

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
FIRST APPEAL NO.1455 OF 2005**

|                                       |   |                   |
|---------------------------------------|---|-------------------|
| Subhash Govind Adhikari,              | ] |                   |
| Age 40 years, Occu: Service,          | ] |                   |
| R/O B-302, Darpan Co-operative        | ] |                   |
| Housing Society, Near Shankar Temple, | ] |                   |
| Belapur Road, Kalwa, Thane.           | ] | <b>Appellant</b>  |
| Vs.                                   |   |                   |
| Smita Subhash Adhikari,               | ] |                   |
| Age 38 years, Occu: Service,          | ] |                   |
| R/o Aakar Apartment, Jadhav Nagar,    | ] |                   |
| Chendhere, Alibag, District Raigad.   | ] | <b>Respondent</b> |

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Mr. Anilkumar Patil, for Appellant.

None for Respondent.

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CORAM : PRITHVIRAJ K. CHAVAN, J.  
RESERVED ON : 28<sup>th</sup> July, 2023.  
PRONOUNCED ON : 7<sup>th</sup> August, 2023.

**JUDGMENT:**

1. By this appeal, the appellant challenges the judgment and order dated 27<sup>th</sup> January, 2005 passed in Marriage Petition No.42 of 2003 by the Joint District Judge, Thane.

2. Facts in brief are as follows.

3. Appellant and respondent were married on 19<sup>th</sup> April, 1999. Their marriage was solemnized before the Sub Registrar, Thane. It was a second marriage of both of them. Both have daughters from their earlier marriage. After marriage, they started residing at Kalwa, Thane. The respondent was working at Thal in RCF Factory. She used to travel to the place of her work from Thane. Respondent was appointed on compassionate ground because of death of her former husband. Few days after marriage, relations between the couple soured. It is the contention of the appellant that the respondent was in a habit of picking up quarrels and bickering on account of trivial disputes. She used to give threats of divorce to the appellant.

4. In the month of December, 2000, the respondent left her matrimonial house by deserting the appellant and started residing at Alibag.

5. In the year 2002, both of them filed a petition for divorce by consent for which both of them were initially agreed. However, on 5<sup>th</sup> December, 2002, consent was withdrawn by the respondent and, therefore, divorce petition No.58 of 2002 was dismissed. On 31<sup>st</sup> March, 2003, appellant issued a notice to the respondent expressing

his desire for divorce on the ground of cruelty and desertion. Respondent denied all the allegations levelled in the petition by filing reply. Rather, she made frivolous allegations against the appellant.

6. The appellant, therefore, filed instant marriage petition for divorce. The learned trial Judge, on the basis of the averments in the petition and the written statement framed issue as to whether the petitioner established that he was subjected to cruelty and desertion by the respondent. Having considered the evidence of the respective parties and the arguments advanced by the learned Counsel, the learned Judge dismissed the petition.

7. Despite admission of the appeal way back in the year 2006 and directing the matter to be heard expeditiously, it appears that the respondent did not appear. The appeal has been pending for more than 18 years despite due service.

8. Mr. Patil, learned Counsel for the appellant has taken me through the averments in the petition as well as written statement of the respondent and the evidence before the trial Court. The

Counsel would argue that the trial Court has miserably failed to appreciate the evidence on record wherein the petitioner's evidence could not be rebutted in the cross-examination. There was sufficient evidence of cruelty and desertion on record which learned trial Judge ignored while dismissing the petition. It is submitted that the petitioner had brought on record various instances as regards cruelty and desertion by the respondent which, according to him, cannot be termed to be trivial issues in the family.

9. Affidavit of the appellant in lieu of examination-in-chief indicates that during initial days of their marriage, there were no quarrels. The appellant and his mother made all adjustments after his marriage. However, after passage of time, there used to be quarrels between the appellant and the respondent on trivial issues and there were differences of opinion, disharmony and there was no meeting of minds. As such, there was no peace and the dream of happy married life which the appellant visualized was completely shattered and there was a discordant note between him and the respondent.

10. Despite efforts being taken by the friends and close relatives to resolve the quarrels, it was in vain. He testified that there were differences in temperament, habits, tastes, thoughts and increasing incompatibility, due to which relations were strained and did not improve in spite of sincere efforts made by the relatives for reconciliation.

11. Appellant testified that the respondent is very obstinate and always tried to prevail upon everyone and everything. She always wished that her words should be final. She was dictating her terms not only to the appellant but also to his aged mother who scared to open her mouth in the presence of the respondent.

12. Appellant's evidence further reveals that on one occasion, respondent threw away photograph of his first wife just few days before her 4<sup>th</sup> death anniversary. Respondent had also pierced a nail through the brick and ensured that the photograph could not be placed on the same place again. That had disturbed the appellant most and caused him immense physical and mental cruelty which reflected upon his health. He started realizing day by day that it was impossible for him to co-habit with the respondent as a husband.

13. The next incident quoted by the appellant in his evidence is about attitude of the respondent towards his daughter. The respondent had kept his daughter 'Amla' behind closed doors for a couple of hours on flimsy grounds when Amla made fuss for food. The respondent ill-treated Amla who was also scared to be near to the respondent. According to him, he married for the second time with a hope that his daughter would get a loving mother, however, his dreams and very purpose of marrying second time got frustrated. The respondent was more concerned with her daughter Prachi.

14. The appellant further testified that the respondent often insulted and spoke very rudely with his mother and told her to remove herself from the house with her belongings.

15. The next incident testified by the appellant is that on one occasion when Amla had taken part in a competition, she was prepared by sister-in-law of the appellant. The respondent did not remain present till Amla received her prize. She left the hall due to the presence of sister-in-law of the appellant. On one occasion, she left the house without his consent and permission. His evidence further indicates that during their short span of cohabitation,

relations between them were neither healthy nor congenial. Thereafter, at the respondent's instance, they started residing separately till the consent petition for divorce was filed. Separation of the appellant and the respondent commenced in the month of December, 2000, since then, there is no cohabitation. It is further testified by the appellant that there was no willful desertion on his part but it was a deliberate attempt on the part of the respondent to bring the cohabitation to an end. Despite efforts on his part to resume cohabitation, the respondent always refused and was reluctant to resume cohabitation. Since the respondent has been staying separately at Alibag from 25<sup>th</sup> December, 2000 along with her daughter Prachi and the respondent is staying at Kalwa, Thane along with his daughter Amla, there existed *animus deserendi* on the part of the respondent.

16. The respondent had also withdrawn Prachi's name from the School at Thane and took admission at Alibag. All such willful conducts of the respondent exhibit that she does not wish to cohabit.

17. His evidence also reveals that the respondent did not attend the Court on four dates and subsequently, on 5<sup>th</sup> date i.e on 5<sup>th</sup> December, 2002, she withdrew the consent terms which was a shock to the appellant which amounts to cruelty of highest form.

18. During cross-examination, nothing could be elicited which would show that the appellant was not subjected to cruelty or desertion by the respondent. It is a general cross-examination reiterating the facts about nature of the job, behaviour of the children, their school admissions etc. It was absolutely a futile cross-examination. Entire evidence of the appellant remained intact.

19. It is interesting to note that in her affidavit in lieu of examination-in-chief, the respondent in paragraph 2 itself admits that there is no need to dispute the correctness of the various allegations made by the appellant in the petition.

20. Interestingly, the respondent in paragraph 9 of her affidavit in lieu of examination-in-chief testified that the appellant has not told under which Act and under what provisions of law, the petition has been filed. However, in her cross-examination, the respondent

clearly admits that the appellant never failed in his duty as a father of her daughter Prachi. Her cross-examination also reveals that on 2<sup>nd</sup> January, 2001, she had informed the School at Thane where her daughter was studying that she (her daughter) would be unable to attend the School for few days. She admits that she did not inform the appellant that her daughter was admitted in a School at Alibag. She also admits that she left the company of the appellant on 25<sup>th</sup> December, 2000 and felt that she should not go back to the appellant's house until the disputes are settled amicably.

21. Respondent's further admission fully buttresses the appellant's contention as regards desertion and cruelty when she admits that she felt that the relationship was damaged to a large extent. She also admits that she did not meet her husband after 25<sup>th</sup> December, 2000 till they filed petition in the Thane Court in the month of February, 2002. She admits that it was she who gave clue for filing petition under section 13B for divorce by mutual consent.

22. On 6<sup>th</sup> March, 2003, she had submitted written submissions to the Court in the said marriage petition. She also admits that she informed earlier in writing that she had no desire to continue with

the application for divorce by mutual consent and she also admits that she had not filed any application for restitution of conjugal rights.

23. The learned trial Judge has not correctly appreciated the un-rebutted testimony of the appellant which finds corroboration from the admissions of the respondent referred hereinabove. The findings arrived at by the learned Judge are in total ignorance of the facts and evidence on record. Observations of the learned Judge in the impugned judgment that those were small quarrels which took place between the parties and cannot be said to be a cruelty meted out by the appellant to the respondent are perverse. Interestingly, the learned trial Judge in the impugned judgment observed that the respondent was not interested in proving the alleged cruelty at the hands of the appellant. It is surprising as to how the respondent would be interested in proving alleged cruelty when it is not her case but it was the case of the appellant that he was subjected to cruelty. Observations of the learned trial Judge in the impugned that out of anger and frustration, the respondent left her matrimonial house on 25<sup>th</sup> December, 2000 is based on surmises and conjunctures *sans* any evidence to that effect on record. Rather, most of the observations are without any evidence on record.

24. Learned Counsel for the appellant has argued that from the evidence of the appellant, coupled with the admissions given by the respondent in the cross-examination, it is apparent that it is an irretrievable break down of their marriage since they are residing separately for more than 20 years. Even the evidence of the respondent-wife is without any pleadings in the written statement which cannot be considered. The learned Counsel has also invited my attention to the written statement wherein there are no specific denials of the averments in the petition.

25. Having considered the instances given by the appellant about the conduct and nature of the respondent as well mental cruelty with which he was subjected and also the fact that the respondent had scant regard for the feelings and emotions of the appellant, the case can be said to be squarely covered under section 13 (1) (ia) of the Hindu Marriage Act which contemplates mental cruelty. Learned Counsel for the appellant has, therefore, rightly placed reliance on a judgment of the Hon'ble Supreme Court in case of **Samar Ghosh Vs. Jaya Ghosh, (2007) 4 Supreme Court Cases 511.**

26. It is an admitted fact that ever since the appeal has been filed, respondent did not turn up. It can, therefore, be concluded that it is a clear case of irretrievable break down of marriage. The respondent had voluntarily left her matrimonial house and started residing at Alibag. The Hon'ble Supreme Court in the case of **Samar Ghosh** (supra) held that where there has been long period of continuance separation, it may fairly be concluded 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. In such like situations, it may lead to mental cruelty.

27. The Hon'ble Supreme Court in the case of **Samar Ghosh** (supra) has laid down for the guidance a few instances while dealing the case of mental cruelty. It would be advantageous to quote the said instances;

“ No uniform standard can ever be laid down for guidance, yet it is deemed appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of “mental cruelty”. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of the complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make it possible for the parties to live with each other, could come within the broad parameters of mental cruelty;

(ii) On a comprehensive appraisal of the entire matrimonial life of the parties, if it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party;

(iii) Mere coldness or lack of affection cannot amount to cruelty; but frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable;

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time, may lead to mental cruelty;

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse;

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually

affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty;

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness, causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty;

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset, but may not be a ground for grant of divorce on the ground of mental cruelty;

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty;

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty;

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty;

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded 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. In such like situations, it may lead to mental cruelty”.

Taking into consideration the ratio laid down hereinabove by the Hon’ble Supreme Court, the present case would squarely falls

within the scope and ambit of the instances, more particularly, clauses (iv) and (xiv).

28. The trial Court had utterly failed to appreciate the facts and evidence in its correct perspective. The judgment is based on surmises and conjectures. As already stated, since the parties have been admittedly residing separately for more than 20 years, entire substratum of the marriage had already expired. The impugned judgment, therefore, needs to be quashed and set aside. Consequently, the following order is passed.

**: ORDER :**

[a] The appeal is allowed.

[b] The judgment and order dated 27<sup>th</sup> January, 2005 passed in Marriage Petition No.42 of 2003 is hereby quashed and set aside.

[c] Marriage of the petitioner with the respondent stands dissolved by a decree of divorce on the ground of desertion and

cruelty in view of section 13 (1) (ia) and 13  
1 (ib) of the Hindu Marriage Act.

[d] In the circumstances of the case,  
there is no order as to costs.

29. Appeal stands disposed of.

**[PRITHVIRAJ K. CHAVAN, J.]**