respect of Flat No.404 (for short “the said flat”) in Twin Star Building, Shristy Complex, Saki Vihar Road, Powai, Mumbai. Injunction sought was for restraining the respondent – wife from entering upon or remaining upon the suit flat. The prayer for perpetual injunction was also sought restraining the respondent – wife

from visiting premises of M/s. Vitrun Glass where the appellant was working and from contacting the appellant's employer on telephone. The Petition was contested by the respondent – wife by filing her written statement. The appellant adduced evidence of himself by filing an affidavit in lieu of examination-in-chief at Exhibit – 21 and additional affidavit in lieu of examination at Exhibit – 31. The respondent examined herself by filing an affidavit in lieu of examination-in-chief. Apart from examining themselves, the parties did not examine any other witnesses but both parties adduced documentary evidence. By the impugned decree, the learned Judge of the Family Court held that the appellant was not entitled to any relief and proceeded to dismiss the Petition.

4 With a view to appreciate the submissions canvassed across the bar, a brief reference to the pleadings of the parties will have to be made. In the Petition, the appellant pointed out that the respondent has been working as Air Hostess with the Indian Airlines for more than 20 years and that she was continuously posted at Delhi. The appellant was working at Delhi from the year 1982 to 1987. Thereafter, the appellant started residing in Mumbai. The case made out by the appellant is that at the relevant time, the respondent was earning Rs.60,000/- to 70,000/- per month with perquisites. According to the case of the

appellant, he had clearly informed the respondent before solemnization of marriage that if at any stage after the marriage, the respondent creates a situation where the appellant is called upon to choose between her and his children, he will choose his children. It is the case of the appellant that the respondent agreed to the said condition and also promised to assist the appellant to look after the children.

5 According to the case of the appellant, from the next day of marriage, the respondent started quarreling with him and started criticizing the his children. She started criticizing the appellant for talking to his daughter for a long time on telephone.

6 A very serious allegation is made by the appellant that the respondent could not sleep between 11.00 pm to 4.00 am. The allegation is that the respondent used to pick up some quarrel on some trifle issue in the night and start shouting at and abusing the appellant in a loud tone which was to continue upto 4.00 am or 5.00 am. The allegation of the appellant is that thereafter the respondent used to sleep and used to get up at 11.00 a.m.

7 According to the case of the appellant, in order to appease her relatives, the respondent asked the appellant to undergo one more marriage ceremony in Delhi which was held in April, 1995 and only

after that ceremony that the parties announced their marriage to their friends and relatives. According to the case of the appellant for two to three years, the respondent continued her tirade from 11.00 pm to 4.00 am whenever she used to be in Mumbai with him. According to him, the respondent used to quarrel over trifle matter and refused to talk to the appellant or come to Mumbai for two to three months. Sometimes, she used to stay away even for a continuous period of six months. Further the allegation is that the respondent used to call the appellant from Delhi several times between 11.00 pm to 5.00 am and abuse him in a filthy language.

8 According to the case of the appellant, as this was his second marriage, he tried his level best to save the marriage by going to the extent of tendering apology to the respondent. According to the case of the appellant, when his employer gave him a new car, on the request made by the respondent, he gave his old car to the respondent for her use at Delhi. Accordingly, by the said car, they travelled upto Delhi and the appellant stayed for three days with the respondent in Delhi when the appellant gifted a television set to the respondent. It is alleged that in the year 1996, the appellant took the respondent to Nainital for a holiday for about 4-5 days when the respondent was happy and behaved well. Though the appellant tried to persuade the

respondent to give up her employment in Delhi or at least get transfer to Mumbai, the respondent used to insist on the appellant shifting to Delhi. The appellant has set out the details of the travelling undertaken by him along with the respondent to various places. The appellant has stated that in the year 1998, he took the respondent to various places in Maharashtra including Ellora Caves at Aurangabad. He has stated that whenever the respondent used to be at home, she continued her conduct of not sleeping upto 4 to 5 am and shouting and screaming at the appellant.

9 The appellant has stated that he took leave from his employer from May, 1999 and took the respondent to a tour of temples in South India. Thereafter, the appellant received a complaint from his children that the respondent had been telephoning them at their mother's residence and abusing them and shouting at them. The appellant alleged that due to quarrelsome nature of the respondent during the span of 10 years, the appellant could take his children away for holiday only once in March, 1999.

10 It is the allegation of the appellant that the respondent had been threatening that if she does not conceive, she would commit suicide. His allegation is that the respondent's behaviour continued to become more and more neurotic.

11 The appellant further alleged that in February, 2000 the respondent came to Mumbai for 10 to 12 days for wedding of his nephew. It is alleged that in the marriage function, the respondent started a quarrel with the appellant in presence of others. Ultimately, the appellant had to take her outside the place of function for pacifying her. In the function, on the same day, the respondent again started quarreling by objecting to the act of the appellant of talking to his family relatives and especially his niece who had come from Kenya. It is alleged that even at the time of reception, she created a scene.

12 In the night on the same day, the respondent refused to stay with the appellant and demanded money to enable her to stay in a hotel in Mumbai and returned to Delhi next day. While the appellant and the respondent were travelling by auto rickshaw, the respondent kept on shouting and asking for the address of mental hospital to the people around.

13 The case of the appellant husband is that after few days, she came back to Mumbai and was staying in Centaur Hotel at Juhu where she was put by her employer. The appellant reached the Hotel room of the respondent when she was performing Pooja. It is alleged that after the Pooja was over the respondent started shouting at the

appellant and abusing the appellant. She wrote a note in which she stated that if anything happens to her, the appellant would be responsible for the same.

14 We are quoting paragraphs 17 to 21 of the Petition as heavy reliance was placed on the incidents narrated therein. Paragraphs 17 to 21 read thus :-

“17. The petitioner says that, similarly the respondent came and stayed with him for 10 days each in March and April, 2000 each. Throughout the said two visits, the respondent was continuously threatening to commit suicide by jumping down from the petitioner's fourth floor flat or taking sleeping tablets. With every such threat, the respondent used to remind the petitioner that she not only has kept the said note in her purse but also has kept similar notes at her residence in Delhi. At the same time, the respondent was forcing the petitioner to ensure that she somehow conceives for which purpose she forced the petitioner to take her to the infertility clinic, where the doctors tried for a test tube baby but did not succeed as the respondent did not have sufficient ovulation. Thereafter, the respondent was undergoing IUI (Intra Uterine Insemination). In spite of trying all the methods, it did not succeed.

18. **On 10th April 2000, the respondent asked the petitioner for some monies. The petitioner took out a bundle of notes from the cupboard and gave it to her. The respondent, on the pretext of prying open**

the stapler pins on the bundle of notes, picked up a knife from the kitchen and came back to the bedroom. The petitioner was surprised to note that instead of opening the said pins, the respondent stood staring at the petitioner in a strange way, brandishing the knife and said "Shall I kill myself?" the petitioner was afraid that she may actually stab herself, and he quietly went down the stairs and brought the watchman of the building up, in case he needed help. The watchman was shocked to see the respondent brandishing the knife and asked her to give the knife to him. The respondent looked at the watchman blankly for sometime and thereafter gave the knife to the watchman. Thereafter, the respondent has been threatening to do an "Anju llasayi" to the petitioner i.e., commit suicide and put the blame on the petitioner. The respondent also threatened the petitioner that if she could not live in his flat, she would set it on fire. The petitioner says that, the Respondent was quite capable of putting the said threat into practice. It was not possible for the petitioner to bear any more the cruelty, torture and mental trauma heaped upon him by the respondent. On 23-4-2000, the respondent left for Delhi. The petitioner by his Advocate's letter dated 24-4-2000 addressed to the Sr. Inspector, Sakinaka Police Station, to prevent the respondent from taking the law into her own hands. A copy of the said letter dt. 24-4-2000 is annexed hereto and marked Ex. "C".

19. Due to the said abnormal, violent and cruel behaviour of the respondent, the petitioner took the respondent to Dr. Jyoti Dass, a psychiatrist, who examined and a sitting of one hour, who prescribed some tablets and asked them to come back after a few days. The respondent refused to meet her again. The petitioner met Dr. Dass after a week, and informed her of Respondent's reluctance to meet her. Dr. Dass gave to the petitioner gave to the petitioner a Certificate dt. 14-4-2000 showing the treatment required by the Respondent. In spite thereof, the respondent refused to consult Dr. Dass or any other psychiarist.
20. The Petitioner says that, the respondent returned to Mumbai on flight in the evening of 25th April 2000, which was not normal as she could not get flights to Mumbai so soon. But she appears to have been arranged it specially. The respondent went to the petitioner's residence in his absence and finding the house closed, she went to the petitioner's office and tried to contact him from the gate of the factory. The petitioner was not at his office at that time, as he was in a meeting with a customer elsewhere. The respondent seeking the petitioner's car and the driver, sat in the car and refused to leave. The respondent could not contact the petitioner, she telephoned the petitioner's bosses and made false allegations against the petitioner. In spite of the request of the security officer of the company to leave, the respondent refused to do so, and kept on

harassing the petitioner's driver to telephone the petitioner at the residence. At the instance of the respondent, the driver telephoned the petitioner 3-4 times from the respondent's mobile telephone and left messages on the answering machine that he should come to the factory. Ultimately, the security staff of the petitioner's employers dropped the respondent near the petitioner's residence in the company's car. The petitioner returned home at about 11.30 p.m. and found several messages from his driver as well as respondent on his answering machine. However, next morning the respondent went back to Delhi.

21. On 27th April 2000, the Respondent again came to Mumbai on a flight and stayed at Centaur Hotel but kept on telephoning and threatening the Petitioner. Even when the petitioner is not at home, the messages left by her on the answering machine show that she even shouts and screams to the answering machine. The petitioner says that the respondent may commit suicide or harm herself and put the blame on him. In any event, it is not safe for the life, limb and sanity of the petitioner to continue to live with the Respondent.”

(emphasis added)

15 The respondent – wife filed written statement in which she denied the allegations made by the husband. Her contention is that she was suffering from thyroid gland disorder. Her case is that though she conceived in the year 1992, the appellant prevailed upon her to

undergo an abortion. She stated in paragraph 26 of the written statement which reads thus :-

“26. The Respondent further submits that she is suffering from Thyroid gland disorder but once when she is conceived in the year 1992 he prevailed upon her to abort the said pregnancy which created tension in her mind and she used to suppressed her emotional feeling which resulted into Harmonal imbalance. Infact doctor told Petitioner to keep the atmosphere of home happy which will help her to conceive in future.”

16 Apart from denying the allegations made in the Petition, the Respondent – wife contended that she hails from a family of freedom fighters which is a very cultured family. She stated that she maintained a very cordial and good relationship with the entire family of the appellant even till the date of filing written statement and in fact she stayed with the appellant's sister after the present Petition for divorce was filed.

17 The learned counsel appearing for the appellant has taken us through the pleadings and notes of evidence. He submitted that consistent conduct of the respondent as demonstrated by the evidence shows that her conduct caused enormous annoyance and mental cruelty to the appellant. He submitted that cruelty has to be judged after taking

into consideration the entire facts and circumstances of the case. He relied upon the observations made by the Apex Court in the case of *Ravi Kumar Vs. Julmidevi*¹. He invited our attention to the written statement of the respondent and in particular paragraph 26. He submitted that what is stated therein itself supports the ground of mental disorder agitated by the appellant.

18 He invited our attention to the incident of 10th April, 2000 of the respondent brandishing a knife and threatening to stab herself. He submitted that merely because watchman of the building was not examined, the incident of 10th April, 2000 cannot be disbelieved. He submitted that the fact that the appellant allowed the respondent to stay with him continuously till 24th April, 2000 cannot be held against him. He submitted that merely because a police complaint was not filed by him, the case of the appellant as regards the conduct of the appellant on 10th April, 2000 cannot be disbelieved. Referring to the greeting cards which are on record, he submitted that in fact the act of sending greeting cards will show that the appellant always greeted the respondent notwithstanding her conduct. The act of sending greeting cards or the act of allowing the respondent to stay with him cannot be held as a condonation of cruelty by the appellant.

1 (2010) 4 SCC 476.

19 The learned counsel appearing for the appellant invited our attention to the impugned judgment. He submitted that the learned Judge of the Family Court has not at all discussed the evidence adduced by the parties and the impugned judgment hardly contains any finding based on analysis and appreciation of oral and documentary evidence. He submitted that the Family Court under the Family Courts Act, 1994 is not bound by strict rules of evidence and therefore, when the transcript of the conversation produced by the appellant along with the cassette was on record, the learned Judge could not have discarded the same.

20 He relied upon various decisions of the Apex Court in support of his submission that the marriage between the parties has irretrievably broken down and therefore, no purpose would be served by continuing the marriage as the same would cause mental agony to both the parties. He relied upon the decision of the Apex Court in the case of *V. Bhagat Vs. D. Dhagat*².

21 In support of ground of cruelty, he relied upon the decisions of the Apex Court in the case of *A. Jayachandra Vs. Aneel Kaur*³, *Samar Ghosh Vs. Jaya Ghosh*⁴, *Manisha Tyagi Vs. Deepak Kumar*⁵,

2 (1994) 1 SCC 337

3 (2005) 2 SCC 22

4 (2007) 4 SCC 511

5 (2010) 4 SCC 339

*Vishwanath Agrawal Vs. Sarla Vishwanath Agrawal*⁶. His submission is that both grounds agitated by the appellant have been established and even otherwise, the appellant is entitled to a decree of dissolution of marriage.

22 The learned counsel appearing for the respondent submitted that on the basis of oral and documentary evidence on record, the learned Judge of the Family Court has recorded a finding regarding the condonation of alleged acts of cruelty by the appellant by his conduct. He urged that both grounds pleaded by the appellant are by way of an afterthought. He urged that there is nothing wrong with the ultimate conclusion drawn by the learned Judge of the Family Court when he held that no ground for grant of divorce is made out. He submitted that all the decisions of the Apex Court by which marriages were dissolved on the basis of irretrievable break down have been rendered under Article 142 of the Constitution of India. He, therefore, submitted that no interference is called for.

23 We have carefully considered the submissions. At the outset, there are submissions made by the learned counsel appearing for the appellant on the manner in which the findings have been recorded by the learned Judge of the Family Court. We are dealing with

6 (2012) 7 SCC 288

a statutory appeal which is available both on facts and law. Therefore, we are recording our own findings after considering the pleadings and after appreciating oral and documentary evidence on record. The learned Judge has not framed any issue though there is a specific pleading in the divorce Petition filed by the appellant – husband that the wife has been suffering intermittently from mental disorder of such kind and to such an extent that he cannot be reasonably expected to live with her. In the evidence of the husband, he has come out with the case that he had taken the respondent – wife to Dr. “J”, Psychiatrist. The appellant has alleged that on 10th April, 2000 while he was handing over certain currency notes to the respondent, she started brandishing a knife and threatened to kill herself. The case of the respondent is that as he apprehended that she may actually stab herself, he went down stairs and brought a watchman for help. His case is that the respondent looked at the watchman blankly for sometime and thereafter gave the knife to the watchman. In the cross-examination, the husband stated that after the said incident also he had taken his wife to Dr.“J”. Surprisingly, the husband has not examined Dr. “J”. There is a certificate dated 19th April, 2000 purportedly issued by Dr. “J” which is not admitted in evidence. Nevertheless, we have perused the said certificate which records that Dr. “J” had seen the respondent - wife on 14th April, 2000 who was accompanied by her husband. Dr. “J” stated that she

complained of decreased sleep, crying spells and angry outbursts, as well as sadness of mood. She has merely recorded that she required psychiatric assessment and observation. Dr. "J" was perhaps the best witness to depose in support of the plea of the appellant– husband that the respondent – wife was intermittently suffering from mental disorder. However, the appellant – husband has made no efforts to examine the said witness. Hence, the said ground for divorce under clause (e) of sub-Section (1) of Section 27 of the Act has not been proved.

24 Perusal of the averments made in the Petition and examination-in-chief of the appellant – husband shows that according to his case, after the solemnization of marriage on 6th July, 1994, he continued to stay in Mumbai and the respondent – wife continued to stay at Delhi. For few days in a month, she used to come down to Mumbai and stay with the appellant. The appellant – husband has alleged that virtually from the next day of the marriage, the behaviour of the respondent was objectionable. It has come on record that the appellant and the respondent had consulted Doctors as the respondent was not conceiving. In paragraphs 34 and 35 of his cross-examination, the appellant has stated thus :-

“34. True to say that after April 1999 both of us were consulting doctor's for the problem of respondent not conceiving. It is true that it was our joint

decision to have a child. It is true that Dr. Rama Vaidya was one of the doctor's to whom we had consulted for this problems. I have visited Dr. Rupin Shah. I might have visited Dr. Rupin Shah in the year July 99, as per the advise of Dr. Meena Shringi.

- 35. I do not remember of having gone to Dr Rupin Shah. The respondent has visited me last in May 2000. It is true that in the year 1999 to 2000 we were visiting to doctor.”**

(emphasis added)

25 Thus, these statements show that at least till May, 2000, the appellant and the respondent were planning to have a child. This is one circumstance which will have to be borne in mind while dealing with the issue of cruelty.

26 As pointed out earlier, according to the case of the appellant, there was a major incident of 10th April, 2000 when the respondent – wife threatened to stab herself by using a knife. The appellant has admitted in paragraph 39 of his evidence that from 10th April, 2000 till 24th April, 2000, the respondent – wife was continuously staying with him. Moreover, the appellant did not file any police complaint of the incident of 10th April, 2000. The appellant through his Advocate filed a police complaint on 24th April, 2000 (Exhibit – 39). The said police complaint refers to the incident of 10th April, 2000. The act of filing the complaint may not be sufficient to come to the conclusion that incident of 10th April, 2000 has been proved. The

appellant has not chosen to examine the watchman who was allegedly called by him. Evidence of the watchman could have been an important piece of evidence. However, the appellant did not examine the watchman, in fact in paragraph 47 of the cross-examination, the appellant accepted that he was not examining the watchman to prove the incident of 10th April, 2000. Hence, an adverse inference ought to be drawn against the appellant for not examining the watchman.

27 The appellant has relied upon an incident of 25th April, 2000 when, the respondent visited the factory where the appellant was working. She did not leave though the Security Officer told her to leave. Moreover, it is alleged that the respondent telephoned appellant's superior officers and made allegations against the appellant. However, the appellant has not examined Security Officer of his company and his superior officers to prove the incident. Moreover, the appellant did not examine his children. The appellant has relied upon recorded conversation with the respondent. But, the appellant has not proved that the voice of female in the recording was that of the respondent. In this case there is a word against word as both the parties have not examined any other witness.

28 There are large number of greeting cards which are placed on record which were sent by the appellant to the respondent in the

year 1999. On 8th October, 1999, the appellant had sent two greeting cards to the respondent wishing her on her birthday. As stated earlier, the present Petition was filed by the appellant on 2nd May, 2000. There is a greeting card of 8th October, 2000 at Exhibit - 78 sent by the appellant to the respondent. The greeting card at Exhibit – 78 has been produced by the wife along with list of documents at Exhibit – 17. There is an endorsement that the said greeting card has been admitted by the appellant and therefore, the same has been marked as Exhibit.

29 The aforesaid discussion shows that even assuming that there were acts of cruelty on the part of the respondent, the said acts of cruelty were consistently condoned by the appellant as can be seen from his conduct reflected from evidence. He has accepted that in the years 1999 and 2000, they were visiting Doctors for consulting them as the respondent was not conceiving. In fact, the respondent was admittedly consulting Dr. Rupin Shah as disclosed from paragraph 35 of the cross-examination of the appellant. Moreover, on 8th October, 1999 the appellant has sent two greeting cards to the respondent which showed that everything was normal. What is pertinent to note is that even on 8th October, 2000 during the pendency of the Petition, the appellant forwarded a greeting card to the respondent. The greeting cards issued from the year 1996 onwards are on record which show

normal relationship between the appellant and the respondent. Moreover, the respondent continued to stay with the appellant till 24th April, 2000. Therefore, apart from the fact that the appellant has not adduced evidence of crucial witnesses, the aforesaid conduct of the appellant creates a serious doubt about the correctness of the allegations of cruelty. In any event, the said conduct amounts to condonation by the appellant of the alleged acts of cruelty on the part of the respondent.

30 It is true that the marriage between the parties seems to have irretrievably broken down. However, in view clause (a) of sub-Section (1) of Section 34 of the said Act, unless one of the grounds for dissolution of marriage set out in Section 27 is established, the Court is powerless to pass a decree of divorce. All the decisions of the Apex Court relied upon by the appellant wherein marriage was dissolved on the basis of irretrievable breakdown have been rendered by exercising the power under Article 142 of the Constitution of India. Therefore, we are unable to pass a decree of divorce on the said ground.

31 We are, therefore, of the considered view that both grounds of divorce pleaded by the appellant have not been established. Though the impugned judgment may not be satisfactory, the ultimate conclusion drawn by the learned Judge of the Family Court is correct.

32 Hence, we pass the following order :-

ORDER

- (i) The Appeal is dismissed with no order as to costs.

(SMT. ANUJA PRABHUDESSAI, J)

(A.S. OKA, J)