

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FAMILY COURT APPEAL NO. 45 OF 2006

Nalini Nagnath Uphalkar

Age : 50 years, Occu. Household,

Residing at : S.No.63, Kedari

Nagar, Wanowadi, Pune-411040

... Appellant

V/s.

Nagnath Mahadev Uphalkar,

(Since deceased through L.R.

Sudesh Kumar Naganth Upalkar,

Residing at N/64, Parmar Nagar,

S.No.16, Wanawadi, Pune 411040

... Respondent

Mr. Vikas B. Shivarkar for the Appellant.

Mr. Onkar Kulkarni i/by Mr. Yadunath Chaudhari for Respondent.

**CORAM : NITIN JAMDAR AND
 SHARMILA U. DESHMUKH, JJ.**

DATE : 12 October 2022

JUDGMENT (Per SHARMILA U DESHMUKH, J) :

Rule, returnable forthwith. By consent of parties, Appeal is taken up for final hearing.

2. Heard the Learned Counsels appearing for the parties.

3. By this Appeal, the Appellant-wife takes an exception to

the judgment and decree dated 22 November 2005, passed by the Family Court (Court No.3), Pune in Petition no. A-65 of 2004, whereby the counter claim of the Respondent-husband was allowed and the marriage between the Appellant wife and Respondent husband was dissolved by a decree of divorce under Section 13 of Hindu Marriage Act. During the pendency of the Appeal, the Respondent husband expired and his legal heir was brought on record. For the sake of convenience, the parties are referred to by their status as before the Family Court.

4. Few facts are necessary to appreciate the controversy in issue.

On 25 October 2015, after the death of his first wife, the Respondent and Petitioner got married. In the year 2004, Petition No. A-65 of 2004 was filed by the Petitioner-wife, under section 9 of the Hindu Marriage Act, 1955 for Restitution of Conjugal Rights, to which the Respondent-husband filed his reply and also filed a counter claim seeking decree of divorce. In the said proceedings, preliminary issue came to be framed by the Family Court, as to whether the petition by the Petitioner-wife is tenable in view of the petition filed by the petitioner for maintenance under section 18 of the Hindu Adoption and Maintenance Act and the passing of a decree in favour of the Petitioner-wife in PC No.84 of 2001 on 18 February 2002, which was answered against the Petitioner wife and an order dismissing the petition was passed. The Family Court then proceeded

to decide the counter claim of the Respondent-husband, wherein the impugned judgment and decree dissolving the marriage under Section 13 of Hindu Marriage Act, 1955 was passed and an order of payment of maintenance of Rs.2000/- p.m. to the Petitioner-wife was granted.

5. Prior to the present proceedings, the Respondent-husband had filed a petition seeking decree of divorce on the ground of cruelty being PA No.271 of 2002 which came to be dismissed on 6 August 2003.

6. Heard learned Counsel for the parties and perused the papers and proceedings.

7. Learned Counsel appearing for the Petitioner wife submits that the learned Family Court Judge erred in granting the decree of divorce on the ground that the allegations made in the reply to the counter claim constitute an act of cruelty. Learned Counsel submits that in the previous litigation between the parties i.e. PA No.271 of 2002, the same allegations were leveled by the Petitioner against the Respondent and it was not held to constitute an act of cruelty. He further submits that with respect of the same allegations, the learned Family Court Judge has now passed the impugned judgment and in the same set of circumstances a decree of divorce has come to be granted. Learned Counsel submits that in the counterclaim, the Respondent has set out the alleged instances of

cruelty which has not been accepted by the learned Family Court Judge and that the decree of divorce has been granted only on the ground that the allegations in the reply to the counter claim, not being proved by Petitioner, constitute an act of cruelty entitling the Respondent to a decree of divorce.

8. Learned Counsel appearing for the Respondent supports the impugned judgment and submits that the allegations made by the Petitioner-wife constitute an act of cruelty as she has failed to substantiate the allegations and hence the learned Family Court Judge has rightly passed the decree of divorce. In support of his submissions, he relies upon the following judgments.

- (i) “X” *versus* “Y”, reported in 2016 (3) AIR Bom R 122;
- (ii) *Tejas Shah vs. Ms Aditi Tejas Shah*, in Family Court Appeal No. 71 of 2008 of this Court (Coram: A.S. Oka & A.K. Menon, JJ) dated 12 February 2015.

9. We have considered the rival submissions of the parties. In our opinion, the issue which arises in the present case is whether the allegations made by the Petitioner-wife in her reply to the counter claim constitute “cruelty” within the meaning of Section 13(1)(i-a) of Hindu Marriage Act, 1955 so as to entitle the Respondent-husband to a decree of divorce. The learned Family Court Judge has based the

decree of divorce on the unsubstantiated allegations of the Petitioner in the pleadings.

10. In the context of the issue arising in the present case, it is necessary to consider the relevant pleadings of the Petitioner wife. It is the case of the Petitioner in her reply to the counter claim that the Respondent is an alcoholic and used to physically and mentally harass the Petitioner; that the Respondent is a womaniser and due to his vices, he used to be out of house late at night; that the Petitioner was deprived of her conjugal rights; that the Respondent on one pretext or the other used to visit the Petitioner's and sister; and that the Respondent pretended to be a great social worker.

11. A scrutiny of the evidence of the Petitioner is required to ascertain as to whether the Petitioner has been able to prove the allegations. The Petitioner has examined herself and her sister Madhuri Anand Pawar. Petitioner has deposed that the Respondent used to be constantly under the influence of liquor and used to physically assault her; that apart from being an alcoholic, he was also a womaniser; that due to his vices he used to return home late at night and that she was deprived of her conjugal rights; and that he was in the habit of visiting her sister - Yashoda Pawar, on one pretext or the other. In the cross-examination a suggestion was given that she has made false and defamatory statements against the Respondent, which was denied by her and she maintained that the allegations made by

her are correct. It is important to note that the Petitioner's sister—witness No.2- Madhuri Anand Pawar has not corroborated the case of the Petitioner and has only deposed that the Respondent used to consume liquor.

12. Considering the above evidence, we find that apart from filing her affidavit of evidence reproducing the contents of the reply, there is no evidence produced by the Petitioner to substantiate her allegations. Pertinently, the Petitioner's own sister has not corroborated the case of the Petitioner and has merely deposed that the Respondent used to consume liquor, but there is no assertion of being alcoholic which has distinct connotation. The Petitioner has alleged that the Respondent used to visit her sister on one pretext or other, yet the evidence of the Petitioner's sister does not give any details. The evidence on record produced by the Petitioner fails to prove the allegations made by her in pleadings.

13. Pertinently, it is the specific case of the Respondent that the Petitioner has caused him mental agony by making false and defamatory allegations against him in society. In his evidence, Respondent has deposed that the Petitioner had approached the members of the institution wherein he was doing social work and leveled the same allegations against him, defaming him in society and by reason of this conduct, his marital as well as social life has been completely destroyed. He has further deposed that the Petitioner has

separated him from his children and his grand-children and due to loneliness, he immersed himself in social work and even at the institution where he was carrying out social work, the Petitioner has defamed him causing him mental agony. There is no cross examination on this aspect, not even a suggestion that the case put up by the Respondent regarding the defamation by the Petitioner is false. In view thereof, the testimony of the Respondent to this extent stands uncontroverted.

14. In the earlier round of litigation, similar allegations were made by the Petitioner, however, the learned Family Court Judge held that the same cannot be construed as an act of cruelty, in the absence of contention by the Respondent-husband, that by virtue of such allegations, he has suffered mental torture. In the present case, we find that it is the specific case of the Respondent that the Petitioner has defamed him in the society by making false and baseless allegations, causing him mental agony, which is proved by the Respondent. On the other hand, the Petitioner has failed to substantiate the allegations made by her in the reply to the counter claim. We, therefore do not find any substance in the contention of the learned Counsel for Petitioner, that on same set of allegations, in earlier round of litigation, the allegations were not held to constitute an act of cruelty and therefore the same allegations in the present case cannot be held to be an act of cruelty. There is a distinction in as much as in the present case, the Respondent has come with a specific case that the

Petitioner has defamed him in the society by making false and baseless allegations against him, causing him mental agony.

15. Section 13 of Hindu Marriage Act, 1955 sets out the grounds on which a marriage can be dissolved by a decree of divorce. In the present case the relevant provision is Section 13 (1) (i)(i-a) and is reproduced:

“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-

*(i)
(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or
(ib)
(ii)”*

16. It is settled position in law that “cruelty” can broadly be defined as a conduct which inflict upon the other party such mental pain and suffering as would make it not possible for that other party to live with the other. While considering the conduct of a party, in the context of “cruelty” as contemplated under the provisions of Section 13(1)(i-a) of Hindu Marriage Act, 1955, the strata of the society to which the parties belongs is also relevant. In the present

case, the Respondent is an ex-army man retired as “Major” and as stated by the Petitioner in her pleadings, belongs to upper strata of society and has a standing in the society.

17. We find that the Petitioner has repeatedly made allegations assassinating the character of the Respondent, in both the rounds of litigation. The conduct of the Petitioner in continuing to make unwarranted, false and baseless allegations pertaining to the Respondent’s character labelling him as an alcoholic and womaniser has resulted in shredding his reputation in the Society. In such circumstances, and considering the standing of the Respondent in the society, the stand of the Respondent that he could not put up with such conduct of the Petitioner defaming him in the society where he was carrying out social work and that he cannot continue with the matrimonial relationship in the face of such allegations cannot be said to be unjustified. Considering the above, we find that the conduct of Petitioner constitutes “cruelty” within the meaning of Section 13 (1) (i-a) of Hindu Marriage Act, 1955.

18. We are mindful of the fact that the Petitioner is entitled to take all defence necessary to oppose the Respondent’s application including the defence that it is the Respondent who is guilty of causing cruelty and cannot take advantage of his own wrong, the caveat being that the Petitioner is able to substantiate the allegations, lest it constitutes an act of cruelty. In the present case, the Petitioner has failed to prove the allegations and looking at the gravity of the

allegations, it is fit case for grant of divorce.

19. Considering the above discussion, we are of the opinion, that no infirmity can be found in the impugned Judgment of the learned Family Court Judge. The Appeal is therefore without merit and is liable to be dismissed. Hence, following order is passed;

ORDER

Appeal is dismissed.

(SHARMILA U. DESHMUKH, J.)

(NITIN JAMDAR, J.)