Madras High Court
S.Valli vs N.Rajendran on 12 February, 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 12.02.2010

CORAM

THE HONOURABLE MRS. JUSTICE R.BANUMATHI
AND
THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

C.M.A. NO.3352 OF 2004

S.Valli .. Appellant

versus

N.Rajendran .. Respondent

Civil Miscellaneous Appeal filed under Section 19 of Family Courts Act, against the judg

For Appellant : M/s.D.Nagasaila for
M/s.S.Tamizharasi

For Respondent : M/s.Sheila Jayaprakash

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J U D G M E N T

M.M.SUNDRESH, J This appeal has been filed by the wife challenging the decree granted on the file of I Additional Family Court, for divorce in favour of the husband under Section 13(1) (ia) of the Hindu Marriage Act, 1955.

2.The brief facts of the case in a nutshell are as follows:

i.The appellant and the respondent are wife and husband. The marriage was solemnised as per the Hindu Rites and Custom on 29.08.1999 at Ananda Kalyana Mandapam, Chrompet, Chennai. The marriage was an arranged marriage between the parties. Prior to the marriage between the appellant and the respondent, the marriage between the appellant's brother and the respondent's sister was also solemnised on 24.05.1999. After the marriage the appellant became pregnant and

went to her parents home.

ii.Thereafter a male child was born between the parties on 29.08.2000. Alleging that the appellant has left the matrimonial home on her own will and thereafter refused to come back from her parental home, the respondent filed the petition for divorce under Section 13(1) (ia) of the Hindu Marriages Act, 1955 on the ground of cruelty which was caused by the desertion of the appellant in view of her objections about the presence of her sister-in-law in her matrimonial home.

iii.It is the case of the respondent who was the petitioner in O.P.No.326 of 2001 which was filed for divorce on the ground of mental cruelty that the appellant had a disliking for the respondent's sister. It is further stated that the appellant was instrumental for the problems of the petitioner's sister. The appellant used to go to her parents house situated in the same city even without informing the respondent. When the respondent questioned the appellant she used to threaten him stating that she would commit suicide and implicate him and his parents.

iv.It is further stated that on 03.01.2000 the respondent's sister came to his house, since she was ill-treated by the brother of the appellant and her family. On 18.01.2000, the appellant picked up a quarrel with the respondent and took her belongings with her. Thereafter she did not visit the matrimonial home and she was eight weeks pregnant at that point of time. A male child was born on 29.08.2000. The respondent visited the appellant at the hospital but he was not treated well. Neither the appellant nor his family members were invited for the ceremonies conducted on the first year of the child. The above said actions of the appellant would amount to mental cruelty and hence he has filed the petition for divorce.

v.A counter affidavit and written submissions were filed on behalf of the appellant stating that she never left her matrimonial home on her own but she was brought to her parents house by her father-in-law for delivering the child. It is not true to state that she created trouble for sister-in-law and if that is the case she would not have married the respondent. Therefore there was no misunderstanding between them. The present petition was filed in view of the petition filed by the sister of the respondent in O.P.No.337 of 2001. She never went to her parents home on her own accord and she only went to the said home on 13.09.1999 during Vinayagar Chathurthi, on 25.09.1999 with her father-in-law to see her sister-in-law, on 03.10.1999 with her husband while she was pregnant for taking rest and 06.11.1999 for Deepavali festival. In fact during the absence of the respondent his mother once locked the door and refused to allow her inside. The issue was kept quite at the request of the respondent. The appellant has never quarrelled with the respondent. The respondent has never visited the appellant and the child after child birth.

vi.It is further stated that only on 19.01.2000 she went to her parents home, since she was suffering from morning sickness to take care of her health. Only on her in-laws she was taken to her parents home by her brother with consent. She never picked up any quarrel on 19.01.2000 and took her belongings. It is nothing but natural for a lady suffering from morning sickness due to the early stage of pregnancy to go to her parents home situated in the same city for taking rest. The appellant was not at all responsible for the problems faced by the respondent's sister and the appellant's brother. She never threatened to commit any suicide as alleged in the petition.

vii.In the written arguments it has been stated that the appellant has always been ready and willing to join and live with the respondent. The petition for divorce has been filed in view of the strained relationship between the sister-in-law and the brother of the appellant. It is the respondent who has refused to take the appellant and the appellant has been waiting for the respondent to take her back into the matrimonial home with the male child. It was also prayed that inasmuch as the appellant is always ready and willing suitable orders will be passed directing the respondent to take her back into the matrimonial home.

viii.Before the Trial Court the respondent has examined himself as PW-1 and the appellant has examined herself as RW-1. Two documents have been marked in Ex.A-1 to A-2 by the respondent. Ex.A-1 is the Marriage Invitation dated 29.08.1999 and Ex.A-2 is the Joint Account standing in the name of the parties in the Indian Bank Branch. The Court below after the consideration of the materials available on record has granted a decree for divorce by holding that mental cruelty caused by the appellant has been proved as against the respondent. Challenging the said judgment and decree of the Court below, the appellant has filed the present appeal.

3.PW-1 who is the respondent herein in his evidence has stated that there has been a problem between his sister and brother-in-law and there is a talk of settlement between the parties. In view of the said dispute his sister came to his house and stayed with him which was objected to by the appellant as a result of the same she went to her parental home on her own and she also made a threat to commit suicide. His sister came to his house on 03.01.2000 and on 18.01.2000 the appellant left the matrimonial home on the ground of health. She was eight weeks pregnant at that point of time and child was born on 29.08.2000 which was not informed. The respondent went to see the child on his own and thereafter he was not allowed to see the child and therefore he did not go to see her. From 18.01.2000 the respondent has not joined the appellant. Since the respondent threatened the appellant by stating that she would commit suicide, refused to see the child and also living separately from 18.01.2000 a decree for divorce is to be granted on the ground of mental cruelty.

4.In his cross-examination he has stated that the appellant left on 18.01.2000 after quarrelling with him in view of the presence of his sister. It is further stated that he saw the appellant after the child birth only once and he did not ask the appellant to live with him. When his father and others asked the appellant to live with him but she refused. It was also denied that the petition was filed in view of the fact that his sister and brother-in-law are living separately.

5.RW-1 in her evidence has stated that she has used to go to her parental home along with the respondent. She has further stated that even now she wants to live with the respondent. In her cross-examination she denied that there was any strained relationship between herself and her sister-in-law after the marriage of her brother.

6.It is further stated that the respondent visited the appellant during her pregnancy at her parents home. The birth of the child was informed to the respondent by her father over phone, the appellant used to talk to the respondent very often over phone. There was no celebration of the first birthday of the child, since the parties have been living separately. The respondent has asked the appellant to

come to his home. Since the delivery was done by way of a cesarian operation and she was advised by the Doctor to take five months rest and she took rest. Since her father also died she could not join with her husband immediately and when she was about to join she received the notice from the Court. It is further stated that in view of the valaikappu function proposed in the month of June 2000 all her belongings along with the certificates were taken by her brother. However since the respondent has refused to come for the same no function was conducted. The respondent has not seen the child after seeing him at the time of birth.

7.A reading of the petition filed by the respondent would show that the marriage between his sister and brother-in-law took up earlier on 24.05.1999 and thereafter the marriage between the appellant and the respondent took place on 29.08.1999. Therefore it cannot be said that right from the marriage between the appellant's brother and her sister-in-law there was a strained relationship between the appellant and her sister-in-law. If that is the case then the subsequent marriage between the appellant and the respondent would not have happened.

8.It is not the case of the respondent that his marriage was solemnised out of force on the ground that his refusal to marry the appellant would result in strained relationship between his sister and brother-in-law. Therefore the statement made by the respondent that the appellant created trouble to his sister after his sister's marriage cannot be accepted. The further allegation that the appellant picked up the quarrel with him on 18.01.2000 and left the matrimonial home on her own has also not been substantiated by the respondent. The appellant has also denied the said fact. The respondent has given further evidence that she used to visit her parents home during festival times.

9.It is further seen from the evidence of PW-1 that the appellant has informed the respondent on 18.01.2000 that she was leaving the matrimonial home due to her health. If it is the specific case of the respondent that the real reason is the objection of the presence of his sister then sufficient evidence should have been let in other than his own evidence particularly in the teeth of the specific denial by the appellant. When the respondent himself states that he was informed by the appellant about the reason for leaving the home on the basis of ill-health, it is a duty cast upon the respondent to substantiate and prove his case that the real reason was something else.

10.The evidence of PW-1 would make it clear that he has not asked the appellant to come and live with him. His further evidence that the appellant has threatened him by stating that she would commit suicide and she prevented him from seeing the child has not been proved with any other corroborating evidence particularly in view of the denial made by the appellant. Further the alleged dispute between PW-1's sister and the appellant has also not been proved.

11.A perusal of the evidence of RW-1 read with the counter affidavit would show that she has always been ready and willing to live with the respondent. The respondent has not issued any notice seeking the restitution of conjugal rights and no other evidence in the form of the letters or mediation made by the third parties was available in support of his case. No attempt was made to see the child and seek custody. The appellant has clearly stated that the valaikappu function was not conducted and the first birthday was also not conducted by her family.

12.The above said facts would show the strained relationship between the families. Therefore the onus is heavily on the respondent being the petitioner before the Court below seeking divorce to prove the allegations made in the petition filed by him. Except the evidence of the respondent and the appellant no other evidence either oral or documentary is available on record. If the respondent was prevented from seeing the child after the child birth and the appellant had refused to come and join him then proper steps should have been taken by the respondent in that regard. Even the evidence of the respondent would show that he has not taken any sufficient steps. He has also stated that he had not asked the appellant to come and live with him. Even though he has stated that others made attempts to bring the appellant back the said statement was not supported by the evidence of any third party and no particulars have been given.

13.It is also seen that the respondent's sister also filed a petition in O.P.No.337 of 2001 before the very same Court seeking divorce against her husband on the ground of mental cruelty. A reading of the petition filed in O.P.No.337 of 2001 would also show that the petitioner therein had requested her husband to take a separate house for their leaving out his other family members. The said fact would clearly show that the appellant's sister-in-law wanted to live separately with her husband. Hence in view of the above said pleadings, the appellant cannot be found fault for the misunderstanding between her brother and sister-in-law particularly in the absence of any evidence other than PW-1 to prove the same. The above facts also prove that the respondent was not ready and willing to take the appellant back.

14.Mrs.S.Nagasailu, learned counsel appearing for the appellant submitted that the Court below has committed an error in granting a decree for divorce on the ground of cruelty by holding that the appellant had left on her own to her parental home and has refused to come back after three months after delivery when the respondent requested her to come back. The learned counsel further submitted that it is nothing but natural for a lady to go to her parental home during delivery and she could not come back after delivery in view of the death of her father. Even prior to that her father was terminally ill and that is the reason the appellant could not come back. The learned counsel submitted that the above said actions would not constitute mental cruelty.

15.The learned counsel for the appellant submitted that the child was born on 29.08.2000 and the appellant's father died on 03.02.2001. The divorce petition was filed on 05.03.2001. On the very same day another divorce petition was filed by the respondent's sister. The learned counsel further submitted that the respondent was said to have been remarried on 31.10.2004 after obtaining a decree for divorce on 23.07.2004 whereas the second wife Mrs.R.Kalaimani delivered a male child at Smith Hospital, Peelamedu, Coimbatore on 25.02.2004 itself. According to the learned counsel, the appeal was filed on 01.11.2004 and therefore the respondent ought to have remarried much prior to 31.10.2004. Hence the learned counsel strenuously contended that the alleged second marriage of the respondent would amount to abuse of the process of law and in view of the conduct of the respondent in remarrying within the period of limitation suitable orders will have to be passed against the respondent.

16.The learned counsel for the appellant further submitted that a suit was filed on 06.12.2004 by the respondent in O.S.No.4322 of 2004 on the file of District Munsif Court, Coimbatore for permanent

injunction restraining appellant and her brother from disturbing his peaceful possession and enjoyment of the suit property stating that the appellant and her brother are pressurizing the brother to get herself remarried to the respondent and there was no mention about the remarriage.

17.The learned counsel relied upon Section 15 and 23 of the Hindu Marriage Act, 1955 and submitted that the second marriage is totally illegal and the same cannot be a fait accompli to hold that the divorce granted is in order. In support of her contention the learned counsel has relied upon the judgments reported in 1995 SUPP (4) SCC 642 [PRAKASH CHAND SHARMA v. VIMLESH], (1997) 11 SCC 159 [YALLAWWA v. SHANTAVVA]; (2001) 4 SCC 250 [CHETAN DASS v. KAMLA DEVI]; (2002) 2 SCC 73 [SAVITRI PANDEY v. PREM CHANDRA PANDEY] and submitted that the appeal filed by the appellant will have to be allowed both on merits and also taking into consideration of the conduct of the respondent.

18.Per contra, M/s.Sheila Jayaprakash, learned counsel for the respondent submitted that the petition for divorce was filed as per the Family Courts Act, 1984. Section 19 of the said Act, gives 30 days time to file an appeal. The respondent has remarried after the expiry of the said time and between the Section 28 of the Hindu Marriage Act which provides for an appeal allowing a period of 90 days and Section 19 of the Family Courts Act providing a period of 30 days for filing the appeal the later would prevail in view of the non-obstante clause contained therein.

19.The learned counsel further submitted that the factum of birth of the child born to the respondent and his second wife on 25.02.2004 for the marriage conducted on 31.10.2004 cannot be gone into since the birth certificate of the child has not been marked. The learned counsel also submitted that the evidence of PW-1 and RW-1 would show that the appellant has not joined the respondent for a long time and therefore the said decision has caused mental cruelty on the respondent. The learned counsel further submitted that the appellant has not taken any steps to live with the respondent and the appellant has also filed subsequent proceedings for restitution of conjugal rights which has also pending. Therefore the learned counsel prayed for the dismissal of the appeal.

20.In this connection it is useful to refer the judgment of the Apex Court reported in (2002) 2 SCC 73 [SAVITRI PANDEY v. PREM CHANDRA PANDEY], wherein the Hon'ble Supreme Court was pleased to hold that a decree for divorce cannot be granted on the ground of desertion in the absence of pleadings and proof. The Trial Court has committed a grave error in shifting the entire responsibility and burden on the appellant to prove the case of the respondent. The respondent being the petitioner seeking divorce on the ground of cruelty is duty bound to substantiate the allegations and averments made in the petition filed for divorce. The Trial Court has granted a decree for divorce on the ground that there was strained relationship between the parties in view of the presence of the respondent's sister in their matrimonial home which was occasioned due to the strained relationship between her and her husband. Even if the same is true the appellant cannot made solely responsible for that.

21.The Trial Court has failed to consider the evidence of PW-1 who himself has stated in the chief examination that the appellant has left the matrimonial home by stating that she was sick due to her

pregnancy. The Trial Court has merely accepted the case of the respondent and granted a decree for divorce. The Trial Court has not considered the fact that the appellant has deposed that no valaikappu was conducted and no function was also conducted after the birth of the child in view of the refusal of the respondent to attend the said functions.

22.Another important factor to be noted is that on 05.03.2001 itself both the respondent and his sister filed petitions before the same Court seeking divorce on the ground of cruelty. It is further to be noted that the Trial Court has presumed certain things by accepting the case of the respondent without any evidence whatsoever. In the present case on hand both the parties have let in evidence in support of their case. A decree for divorce cannot be granted for the mere asking. The Court below has to give a clear finding that mental cruelty has been made out by the continued conduct of the party as against the other. The evidence of RW-1 is to the effect that she left the matrimonial home due to ill-health and the delay in joining was due to the ill-health and the consequential death of her father. The said evidence ought to have seen in the proper perspective by the Trial Court especially considering the desire of the appellant to rejoin. The respondent has not made any attempt to see his child after seeing in the hospital at the time of delivery. It is the evidence of the appellant that the respondent was talking to her over phone.

23.The Trial Court has committed a further error in stating that the appellant has not made any attempt to rejoin the respondent. There is also no evidence to show that after the birth of the child the appellant has caused any mental agony to the respondent by criticizing her sister-in-law and also made any continuous threat of committing suicide. An incident once happened long time back even assuming as true cannot be a determining factor for seeking divorce. Quarrels are common in any relationship more so in a relationship between husband and wife. Therefore the Trial Court has committed an error in taking into consideration of the incidents alleged to have happened by merely accepting the case of the respondent. It is also to be seen that the appellant's brother has not filed any application for divorce but the same was filed only by the respondent's sister and she has stated in the said petition that she wanted to live separately with her husband. When such is the case of the respondent's sister herself in her petition for divorce then the Court below was not right in stating that it is the appellant who has refused to come and join the respondent.

24.The reasons assigned by the Court below in holding that the appellant conduct in taking the jewels and the certificates would show that she was not interested in joining the respondent also cannot accepted. It is the specific case of the appellant that along with the dress and jewels the entire materials were taken by her brother. Since admittedly she was staying in her parental home during her pregnancy period she would have thought fit to take those materials with her. From the said evidence it cannot be said that the appellant did not want to live with the respondent.

25.The word cruelty has not been defined and the Hindu Marriage Act,1955. In order to define cruelty, the conduct of a party should be so dangerous, so that a spouse is unable to live with the other. It is not the isolatory incident which is relevant but the whole matrimonial life that will have to be seen. A marriage is a meeting and union of two minds. There will always be difference between two persons who come from different background having different behaviors, thoughts, attitude, conduct and values. The above said factors are determined by the environment in which a person is

brought up. Therefore, mere bickerings in a marital life cannot be a ground for cruelty. In order to make out cruelty, the intensity and gravity of one's action will have to be seen.

26.In order to consider mental cruelty the social status of the parties, their customs and traditions, educational level and the environment, in which they have been living will have to be looked into. The Court will have to draw inference and decide on the basis of the probabilities of the case having regard to the effect on the mind of the spouse. The Hon'ble Apex Court in the judgments reported in (2002) 2 SCC 296 [G.V.N.KAMESWARA RAO v. G.JABILLI] and (2005) 2 SCC 22 [A.JAYACHANDRA v. ANEEL KAUR] have taken the view that cruelty will have to be seen by applying the above said principles.

27.There cannot be any specific definition mental cruelty. The mental cruelty cannot be put in a strait-jacket formula. The concept of mental cruelty cannot remain static. Therefore, no uniform standard can be laid down and Courts will have to prudent and have a practical approach in adjudicating a case based upon its own facts. A sustained course of abusive and humiliating treatment rendering the life of spouse is one of the factum to decide the mental cruelty. However, mere trivial irritations, quarrels, normal wear and tear of the married life would not amount to mental cruelty. If by the continued ill conduct of a spouse the relationship deteriorates then such an action alone amount to mental cruelty.The Hon'ble Supreme judgment in SAMAR CHOSH v. JAYA GHOSH (2007 (3) ALT 62) has observed as follows:-

"97.Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in our definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

98. Apart from this, the concept of mental cruelty cannot remain static. It is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. what may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

99. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instance 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 complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties. 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 lock of affection cannot amount to cruelty, 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 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, sustained and weighty.

(vii) Sustained reprehensible conduct, studied neglect in difference 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 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 sterilization without medical reasons and without the consent of knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent of 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.

Applying the said principles to the facts of the case, we are of the opinion that the respondent has not made out a case for both mental and physical cruelty.

28.The above said judgment of the Apex Court was also followed by subsequent judgment reported in (2009) 1 SCC 422 [SUMAN KAPUR v. SUDHIR KAPUR] wherein the Hon'ble Supreme Court has observed as follows:

"39.Mental cruelty has also been examined by this Court in Parveen Mehta v. Inderjit Mehta thus: (SCC pp.716-17, para21) "21.Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. 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. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

40.In A.Jayachandra v. Aneel Kaur the Court observed as under: (SCC pp.29, para 10) "10.The expression 'cruelty' has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like

matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes."

41.In Vinita Saxena v. Pankaj Pandit the Court said: (SCC pp.796-97, paras 31-32) "31.It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

32.The word 'cruelty' has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

42.It was further stated: (Vinita Saxena case, SCC pp.797-98, paras 35-36) "35.Each case depends on its own facts and must be judged on these facts. 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. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

36.The legal concept of cruelty which is not defined by the statue is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relation must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the

consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure."

29.Applying the above said principles to the facts of the case, we are of the opinion that the respondent has not made out a case for mental cruelty. We are also find that in the present case on hand, the respondent has acted in a haste in filing the petition for divorce. The marriage was solemnised on 29.08.1999. The child was born on 29.08.2000. The appellant's father died on 03.02.2001 and the divorce application was filed on 05.03.2001. The above said facts by themselves would indicate the haste in much the divorce petition was filed. It is seen that just one month after the death of the father of the appellant and seven months after the birth of the child the respondent has filed the petition for divorce. The petition for divorce was filed by the respondent as well as his sister on the same day. The said fact would clearly show that the petitions have been filed primarily because of the strained relationship between appellant's brother and her sister-in-law. The strained relationship of such nature cannot be a ground for a petition seeking divorce on the ground of cruelty between the appellant and the respondent.

30.In so far as the other contention of the learned counsel for the appellant regarding the conduct of the respondent in remarrying after the decree for divorce granted by the Court and before the disposal of the appeal certain facts will have to be looked into. The Court below has granted a decree for divorce on 23.07.2004. The appellant's counsel made the copy application on 31.07.2004. The copy was made ready on 19.08.2004. The marriage between the respondent and his second wife was alleged to have been conducted on 31.10.2004. The appeal was filed on 09.09.2004. From the above said facts, it is clear that the appeal was filed within the period of 30 days as provided under Section 19 of the Family Courts Act, 1984 which will have preference over Section 28 of the Hindu Marriage Act, 1955. Section 19 of the said Act provides for 30 days period of limitation to file an appeal whereas Section 28 provides for a period of 90 days. The petition having been filed under the Family Courts Act and appeal was also having filed under Section 19 of the said Act, we are of the considered view that the provisions of Family Court Act, 1984 alone would be applicable, more so, in the light of the non-obstante clause mentioned under Section 19 of the Family Courts Act. However the question to be considered is as to whether the second marriage was consummated before the expiry of the 30 days as provided under Section 19 of the Family Courts Act, 1994.

31.A reading of the Section 19 of the Family Courts Act, 1984 would show that the period of 30 days as mentioned in Section 19(3) would only mean from the date on which the judgment and decree was made ready. That is a reason why the appeal filed by the appellant was taken on file without an application for condonation of delay as one filed within the period of limitation. Section 15 of the Hindu Marriage Act, 1955 provides for the divorce persons to get remarried. The said section is

extracted hereunder:

"15.Divorced persons when may marry again:-When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again."

32.A reading of the above said section would show that only on the grounds mentioned therein a party who obtained a decree can get remarried. Accordingly when the time for appealing has expired or when an appeal has been preferred but has been dismissed only then it would be lawful for either party to the marriage to marry again. Applying the above said section in the present case on hand admittedly the time for appealing has not expired when the appeal was presented on 09.09.2004. When the alleged marriage was conducted on 30.10.2004, the appeal was already presented on 09.09.2004. What the section contemplates is the presentation of the appeal. When the appeal is filed the same would amount to the presentation of the appeal. Applying the said principle, we are of the view that the second marriage of the respondent is per se illegal and unauthorised.

33.In this connection it is useful to refer the judgment of the learned Division Bench reported in 2004 (5) CTC 724 [P.RAMADOSS AND ANOTHER v. THE REVENUE DIVISIONAL OFFICER SIVAKASI AND OTHERS] wherein the Division Bench has observed as follows:

"6.We find from the Xerox copy of the order of the Revenue Divisional Officer, Sivakasi, though the orders are dated 18.11.2003, the Personal Assistant has signed the same on 10.12.2003 and there is an endorsement made by the appellants for the receipt of the order on 23.12.2003. It is clear that if the date of signature of the Personal Assistant, namely, 10.12.2003 is taken into account, the appeals which were filed on 30.1.2004 are within time. As per Section 47-A of the Indian Stamps Act, 1899 read with Rule 9 of the Tamil Nadu Stamps (Prevention of Under Valuation of Instruments) Rules, it is open to the appellants to file an appeal within two months from the date of the order. The 3rd respondent has proceeded on the basis of the date of the order is the date which the order bears. But, it is well settled that for the purpose of computing the limitation in preferring the appeals the date of service of the order is relevant and not the date which the order bears. In Harish Chandra v. Dy. L.A. Officer, AIR 1961 S.C. 1500 the Supreme Court construed the expression, 'the date of the award' found in Section 18(2) of the Land Acquisition Act, 1894 to mean the date when the award is either communicated to the party or known to him either actually or constructively. The Supreme Court after considering earlier decisions held as under:

"A similar question arose before the Madras High Court in Annamalai Chetti v. Col. J.G. Cloete, ILR 6 Mad 189. Section 25 of the Madras Boundary Act XXVIII of 1860 limited the time within which a suit may be brought to set aside the decision of the settlement officer to two months from the date of the award, and so the question arose as to when the time would begin to run. The High Court held that the time can begin to run only from the date on which the decision is communicated to the parties. 'If there was any decision at all in the sense of the Act,' says the judgment, 'it could not date earlier than the date of the communication of it to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed'. Adopting the same

principle a similar construction has been placed by the Madras High Court in Swaminathan v. Lakshmanan Chettiar, ILR 53 Mad. 401: AIR 1930 Mad.490 on the limitation provisions contained in Ss.73(1) and 77(1) of the Indian Registration Act XVI of 1908. It was held that in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed the expression 'within thirty days after the making of the order' used in the said sections means within thirty days after the date on which the communication of the order reached the parties affected by it. These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned."

We, therefore, hold that the date of the order under Section 47-A for the purpose of deciding the limitation for filing appeals should be construed to mean the date of the service of the order. Hence, the date of order under Rule 9 of the said Rules shall be construed to mean the date of service of the order for the purpose of determining the time limit to prefer the appeals.

7.Moreover, in the instant case, the Personal Assistant has signed the order on 10.12.2003 for despatch to the appellants and the orders could not have been despatched prior to 10.12.2003. It is apparent that if 10.12.2003 is taken into account, the appeals preferred would be within time. The orders suffer from other infirmities as the third respondent without giving an opportunity to explain as to how the appeals preferred were within time, rejected the appeals. In our view, it is not necessary to quash the orders on the ground that they were passed in violation of the principles of natural justice as we hold that the view entertained by the third respondent that the date of order means the date which the order bears, and not the date of service of the order to determine the time limit for preferring the appeals is not legally sustainable. Hence, the orders of the 3rd respondent holding that the appeals preferred were beyond the period prescribed under Section 47-A of the Stamps Act are not sustainable. Consequently, the orders challenged in both the appeals are set aside and the matters are remitted back to the 3rd respondent to consider the same on merits."

34.Hence on a consideration of the ratio laid down by the Division Bench of this Court, we are of the opinion that the period of limitation would start from the date on which the order copy was received.

35.Section 23 of the Hindu Marriages Act, 1955 provides that a party to a proceedings cannot take advantage of his or her own wrong for the purpose of getting the relief sought for by the said party. The scope of Section 23 has been considered by the Hon'ble Supreme Court in the judgment reported in 1995 SUPP (4) SCC 642 [PRAKASH CHAND SHARMA v. VIMLESH] wherein the Apex Court has observed as follows:

"4.However, Mr.Pramod Swarup, the learned counsel for the appellant-husband, vehemently submitted that having regard to the fact that both the parties have drifted from married life the marriage must be taken as irretrievably broken, more so because the husband has remarried and has a child through the second marriage and, therefore, this Court should grant a divorce. We do not think that in the facts and circumstances of the case such a view can be taken. From the very

beginning the wife has been saying that she is ready and willing to live with the husband. It is the husband who is denying her access. If the husband remarried in hot haste after the institution of the second appeal which was delayed by only three days, we cannot see how that fact can come to his rescue. That is clearly opposed to Section 15 of the Hindu Marriage Act which in terms states that when a marriage is dissolved by a decree of divorce and there is no right of appeal against the decree or where there is such a right, the time for filing an appeal has expired or an appeal has been presented and has been dismissed, it shall be lawful for either party to the marriage to remarry. In the instant case no doubt the second appeal was delayed by three days but the fact is that it was instituted and was pending on the date of the second marriage. Therefore, the husband acted in disregard of Section 15 and cannot get the benefit of his own wrong"

36.A similar view has been taken in the judgment by the Hon'ble Supreme Court reported in (2001) 4 SCC 250 [CHETAN DASS v. KAMLA DEVI] wherein it has been held as follows:

"14.Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

37.It is further observed as follows:

"18.Learned counsel for the respondent submits that in certain situations, relief would be denied to the petitioner where it is found that he is taking advantage of his own wrong for the purposes of making out a case to obtain the decree. He had drawn our attention to Section 23(1) clauses (a),(b) and (c) of the Hindu Marriage Act which are quoted below:

"23.Decree in proceedings.-(1)In any proceeding under this Act whether defended or not, if the court is satisfied that-

(a)any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b)where the ground of the petition is the ground specified in clause (i) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c)-(d) * * *

(e)there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly."

19.In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under Section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile easily to be broken which may serve the purpose most welcome to the wrongdoer who, by heart, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point."

38.The said judgment of the Apex Court was followed in the subsequent judgment reported in (2002) 2 SCC 73 [SAVITRI PANDEY v. PREM CHANDRA PANDEY] wherein it has observed as follows:

"14.For upholding the judgment and decree of the Family Court, Shri Dinesh Kumar Garg, the learned counsel appearing for the appellant submitted that as after the decree of divorce the appellant had remarried with one Sudhakar Pandey and out of the second marriage a child is also stated to have been born, it would be in the interest of justice and the parties that the marriage between them is dissolved by a decree of divorce. In support of his contention he has relied upon judgments of this Court in Anita Sabharwal v.Anil Sabharwal, Shashi Garg v. Arun Garg, Ashok Hurra v. Rupa Bipin Zaveri and Madhuri Mehta v. Meet Verma."

15.To appreciate such a submission some facts have to be noticed and the interests of public and society to be borne in mind. It appears that the marriage between the parties was dissolved by a decree of divorce vide the judgment and decree of the Family Court dated 8.7.1996. The respondent-husband filed appeal against the judgment and decree on 19.1.1997. As no stay was granted, the appellant solemnised the second marriage on 29.5.1997, admittedly during the pendency of the appeal before the High Court. There is no denial of the fact that right of at least one appeal is a recognised right under all systems of civilised legal jurisprudence. If despite the pendency of the appeal, the appellant chose to solemnise the second marriage, the adventure is deemed to have been undertaken at her own risk and the ultimate consequences arising of the judgment in the appeal pending in the High Court. No person can be permitted to flout the course of justice by his or her overt and covert acts. The facts of the cases relied upon by the learned counsel for the appellant are distinct having no proximity with the facts of the present case. In all the cases relied upon by the appellant and referred to hereinabove, the marriage between the parties was dissolved by a decree of divorce by mutual consent in terms of application under Section 13-B of the

Act. This Court while allowing the applications filed under Section 13-B took into consideration the circumstances of each case and granted the relief on the basis of compromise. Almost in all cases the other side was duly compensated by the grant of lump sum amount and permanent provision regarding maintenance."

39.Similarly in a recent judgment reported in (2009) 1 SCC 422 [SUMAN KAPUR v. SUDHIR KAPUR] the Hon'ble Supreme Court after dismissing the Special Leave Petition filed by the wife challenging the divorce granted in favour of the husband has come down heavily on the husband who remarried within 60 days of the decree of divorce confirmed by the High Court and without waiting for the expiry of the period of 90 days provided for filing a Special Leave Petition. The Hon'ble Apex Court has imposed a cost of Rs.5,00,000/- even while confirming the decree for divorce. On a consideration of the above said legal principles laid down by the Hon'ble Supreme Court, we are of the opinion that the conduct of the respondent is clearly unacceptable and it was an attempt to prevent the appellant from getting the decree of the Trial Court reversed by depriving her statutory right of an appeal. Therefore while setting aside the judgment and decree of the Court below, we are of the considered opinion that the respondent herein will have to be directed to pay a sum of Rs.1,00,000/- to the appellant.

40.In fine, the judgment and decree of the Court below passed in O.P.No.326 of 2001 dated 23.07.2004 on the file of the I Additional Family Court is hereby set aside and the appeal is allowed. The respondent is also directed to pay a sum of Rs.1,00,000/- (Rupees One Lakh Only) to the appellant within a period of 8 (eight) weeks from the date of receipt of a copy of this order. No costs.

(R.B.I.,J.) (M.M.S.,J

12.02.2010

Index : Yes / No
Internet : Yes / No

sri

R.BANUMATHI, J.
AND
M.M.SUNDRESH, J.

sri

To
I Additional Family Court, Madras.

C.M.A. NO.3352 OF 2004

12.02.2010