

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

FAMILY COURT APPEAL NO. 358 OF 2014

Nitin s/o Narayanrao Bobade
aged about 43 years, Occ. - Nil,
R/o. Shubham Adarsha Colony,
Akola, Tah. & Dist. Akola

.... APPELLANT

VERSUS

Pushpa Nitin Bobade
Aged Major, Occ. Household,
R/o. C/o Narayan Bhonkhade,
Vilas Colony, Kathora Naka,
VM.V. Road, Amravati

...RESPONDENT

Shri R.K. Thakkar, Advocate for the appellant.
Shri A.B. Mirza, Advocate for the respondent.

**CORAM : A.S. CHANDURKAR AND
PUSHPA V. GANEDIWALA, JJ.**

DATE WHEN ARGUMENTS WERE HEARD : FEBRUARY 15, 2021.

DATE OF PRONOUNCEMENT : FEBRUARY 22, 2021.

JUDGMENT (Per Pushpa V. Ganediwala, J.) :

This is the husband's appeal under Section 19 of the Family Courts' Act, 1984 against the judgment and decree dated 05/07/2011 in petition No. A-167/2009 passed by the

Judge, Family Court, Akola whereby his petition for divorce came to be dismissed.

2. The facts necessary to decide the present appeal are as under :

i) The marriage between the parties was solemnized on 18/12/2000 at Amravati. Out of this wedlock, they have one son by name Lalit alias Rishikesh, born on 25/12/2001. The appellant/husband had a joint family consisting of a mother and a married brother.

ii) It is the case of the appellant/husband that when the respondent/wife came back after delivery on 09/04/2002 from her parental home, he noticed her strange behavior just like a mentally sick person. She would keep murmuring to herself. She would throw utensils. She would not sleep in the night and walk in the house. She would accuse the appellant / husband of having illicit relationship with her sister. The appellant/husband informed about her behavior to her parents, and accordingly her father came on 13/04/2002, and took her

back to Amravati, and since then, the respondent/wife is residing with her parents.

iii) The appellant/husband further states that he went to Amravati on 15/04/2002 to meet the respondent/wife and their minor son, but the respondent/wife and her parents quarreled with him, and she refused to cohabit with him. He states two incidents; one is of 30/06/2003 when the respondent /wife visited the office of his brother, and abused him in his absence, and second is of 20/03/2007 when the respondent/wife forcibly entered his house in his absence thereby assaulted and abused his mother. Reports were lodged accordingly. It is further the case of the appellant/husband that he made numerous efforts to fetch the respondent/wife, but all efforts are gone in vain. Lastly, he states that the conduct and behavior of the respondent/wife was only to harass him. Under the circumstances, he prayed for dissolution of his marriage.

iv) The respondent/wife, in her written statement at Exh. 12, denied all the adverse allegations with regard to

harassment. However, she admitted that after delivery, she went back to her matrimonial house on 09/04/2002. She states that the appellant/husband did not allow her to live peacefully. He used to pick up quarrels at the instigation of his mother. He used to abuse and beat her on the issue of dowry. Once the appellant/husband called her father, and quarreled with him, and also demanded divorce. She also states one incident of demand of Rs.2,00,000/- (Rs. Two lakhs) on the pretext that her father received a handsome amount in lieu of retiral benefits. Lastly, she states that their friends and relatives tried to settle their dispute, however, the appellant/husband was adamant and wanted divorce. Under these circumstances she prayed for dismissal of the petition.

v) The learned trial Court framed necessary issues and recorded evidence as adduced by the parties. The attempts were also made to reconcile their dispute through mediation process as well as through marriage counselor, but in vain. The appellant/husband examined himself at Exh. 37, while the respondent/wife examined herself at Exh. 52. The learned trial Court, after hearing both the parties and on the basis of

evidence on record, came to the conclusion that the appellant/husband has failed to prove the case of divorce. This judgment of the learned trial Court is impugned in this appeal.

3. We have heard Shri Thakkar, learned counsel for the appellant and Shri Mirza, learned counsel for the respondent. We have also perused the record with the assistance of both the learned counsel.

4. The following point arose for determination of this Court:

Is the appellant/husband entitled for decree of divorce on the ground of cruelty or any other ground?

5. At the outset, a perusal of the pleadings and the evidence in support of the pleadings would reflect that there isn't a single incident of discord or differences between the couple since their marriage till she came back to her matrimonial home after delivery on 09/04/2002. The date of their marriage is 18/12/2000 and evidently, she left for

delivery in November 2001. This shows that for around one year, the couple lived peacefully, and there was no instance of disharmony between the parties.

6. We have carefully perused the evidence led by the parties. Undisputedly, the mental cruelty, as alleged by the appellant/husband, was spread mainly over the period of four days i.e. 09/04/2002 to 13/04/2002. During this period, he states that her behavior was strange like a mentally sick person. She would murmur to herself. She would throw utensils. She would not sleep in the night. Apart from the bare oral testimony of the appellant/husband with regard to this behavior of respondent/wife, there is absolutely no other supporting material. He does not state that she was taken to the hospital for her mental problem. On the contrary, in his cross-examination, he has admitted that during this period, she was unwell and, therefore, she was sent to her parental home with her father, and after she was feeling well, she kept calling him to come and fetch her.

7. More so, a perusal of the aforesaid instances during the short period of four days, at once, are nothing but the bald, omnibus and vague instances without further details. Furthermore, a perusal of the legal notice dated 12/07/2006, (Exh. 45) allegedly sent by him just prior to filing of the present petition for divorce, also does not reflect any such allegations with regard to the strange behavior of the respondent/wife.

8. Apart from this, the alleged strange behavior was in the month of April, 2002, and the divorce petition was filed in December, 2007. This unnecessary and improper delay of around five years has not been explained by the appellant/husband. As per Section 23(1)(d) of the Hindu Marriage Act, 1955, the Court shall decree such relief in the Act, if the Court is satisfied that there has not been any unnecessary or improper delay in instituting the proceedings. In the interregnum period, the appellant/husband could not prove that he made attempts to fetch the respondent/wife for cohabitation. The suggestions which were put to the respondent/wife in her cross examination about the husband's

coming to her parental home to fetch her, she flatly refused and volunteered that he never came to take her back. It is the stand of the respondent/wife since beginning that she is willing to cohabit with the appellant/husband if he undertakes to treat her properly. This fact gets further support from the fact that she filed a petition for restitution of conjugal rights in the Court at Akola which later on came to be dismissed for want of prosecution. Evidently, in the said petition, the appellant /husband made his appearance and also filed his written statement.

9. As against this, the evidence on record does not support the case of the appellant/husband that he ever tried for restitution of conjugal rights. With regard to other instances of cruelty as alleged by the appellant/husband, i.e., incident in the office of brother of the appellant/husband and the incident of respondent/wife forcibly entered the house and gave beating and threats to his mother, the appellant/husband neither examined his brother nor his mother nor brought on record the police complaints allegedly lodged of the said incidents.

10. With regard to filing of matrimonial litigations i.e. petition for maintenance and a petition for returning of Stridhan under Sections 405 and 406 of the Indian Penal Code, obviously are not filed to harass the appellant/husband. The respondent/wife is claiming her rights as available to her in law, and the appellant/husband could not point out any finding of any of the Courts in the aforesaid proceedings that the same have been false and frivolous at the instance of the respondent/wife.

11. The allegation with regard to the doubt about illicit relations of the appellant/husband with her sister, though appears to be serious and wild in nature, however, considering the quality of the other material with regard to cruelty as alleged by the appellant/husband, we have a doubt about the truthfulness of this allegation. It is very difficult to comprehend as to how immediately after returning to her matrimonial house after her delivery, in four days, the respondent/wife was skeptical about the alleged relationship.

12. With regard to ground of desertion under Section 13(1)(ib) and mental disorder under Section 13(1)(iii) of the Hindu Marriage Act, 1955, though the learned trial Court considered these grounds and recorded negative findings, we do not find any specific pleadings and prayer with regard to these grounds in the petition of the appellant/husband. A perusal of the evidence in the context of these grounds, yet the appellant/husband could not prove the *animus deserendi*, i.e., intention to stay separately without any reason, on the part of the respondent/wife and mental disorder as contemplated in law as a ground for decree of divorce. Evidently, since beginning, she was inclined to resume cohabitation. There were attempts on her part. On the contrary, the appellant/husband has failed to prove even on the basis of preponderance of probability any endeavor on his part to resume cohabitation. Considering the conduct of the appellant/husband, a bare legal notice, in the instance case, without any bona-fide intention and actual attempts to resume cohabitation, would not be of any help to the appellant/husband to prove that he tried to resume cohabitation.

13. Learned counsel could not point out this Court as to how the appellant/husband suffered the mental cruelty as contemplated in law at the hands of the respondent/wife on the basis of evidence on record. The learned counsel laid much emphasis on the point that it is not the case of four days cruelty, the respondent/wife, by her act, was harassing the appellant/husband persistently even while residing separately. In order to buttress his argument that the cruelty the spouse can cause even by residing separately, the learned counsel for the appellant relied on the judgment of the Hon'ble Apex Court in the case of K. Srinivas Rao Vs. D.A. Deepa reported in (2013) 5 SCC 226 wherein in paragraph No. 19, it has been held that *"staying together under the same roof is not a pre-condition for mental cruelty. Spouse can caused mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can caused mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouse's life measurable. This is what has happened in this case."*

14. There can hardly be any dispute with the aforesaid proposition of law. However, in the case in hand, the appellant/husband could not prove as to how the respondent/wife, while residing separately, caused him mental cruelty. He cited two incidents, i.e., one in the office of his brother in his absence and the second one is forcible entry in his house and beating and threats to his mother. However, as discussed above, he could not prove these two instances, as he neither examined his brother or any person from his office nor his mother. Furthermore, filing of matrimonial litigations in the nature of claiming maintenance, return of Stridhan and restitution of Conjugal Rights, as discussed above, cannot be stated to have been filed in order to harass the appellant/husband. Admittedly, respondent/wife has not filed any complaint under Section 498A of the Indian Penal Code nor claimed other remedies under the Domestic Violence Act. Instead of living a life of destitute, the law conferred her a valuable right to claim maintenance and an obligation on the husband to maintain his wife if she is unable to maintain herself.

15. Learned Family Court considered the law laid down by the Hon'ble Apex Court in the cases of **Praveen Mehta Vs. Indrajeet Mehta** reported in AIR 2002 SC 2582 and **Savitri Pandey Vs. Prem Chandra Pandey**, reported in AIR 2002 SC 591 and concluded that the appellant/husband has failed to make out a case of mental cruelty by establishing that the conduct on the part of the respondent/wife was so negative and oppressive and of such a magnitude that it was impossible for him to reside with her and had caused a fear in his mind for his well being.

16. The Hon'ble Apex Court in the case of **Vinita Saxena Vs. Pankaj Pandit** reported in 2006 (3) SCC 778 has held that each case depends on its own facts and must be judged on these facts and the concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters.

17. In the case of Mayadevi Vs. Jagdishprasad reported in 2007 (3) SCC 136 the Hon'ble Apex Court relying on the decision of Shobharani Vs. Madhukar Reddy reported in 1988 (1) SCC 105 has held that to constitute cruelty, the conduct complaint should be grave and weighty so as to come to the conclusion that petitioner's spouse cannot be reasonably expected to live with the other spouse and such conduct must be something more serious than "ordinary wear and tear of married life".

18. In the instant case, the husband failed to prove the persistent act of mental cruelty on the part of the wife to make the life of the appellant/husband miserable and to create anguish and hatred in his mind. For the decree of divorce on the ground of cruelty, the cruelty shall be of enduring, continuous and profound in nature, that the other spouse feels that the conduct is so negative and oppressive and of such a magnitude that it is impossible for him or her to reside with her or him.

19. It is worthwhile to mention here that, during the pendency of this appeal, the appellant/husband filed a Civil

Application No. 400/2020 under Order 41 Rule 27 of the Code of Civil Procedure for production of additional evidence wherein it is stated that in order to prove mental sickness and misbehavior on the part of respondent/wife and wild allegation regarding relation with her sister, appellant/husband wants to place on record a C.D. of the incident which had occurred during the pendency of the present appeal.

20. In support of his contention the learned counsel relied on the judgment of the Hon'ble Apex Court in the case of Union of India Vs. Ibrahim Uddin and another reported in (2012) 8 SCC 148 wherein in paragraph No. 36 of this judgment it is held that "*generally the appellate court could not travel outside the record of the lower court and cannot take any evidence in the appeal. However, as an exception, Order 41 Rule 27 of the Code of Civil Procedure enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not*

apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.”

21. In the instant case, the appellant/husband wants to bring on record a C.D. of the conversation to show that the respondent/wife had been to his house and abused his mother and brother. The said conversation, he states, was recorded on mobile phone. However, there are no details given when the conversation was recorded. Generally, the subsequent events occurred during the pendency of the appeal, if having material bearing on the decision of the appeal, the Appellate Court does take the same into consideration. In this case, as discussed above, we have already concluded with regard to insufficient evidence to make out a case of cruelty or desertion. We would have certainly allowed the additional evidence if the same would have been in the considered opinion of this Court essential for adjudication of the dispute in hand. Unfortunately,

the incident of bad behavior of the respondent/wife allegedly recorded in the mobile phone with mother and brother of the appellant/husband, in view of this Court, would not be a determinative factor and, therefore, the prayer of the appellant/husband to lead additional evidence, cannot be accepted. Hence, discretion under provisions of Order 41 Rule 27(1)(b) of the Code is not exercised.

22. In this context, the Hon'ble Apex Court in the case of **Ramesh Kumar Vs. Kesho Ram** reported in 1992 (Supl. (2) SCC 623) observed that wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief. This judgment is further relied with approval in the case of **Pratap Rai Tanwani and anr. Vs. Uttam Chand and anr.** reported in (2004) 8 SCC 490.

23. In the circumstances, a well reasoned judgment of the trial Court which was passed after considering the entire evidence on record, we do not think any interference is called for. The appellant/husband has failed to make out a case of mental cruelty or any other ground for a decree of divorce. In the circumstances appeal is bereft of any merits and deserves to be dismissed and the same is accordingly dismissed with costs. All the pending civil applications stand disposed of.

JUDGE

JUDGE

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