

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

AND

THE HON'BLE SRI JUSTICE NAGESH BHEEMAPAKA

**FAMILY COURT APPEAL Nos.142 and 145 of 2009 and FCA NO.29
of 2010**

COMMON JUDGMENT: (Per Hon'ble NBK,J)

1. All these appeals are preferred by the appellant/husband against the respondent/wife aggrieved by the Common Order in O.P.Nos.924, 662 of 2006 and 955 of 2007 passed by the Judge, Family Court, Hyderabad on 16.05.2009.

2. F.C.A.No.145 of 2009 is filed against the orders in F.C.O.P.No.924 of 2006, wherein the trial Court dismissed the petition filed by the appellant seeking a decree of divorce against the respondent.

3. F.C.A.No.29 of 2010 is filed against the orders in F.C.O.P.No.662 of 2006, wherein the trial Court dismissed the petition filed by the appellant seeking a permanent injunction under Section 26 Order 7 of Rule 1 CPC against the respondent.

4. F.C.A.No.142 of 2009 is filed against the orders in F.C.O.P.No.955 of 2007, wherein the trial Court allowed the petition for restitution of conjugal rights filed by the respondent/wife against the appellant/husband.

5. Since the issues involved in all these appeals revolve around the appellant/husband and respondent/wife and the points involved are analogous to each other they are being disposed of by way of this Common Judgment.

6. The dispute between the petitioner and respondent relates to marital obligations. The evidence was also recorded in FCOP No.924 of 2006. For the sake of convenience, the facts and the parties hereinafter will be referred to as arrayed in F.C.O.P.No.924 of 2006 before the trial Court.

7. Briefly, it is the case of the petitioner/husband that the engagement ceremony between himself and the respondent/wife was performed on 05.09.2005 and marriage was performed on 07.12.2005 as per the Hindu

rites and customs, which is an arranged one, settled by a common priest Niturker Eknath Maharaj, who was known to be an expert in preparing horoscopes and also arranged marriages. As per the customs prevailing in their community i.e., Maharashtra Brahmin community, no dowry was given by the respondent to the petitioner. After the marriage, the respondent joined her matrimonial house at Begumpet, Hyderabad with the petitioner on the evening of 07.12.2005. It is alleged that the respondent had begun to harass the petitioner stating that her elder sister went to Switzerland for honeymoon, as such, until and unless she is taken to Switzerland for honeymoon, she would not offer herself to the petitioner. Though the petitioner expressed his inability to take her to Switzerland, she did not heed him, as such, he applied for passport in the month of March, 2006.

8. The petitioner has two sisters, whose marriages were already performed prior to the marriage of the petitioner. The mother of the petitioner was aged 65 years, suffering

from Osteoarthritis and his father was aged 71 years and a retired Public Prosecutor. It is also alleged that the respondent had demanded the petitioner to give the open land consisting of 1111 sq.yds for development to her brothers, who are Architects and Engineers. When the demands of the respondents were refused by the petitioner, she started refusing the conjugal relationship with the petitioner. On 26.02.2006, on the eve of Mahashivarathri, the petitioner and respondent along with their family members went to Temple and after returning home, as they are all fasting, the petitioner asked the respondent to prepare fruit juice for all of them. Due to which respondent went inside bedroom and began tearing her clothes, crying and abusing the petitioner and his parents in filthy language. She called her brothers at 9.00. She left her matrimonial home at 9.30 PM stating that unless she was taken to Switzerland and the land was given to her brothers, she will not allow the petitioner and his family members to live peacefully. On 27.03.2006, the

respondent along with her brothers and the mediator Eknath Maharaj came to the house of the petitioner and threatened that if her demands are not fulfilled, she will file a case against the petitioner and his family members under Section 498-A of IPC. On 24.04.2006, the respondent along with family members came to the house of the petitioner and tendered an apology for the mistakes she committed and asked the petitioner to fulfill her demands. The respondent stayed with the petitioner for a period of 2 ½ months. Being a Doctor, he observed that she was in furious mood, sometimes happy and sometimes totally depressed and her behaviour is unnatural. Vexed with the attitude of the respondent, the petitioner informed the respondent that he will not fulfill her demands and wanted to take a divorce from her. On 25.08.2006 at about 10.00 p.m, the respondent came to the house of the petitioner along with Panjagutta police and took the petitioner and his family members to the police station, Panjagutta. The police made them to sit there, an entry in General Diary

was made, they humiliated the petitioner and his parents and threatened that if the property is not transferred in the name of the brothers of the respondent, they will be booked in several cases. After the intervention of the elders of the petitioner, they were released from the police station. Again on 01.09.2006, the respondent along with her henchmen came to the petitioner's house and threatened him with dire consequences, if the property is not transferred in the name of the brothers of the respondent. On 02.09.2006, a legal notice was issued to the petitioner and the same was replied to by him.

9. The respondent filed counter denying all the averments in the affidavit filed in support of the petition stating that at the time of marriage 15 tulas of gold and other silver articles were given to the petitioner and all the marriage expenses worth Rs.5.00 lakhs were borne by her parents. The petitioner demanded Rs.5.00 lakhs for establishing a clinic at Secunderabad. On the next day of the marriage, an electrical shock circuit took place in the

house of the petitioner, due to which, some sarees of the mother of the petitioner were burnt. The parents of the petitioner and his family members felt inauspicious about the incident and made the respondent responsible and started harassing her. In the last week of April, 2006, the petitioner and his parents necked her out of the house and asked her to return only with Rs.5.00 lakhs as dowry. When the respondent joined the petitioner, in the month of July, 2006, her signatures were forcibly obtained on five or six blank bond papers and again necked her out of the house by the petitioner on 25.08.2006 demanding to bring Rs.5.00 lakhs as dowry. For the said reason, the respondent and her brothers went to Panjagutta Police Station and gave a report. On such complaint, the petitioner and his family members assured that they will look after the respondent and allow her to stay with them, however, on 27.08.2006, the respondent was again sent her out of their house by retaining her jewellery about 25 tulas including costly sarees. Even though the respondent

gave notice on 01.09.2006 to take her back, the petitioner failed to take her, as such, a petition was filed seeking restitution of conjugal rights in O.P.No.955 of 2007. The respondent was always ready and willing to join the company of the petitioner and lead marital life.

10. P.Ws.1 and 2 were examined on behalf of the petitioner and got marked Exs.P1 to 12. The respondent herself was examined as D.W.1 and got marked Exs.R1 to R8.

11. Based on the oral and documentary evidence adduced on behalf of the parties, the trial Court dismissed O.P.Nos.924 of 2006 filed for a decree of divorce and O.P.No.662 of 2006 filed for a permanent injunction against the respondent. However, allowed O.P.No.955 of 2007 filed by the respondent for restitution of conjugal rights.

12. The trial Court dismissed the O.P.No.924 of 2006 filed for divorce on the following grounds:

i) That as per Section 13(1)(1A) of the Hindu Marriage Act, necessarily there should be either decree for judicial separation or a decree for restitution of conjugal rights between the spouses before filing the petition for dissolution of their marriage by a decree of divorce. Since there are no such decrees passed between the parties, the petition for a decree of divorce itself vitiates the case of the petitioner.

ii) The petitioner failed to prove the cruelty meted out to him by the respondent and that mere demand by the respondent to take her to Switzerland does not amount to cruelty.

iii) There is no evidence to prove that the respondent has demanded the petitioner to give their house and house site to her brothers on a development basis, as such, the same cannot be construed as cruelty.

iv) The petitioner failed to place any evidence either oral or documentary that the respondent is suffering from schizophrenia.

13. The trial Court also dismissed O.P.No.662 of 2006 seeking a permanent injunction restraining the respondent on the ground that the petitioner failed to prove alleged threat and danger to the property, alleged to be the part and parcel of ancestral property of the petitioners. The petition was also dismissed on the ground that the respondent was always ready and willing to join the company of the petitioner for happy marital life.

14. The trial Court allowed O.P.No.955 of 2007 seeking restitution of conjugal rights filed by the respondent/wife on the ground that the respondent was always ready and willing to join the matrimonial home with the petitioner in spite of the mental and physical harassment that was meted out to the respondent by the petitioner.

15. Heard Sri Damodar Mundra, learned counsel appearing for Sri Rahul Kandharkar, learned counsel for the petitioner and Sri Prabhakar Sripada, learned counsel for the respondent.

16. Perused the record and have given anxious consideration to the arguments advanced on behalf of both parties.

17. It is an admitted fact that the petitioner filed FCOP No.924 of 2006 under Section 13(1)(1A) of the Hindu Marriage Act. For the sake of convenience, Section 13(1)(1A) of the Act is extracted hereunder:

"13. Divorce. —

(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

.....

[(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of²² [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of²² [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]"

18. As rightly observed by the trial Court, there are no decrees either for judicial separation or for restitution of conjugal rights between the petitioner and the respondent, produced by the petitioner to claim a decree of divorce. But the same cannot be taken as one of the grounds to dismiss the petition filed for divorce. However, in paragraph 13 of the petition, the petitioner sought a decree of divorce on the ground of cruelty under Section 13(1)(ia) of the Act. Probably, the learned counsel, who drafted the petition, has inadvertently filed the petition under Section 13(1)(1A) of the Act. A perusal of the averments in the affidavit filed in support of the petition would go to show that the petitioner and his family members were subjected to 'cruelty' by the respondent immediately on the night of first day of the marriage. Probably, the petition ought to have been filed under Section 13(1)(ia) of the Act instead of the present petition. In order to augment the said intention, it is pertinent to note that the 1st issue was framed under Section 13(1)(ia)

of the Act. The trial Court also thought that the provision was under Section 13(1)(ia) of the Act and concluded that the acts alleged to have been committed by the respondent would not amount to 'cruelty' as defined under Section 13(1)(ia) of the Act, which states that after the solemnization of the marriage, she treated the petitioner with cruelty. Now, in this background, we have to evaluate whether the acts committed by the respondent will amount to 'cruelty' or not.

19. There is no dispute with regard to the performance of marriage on 07.12.2005 between the parties and the same was arranged by elders. It is the main allegation of the petitioner against that the respondent demanded on the first night of the marriage i.e., on the night of 07.12.2005, to take her to Switzerland for honeymoon, as her sister also went to Switzerland for honeymoon. She also demanded the petitioner to give 1111 sq.yds of the property belonging to the parents of the petitioner for development to her brothers, who are Architects and

Engineers. It is further alleged that when the petitioner and his family members failed to heed her request, she began to harass the petitioner and his parents. The conduct of the respondent can be seen from her evidence in cross-examination, which reads as follows:

"From the next day of our marriage i.e., 8.12.2005 itself trouble arose between me and my husband. It is true to suggest that the disputes that arose between me and my husband from 8.12.2005 onwards were continued till our separation. From the date of marriage myself and my husband lived together for about nine (9) months. During the said nine months period, though I was beaten by my husband and his family members were also demanded a sum of Rs.5,00,000/- towards additional dowry, I did not prefer complaint either before the police or before any women protection cell, but I have informed to the same to my brothers in the month of April, 2006."

20. Even according to the respondent, there were disputes between herself and the petitioner immediately on the next day of the marriage. As stated supra, the respondent was demanding the petitioner to take her to Switzerland for honeymoon. Even though the petitioner expressed his inability to do so, due to constant pressure exerted from the respondent, the petitioner applied for a passport in the month of March, 2006. According to the petitioner, both himself and the respondent lived together up to

26.02.2006 on which date, the respondent left the matrimonial house by taking all her belongings when the petitioner asked to prepare fruit juice for all his family members after returning from Temple, since they were on fasting on the eve Mahashivaratri festival. The statements of the respondent are quite contradicting in nature. In para 13 of the counter affidavit in F.C.O.P.No.924 of 2006, she averred that she was living with the petitioner even on 24.04.2006, however, in the next paragraph, she stated that from the end of April, 2006, she was living with her parents. In her cross-examination, firstly she deposed that 'in the last week of April, 2006' and secondly, 'in the month of June, 2006', her brothers went to the house of her in-laws to enquire about the disputes between herself and the petitioner. Though she contended that she did not complain to the police, Panjagutta about the petitioner and his parents, it is specifically pleaded by the petitioner that an entry was made in page No.19 in the general diary at 11.00 a.m and J.D.No.26 was made at 14.00 hours at page

Nos.436 to 438 of General Diary. Even though she denied the suggestion that on 25.08.2006 after lodging the complaint, she took two constables in two Rakshak vehicles and went to the house of her in-laws and got her father-in-law and husband arrested. In the next sentences she admits that on the said day, her husband and father-in-law were taken to the police station in rakshak vehicles for inquiry.

21. That apart, it is also pertinent to note here that the petitioner gave complaints to the Inspector, Panjagutta Police Station on two occasions i.e., on 28.02.2006, when the respondent left her matrimonial house on the day of Mahashivaratri festival on 26.02.2005 and also on 28.03.2006 apprehending danger in the hands of family members of the respondent.

22. Even according to the respondent, there were disputes between herself and the petitioner from the next day of their marriage. Except alleging that the petitioner and his family members demanded Rs.5.00 lakhs as dowry, there

is no evidence to that effect by the respondent. Except examining herself, none was examined to prove the allegations against the petitioner and his family members that the respondent was harassed by the petitioner and his family members. Admittedly, both the petitioner and the respondent belong to Maharashtra Brahmin community and both the petitioner and respondents were educated and their families must have some reputation in the society.

23. That apart, it is pertinent to mention that the respondent and her parents have given her date of birth wrongly to the petitioner and his parents at the time of marriage. Even according to the respondent, as per Ex.P8 certificate of age, nationality/domicile dated 11.10.1999, her date of birth was mentioned as 06.06.1972, but in Ex.P7, the date of birth of the respondent was mentioned as 02.03.1973, which clearly shows that the respondent has suppressed her age and shown less than almost one year of her age, in order to suit her horoscope to the petitioner. As already stated supra, both the petitioner and

the respondents belong to Maharashtra Brahmin community and they must have verified the compatibility of both the petitioner and respondent before performing the marriage. The acts of the respondent after the marriage must have caused mental agony and tremendous pressure when a complaint was lodged with the Panjagutta police and the petitioner and his father were taken to Police Station, Panjagutta. Though the marriage was performed on 07.12.2005, both the petitioner and the respondent did not lead any happy marital life. The acts of the respondent clearly amount to cruelty. The word 'cruelty' has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention of the party to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case. There may be instances of cruelty by unintentional but inexcusable conduct of any party. The cruel treatment may also result from the

cultural conflict between the parties. In cases of 'cruelty', it has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the petitioner should be called upon to endure as a part of normal human life. Cruelty in matrimonial life may be unfounded variety, which can be subtle or brutal and the same may be by words, gestures or by mere silence, violent or non-violent.

24. In Subhranusu Sarkar v. Indrani Sarkar [AIR 2021 SC 4301], the Hon'ble Supreme Court held that when the marriage between the parties is emotionally dead and there is no point in persuading them to live together any more.

25. In Naveen Kohli v. Neelu Kohli [AIR 2006 SC 1675], the Hon'ble Supreme Court held as follows:

"56. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties,

their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of [Section 10](#) of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party”.

26. In the instant case, in view of the incidents that took place between the petitioner and the respondent since the date of marriage, the relationship between the parties had deteriorated and strained to such an extent that it is impossible for them to live together and there is no hope of reunion without mental agony. Even though it is claimed by the respondent that she was always ready and willing to join the company of the petitioner to lead happy marital life, but the act of the respondent in lodging a complaint with the police, arresting the petitioner and his father in the year 2006 by the Panjagutta Police and subsequent filing of criminal case, and the petitioner and his family members seeking anticipatory bails, will create any amount

of mental agony. The parties are living separately for almost 16 years, and there are no efforts from the respondent to continue her marital relationship with the petitioner and in this background it creates mental agony to accept the company of the respondent, to lead marital life. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. Since both the petitioner and the respondent are living separately for the last more than 16 years, we have no doubt in our mind that the marriage between the parties has irretrievably broken down beyond repairs. It appears that all emotions are dead and the subject marriage has become unworkable and there appears no possibility of reunion of the parties and reached to an end. There is no chance whatsoever of their coming together. Matrimonial matters are matters of delicate human and emotional relationship. In fact this relationship

demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. In the instant case, we feel that the differences between the parties to the litigation are of such magnitude that it would be practically impossible for them to reunite and lead marital life. We feel it apt to state that irretrievable breakdown of marriage by itself is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the wife or the husband or of both, the Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance necessitating severance of marital tie. A marriage that is dead for all purposes, cannot be revived by the verdict of the Court if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried up, there is hardly any chance of their springing back to marital life on account of artificial reunion created by the Court's decree. Courts can dissolve a

marriage as irretrievably broken down when the Court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is broken beyond repair. Therefore, we are of the considered opinion that the petitioner is entitled to decree of divorce.

27. Though the learned counsel for the respondent has relied on the judgments in the cases of; i) **Dr.N.G.Dastane v. Mrs.S.Dastane [(1975) 2 SCC 326]**; ii) **Shyam Sunder Kohli v. Sushma Kohli alias Satya Devi [(2004) 7 SCC 747]**; iii) **S.Hanumanth Rao v. S.Ramani [(1999) 2 SCC 620]**; iv) **Shoba Rani v. Madhukar Reddi [(1988) 1 SCC 105]**; and v) **Chetan Dass v. Kamla Devi [(2001) 0 Supreme (SC) 704]**, but the facts and circumstances in those case where divorce was denied are distinguishable with that of the facts in the present case on hand, as such, the said judgments are of no way come to the rescue of the respondent.

28. In **Naveen Kohli V Neelu Kohli, [(2006) 4 Supreme Court Cases 558]** a three judge Bench of the Hon'ble Apex Court observed as follows:

“Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.”

29. In a series of judgments, the Hon'ble Apex Court has exercised its inherent powers under Article 142 of the Constitution of India for the dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the fact of the case do not provide a ground in law on which the divorce could be granted [see **Samar Ghosh Vs Jaya Ghosh [(2007)] 4 Supreme Court Cases 511; Sukhendu Das V Rita Mukherjee [(2017) 9 Supreme Court Cases 632]**

30. In the result, FCA No.145 of 2009 is allowed. The order of the trial Court in FCOP No.924 of 2006 is set aside and the appellant/petitioner is granted decree of divorce. Consequently, FCA No.142 of 2009 is also allowed setting aside the order granting restitution of conjugal rights in favour of the respondent. Since the FCA Nos.142 and 149 are allowed, the FCA No.29 of 2010 is also allowed and the respondent and her henchmen and agents are restrained from entering into the suit schedule premises of the petitioner as described in FCOP 662 of 2006.

31. As a sequel thereto, miscellaneous applications, if any, pending in these appeals, shall stand closed.

Dr. SHAMEEM AKTHER, J

NAGESH BHEEMAPAKA, J

28th December, 2022
VRKS

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER
AND
THE HON'BLE SRI JUSTICE NAGESH BHEEMAPAKA

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