

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

**FAMILY COURT APPEAL NO. 07 OF 2019
WITH
CIVIL APPLICATION NO. 1630 OF 2019**

Sau. Sheetal w/o. Shrikant Shelke,
Age. 27 years, Occ. Nil,
R/o. Prasad Colony, Osmanabad,
At present R/o. Karmaveer Jagdale Mama
Housing Society, Near Principle Phadtare's
House, Barshi, Taluka Barshi,
Osmanabad.

.. Appellant
[original
respondent]

VERSUS

Shrikant s/o. Vitthal Shelke
Age. 31 years, Occ. Business,
R/o. Prasad Colony, Osmanabad,
Taluka and District Osmanabad.

.. Respondent
[original
applicant]

Mr. V.D. Salunke, Advocate for appellant.
Mr. Vivek Deshmukh, Advocate for sole respondent.

**CORAM : SUNIL P. DESHMUKH &
S.M.GAVHANE,JJ.**

DATED : 09-10-2019

ORAL JUDGMENT : [PER : SUNIL P. DESHMUKH,J.] :-

1. This appeal is preferred by wife against a decree of divorce passed dated 24-09-2018 in HMP bearing No. A-23 of 2018. Petition proceeds on the footing that after marriage for a few days, the marital relations went along well. Subsequently, however, it turned out that the wife is of evasive nature and had

been aggressive and used to intimidate and threaten husband and his relations. Wife had been cantankerous and had been torturing husband and his relations physically and mentally. She had moved out while her brother had been to matrimonial house and went along with brother without intimation to him. Efforts of husband and relations to bring her back had turned out to be futile. On the other hand, wife used to threaten with criminal prosecution. A daughter was born from wed-lock. While parents of her husband went to see grand-daughter, they were not treated well and had to return without seeing the grand-daughter. After a few days, she had been to matrimonial house and while husband tried to touch the child, wife had aggressively declined the attempt and had threatened of suicide. She had called her brother and went back along with him to her parents. The matter went to women grievance cell, where it had been settled and wife had come back to matrimonial house. However, on the very next day, she quarreled and threatened of suicide and had closed door and had asked the husband, if husband is not prepared to stay separately at Osmanabad, then he should come to her mother's place at Barshi. Under all these circumstances, it had become difficult for the husband to carry on with the relationship. He had given a notice to wife. However, the notice had been responded to with a misleading reply.

2. Appellant-wife in her written statement to the petition filed at Exhibit 14 had denied averments and allegations made by husband against her. She in her written statement had claimed the averments to be fallacious, imaginary and false. In her additional written statement, she had referred to

various circumstances including the expenses incurred in the marriage and the amounts claimed to have been given and from where the expenses had been met with has also been stated. Referring to that the amounts had been expended, *inter alia*, from gratuity, EPF amounts of her father. While extent of dowry could not be met with, she was not properly treated, as in-laws were disappointed. Certain further amounts to the tune of Rs. 13 lakh, had also been demanded. Since her family had not been in a position to meet with the demands, she was being ill-treated. She was not being offered proper food. She was not even given medicines while she was not well. She was being beaten cruelly. Her in-laws were not treating her well claiming themselves to be influential persons. Time and again, she was insulted. The matter was sought to be sorted out through mediation. Many other things she had referred to in the written statement.

3. It appears that initially the matter for divorce had been lodged by husband before the court of civil judge, senior division, Osmanabad, as family court then had not been available. Subsequently, on formation of family court, the matter came to be transferred to family court at Osmanabad and started bearing the number referred to above. While the matter had been pending before civil court, two issues to the effect – as to whether present respondent – husband proves that original respondent – present appellant wife has treated him with cruelty ? and as to whether the petitioner husband is entitled to seek divorce against original respondent – wife ? In the proceedings, affidavits by

husband and his maternal uncle had been filed along with certain documents at Exhibits 31, 32 and 34. After hearing advocate for husband, the court had given affirmative findings on the issues framed. It has been observed by the court that cruelty postulates apprehension in the mind of a person that it would be harmful and injurious to him and cruelty shall be of such character as to cause injury to mind, limb, health and it must be more serious than ordinary wear and tear of marriage. The cruelty should be of such nature that a person of ordinary prudence would not tolerate the behaviour of spouse.

4. The court appears to have considered that original respondent - wife had not submitted any evidence in support of her claim, yet it is responsibility of the petitioner - husband to prove issues cast.

5. The court went on to observe that while affidavits in evidence have been filed by husband and his maternal uncle at Exhibit 30 and 36 and while they were present for cross-examination, they were not cross-examined. As such, considering that the evidence on behalf of petitioner having not been controverted and went unchallenged, it appears to have been considered sufficient for grant of decree of divorce referring to observations of supreme court in Civil Appeal No. 3252 of 2008, *Narendra Vs. K. Meena*, wherein it appears in the facts and circumstances, it has been observed that it is a pious obligation of a son to maintain parents. Persistent efforts by wife to force appellant to separated from parents would be torturous, while son would not like

to live separate from parents. Referring to *Geeta Pandey Vs Shekhar Pandey*, MAT APP (FC) No.15/2015, wherein it appears to have observed that wife must have created so much fear in mind of husband and his family that husband was compelled to report the matter to various authorities including police and NCW. The court can take judicial notice of the fact that if the wife dies in unnatural death within seven years of her marriage, presumption of dowry death would crop up. Family court has decided the matter on 24-09-2018. It is with reference to same it appears that decree has been passed.

6. Learned counsel Mr. V.D. Salunke appearing for appellant vehemently submits that at the outset after transfer of proceedings initiated by husband, wife had not been served with the notice of transfer of matter. A junior counsel appearing along with the advocate engaged by wife had been induced to put in purported appearance in the matter after transfer without realizing its implications and in such circumstances the matter had been proceeded with without appreciating the factual scenario. He, apart from aforesaid, submits that even on merits of the case, consideration by the family court, is cursory, while decree of divorce is sought on the ground of cruelty. He submits that perusal of judgment by family court would reveal that learned judge had been oblivious of the defence in written statement and purported to consider that appellant-wife could not justify her defence.

7. He submits that while learned judge had observed that

responsibility of proving the issues is on husband, yet in the matters of cruelty, the words without corroboration would be hazardous for determination of issue of cruelty. Strong evidence would be required. He submits that it would transpire, beyond the affidavits, there is no evidence brought forth, corroborating the statements in the affidavits. He submits that evidence by husband and his maternal uncle is of little consequences in the face of nature of allegations made in the petition. Maternal uncle obviously was as interested witness and his evidence would also show that he has spoken about instances to which he would hardly be privy. It ought to have dissuaded the court from granting the decree of divorce.

8. He submits that though observations of the supreme court have been referred to by the court, yet its purport, spirit and substance appears not to have been properly appreciated. He submits that while wife has been alleged of threatening of committing suicide, it is not the case that such threatening had been made known elsewhere and as in the observations of the judgment of the court, it is not the case of husband that such a threatening had been reported to any concerned authority. He submits that the persons who were likely to be harmed by insistence of wife about staying separate have not led any evidence and it is third person, who is being relied on, while direct evidence could have been possible, same has been kept away. He, therefore, submits that decree of divorce in such a case with thin evidence, ought not to have been awarded by the court and the petition ought to have been dismissed.

9. Learned counsel for respondent has other perspective of the matter. He contends that it would not at all be a case where it can be said that after transfer of matter to family court wife had never been served. He refers to bailiff report and submits that wife had been duly served and in response to same, appearance on behalf of wife had also been put in. In such a case, no credence be given to the contentions on behalf of wife that she has not been served after transfer of matter. He submits that in the facts and circumstances while despite appearance being caused, matter not being prosecuted, the court has decided the matter with reference to evidence and material available on record. He submits that it is not the case that there is no evidence given by petitioner in support of his petition. The evidence went uncontroverted. While the witnesses were available for cross-examination, they were not cross-examined and it was by choice wife had not appeared despite service. In such case decree of divorce granted by family court would not be liable to be faulted with.

10. After hearing learned counsel for parties and going through the judgment and the pleadings, it emerges that wife had denied all the allegations against her. While matter was transferred in 2018, thereafter matter went on for quite a while. On quite a few dates, the matter got adjourned because of the absence on behalf of husband. While it appears that after affidavit of examination-in-chief of husband was filed, on 28.08.2018 affidavit of maternal

uncle was filed and on very day, evidence close pursis has been filed. The matter was kept for evidence of wife. On 10-09-2018 certain documents were filed on behalf of husband and on 24-09-2018 the matter has been decided. Apart from aforesaid, what is germane to be considered is while allegations of cruelty had been made against wife, the matter will have to be looked into as observed by the court as has been referred to by learned judge from the quotations of the orders of the court. It has been observed in said quotations that cruelty should be of such nature as would be harmful or injurious for a party's to live with spouse. Said observations also go on to refer to that allegations of cruelty *per se* cannot be a ground for relief of divorce. The cruelty should be of such character as to cause danger to life, limb or health or to give rise to a reasonable apprehension of such danger. It must be more serious than ordinary wear and tear of marriage and that a person of ordinary prudence or reasonable person would not tolerate the behaviour of spouse. The quotation from MAT APP (FC) No.15/2015 *Geeta Pandey Vs. Shekhar Pandey* refers to that the wife had actually been holding bottle of acid for consumption creating fear in the mind of husband and his family and the husband was compelled to report the same to police and NCW. The observations from Civil Appeal No. 3252 of 2008, *Narendra Vs. K. Meena* were referred to. However, there is nothing said as to how those observations would be able to hold the present case and mere assertion in the affidavit would suffice. It appears that learned judge has gone by the matter rather little too hurriedly and while the wife-appellant seeks an opportunity to address the matter properly, we deem it appropriate in the

interest of justice to remit the matter by setting aside impugned judgment and decree.

11. In view of aforesaid, in order to let the parties have proper opportunity before family court, impugned judgment and decree is set aside restoring the matter with the family court for adequate opportunity to parties to lead evidence and to address the court after the stage of framing of issues. The family court appeal is accordingly allowed.

12. In view of disposal of family court appeal, civil application No. 1630 of 2019 stands disposed of.

[S.M.GAVHANE,J.]

[SUNIL P.DESHMUKH,J.]