Delhi High Court
Dr. Seema vs Dr. Alkesh Chaudhary on 31 January, 2011
Author: Kailash Gambhir
IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 01.11.2010

Judgment delivered on: 31.01.2011

MAT APP No. 19/2004

Dr. Seema .....Appellant Through: Mr. R.K. Kapoor and Mr.Varun Kumar

Advs.

Vs.

Dr. Alkesh Chaudhary .....Respondent Through: Mr. Ajay Goswami with Mr. Diwakar

Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported

in the Digest? Yes KAILASH GAMBHIR, J.

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1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 the appellant seeks to challenge the judgment and decree dated 5.2.2004 passed by the court of MAT APP No. 19/2004 Page 1 of 32 the learned ADJ whereby a decree of divorce was passed in favour of the respondent and against the appellant.

2. Brief facts of the case relevant for deciding the present appeal are that the parties got married on 17.4.1992 at Delhi according to Hindu rites and ceremonies and a child named â Samirâ was born out of the said wedlock on 22.5.1996. The respondent alleged that the appellant did not fulfill her marital obligations and was cruel to him from the very beginning of their marriage. Therefore a petition for divorce under section 13(1) (ia) was filed by the respondent which vide judgment and decree dated 5.2.2004 was decreed in favour of the respondent and against the appellant. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Mr. R.K. Kapoor, counsel appearing for the appellant contended that the appellant and the respondent were maintaining very happy and cordial relations and such a relationship is well reflected from the letters sent by the respondent to the appellant during the period from MAT APP No. 19/2004 Page 2 of 32 14.11.1994 to 22.5.1995. Elaborating his arguments, counsel further contended that even if any alleged act of cruelty was committed by the appellant prior to the said date, the same stood condoned by the passionate letters sent by

the respondent to the appellant. The other limb of argument taken by the counsel for the appellant was that a child was born out of the said wedlock on 22nd May, 1996, which would show that the child must have been conceived by the appellant somewhere in the month of August, 1995 and at least till the month of August, 1995 the relationship between the parties can be presumed to be cordial and congenial and if any alleged act of cruelty has been committed by the appellant prior to the said date of conception that also stands condoned when the said child was conceived by the appellant wife in August, 1995.

4. Counsel further contended that so far the tape recorded conversation proved on record by the respondent as Ex. PW- 1/60 is concerned, the same by itself cannot be taken as an act of cruelty committed by the appellant based on MAT APP No. 19/2004 Page 3 of 32 which the decree of divorce can be granted. Counsel also submitted that the tape recorded conversation was recorded by the respondent with mala fide intentions so as to create evidence in his favour which is borne out of the fact that the respondent had filed the divorce petition just within a gap of about 15 days from the date of the said tape recorded conversation. Counsel also submitted that admittedly both the parties were living together till 28th October, 1996 and divorce petition was filed by the respondent on 9th January, 1997 and except the said tape recorded conversation no other act of cruelty has been complained of by the respondent in the divorce petition. Counsel further submitted that no doubt a criminal complaint was filed by the appellant in July, 1997 before the Crime Against Women Cell, Nanakpura after filing of the divorce petition but any allegation leveled by the appellant in the said complaint cannot be taken into consideration as the said complaint was not pursued by the appellant and no arrest of the respondent or his family members was made pursuant to the lodging of the said MAT APP No. 19/2004 Page 4 of 32 complaint by the appellant. Counsel thus submitted that even in the absence of any evidence led by the appellant, the respondent failed to establish his case to prove the ground of cruelty envisaged under Section 13(1)(ia) of the Hindu Marriage Act, 1955. Alternatively, the counsel submitted that even if any act of cruelty is taken to have been committed by the appellant then the same already stood condoned by the respondent due to his subsequent conduct. In support of his arguments, counsel for the appellant placed reliance on the judgment of the Apex Court in Dastane Vs. Dastane AIR 1975 SC 1534.

5. Mr.Ajay Goswami, counsel for the respondent, refuting the said submissions of the counsel for the appellant submitted that the behaviour of the appellant throughout has been very cruel towards the respondent and this would be evident from the fact that the respondent had to send a legal notice in August, 1993 i.e. just after 1 Â½ years from the date of the marriage. Counsel further submitted that since the appellant had committed various acts of cruelty after the said MAT APP No. 19/2004 Page 5 of 32 love letters written by the respondent to the appellant, therefore, all the previous acts of cruelty of the appellant would get revived. Counsel also submitted that the respondent has proved on record the said tape recorded conversation and the kind of language used by the appellant towards the respondent as well as his family members would clearly show the attitude of the appellant towards the respondent and his family members. The contention of the counsel for the respondent was that the abusive language used by the appellant in the said conversation caused mental cruelty to the respondent. Counsel further submitted that the appellant did not join the company of the respondent at the matrimonial home at Greater Kailash after his return from Chennai in October, 1995 and this also caused cruelty to the respondent. Counsel thus submitted that no fault can be found with the judgment of the learned trial court and the same should be upheld.

6. I have heard learned counsel for the parties at considerable length and carefully gone through the records. MAT APP No. 19/2004 Page 6 of 32

7. The present case concerns the matrimony of two doctors who could not fulfill their marital obligations towards each other due to irreconcilable differences. The marriage between the parties took place on 17.4.1992 and right from the date of inception of the marriage, problems arose between them which led to the service of a legal notice by the respondent upon the appellant just within a period of one and a half years from the date of the marriage. However, they still managed to sail through somehow but ultimately a divorce petition was preferred by the respondent under Section 13 (1) (ia) of the Hindu Marriage Act in 1997. Serious allegations of mental cruelty were leveled by the respondent against the appellant and all such allegations

were also proved by the respondent in his evidence. The respondent was cross examined by the appellant at length and as per the finding of the learned trial court, not even a single suggestion was given by the appellant to discredit the testimony of the respondent in his cross examination with regard to the various incidents of cruelty committed by the appellant. It is MAT APP No. 19/2004 Page 7 of 32 also a matter of record that the appellant failed to lead any evidence either to refute the allegations leveled by the respondent or to place on record her side of the story before the court. In this background of facts, the learned trial court proceeded with the matter taking the allegations leveled by the respondent against the appellant as correct.

8. Mr. R.K. Kapoor, learned counsel appearing for the appellant very fairly submitted that he would also proceed to argue the matter taking the allegations leveled by the respondent as correct but would impress upon this court that all such acts of cruelty, even if they are accepted as correct, were condoned by the respondent by his subsequent conduct. In such a background this court will proceed in the matter taking the entire gamut of allegations of cruelty leveled by the respondent against the appellant as correct and then examine the contention of the counsel for the appellant whether those acts of cruelty were condoned by the respondent by his subsequent conduct. As per the counsel for the appellant, two subsequent acts of the respondent would MAT APP No. 19/2004 Page 8 of 32 clearly show that the previous acts of cruelty committed by the appellant stood condoned by the respondent. With the birth of the child on 22.05.1996, it would be quite apparent that there was resumption of conjugal relations between the parties, the counsel contended. The contention of the counsel for the appellant was that at least till the month of conception, which must be somewhere in the month of August 1995, the pervious acts of cruelty, even if they are taken to have been committed by the appellant, stood condoned by the respondent. The second act of condonation claimed by the counsel for the appellant was that between 14.11.1994 to 22.5.1995, various letters were written by the respondent, which were proved on record as Exs. RW1/R1 to R 31. The contention of the counsel was that these letters were written so passionately by the respondent and had there been any complaint by the respondent against the appellant on account of her cruel conduct then the respondent husband could not have written such letters displaying his love, sentiments and passion for the appellant. Counsel thus urged MAT APP No. 19/2004 Page 9 of 32 that all the previous acts of cruelty, if any, committed by the appellant stood condoned by the respondent by writing said letters to the appellant. Counsel thus submitted that the said two subsequent acts of the respondent would clearly show that not only there was resumption of conjugal relationship between the parties but would clearly show that the respondent had completely condoned the previous acts of cruelty, if any, committed by the appellant towards the respondent.

9. So far the subsequent acts of cruelty alleged to have been committed by the appellant are concerned, the counsel submitted that the tape recorded conversation, on which reliance was placed by the learned trial court, the same by itself cannot be taken as an act constituting cruelty as such conversation was recorded by the respondent with the sole objective to create evidence in his favour before filing divorce petition as the said tape recorded conversation was recorded by the respondent within a short gap of about 15 days before the presentation of the divorce petition by him. MAT APP No. 19/2004 Page 10 of 32 Counsel thus submitted that the said tape recorded conversation was doctored by the respondent in a manner so that the appellant could be shown in poor light in her utterances without correctly highlighting the fact that under what circumstances she was responding in that particular manner. Counsel thus submitted that the learned trial court has wrongly given undue weightage on self serving evidence adduced by the respondent. Counsel also submitted that the learned trial court also wrongly placed reliance on the criminal complaint filed by the appellant with the Crime Against Women Cell despite the fact that the appellant did not pursue the said criminal complaint and such a conduct of the appellant would further show that she never wanted to create any kind of disharmony in the marital relationship.

10. The correctness and veracity of the testimony of any witness can only be tested through his cross examination. Section 138 of the Indian Evidence Act, 1872 therefore, confers a very valuable right on a party to cross-examine a witness who enters the witness box to support the case of one MAT APP No. 19/2004 Page 11 of 32 of the parties. It is an admitted fact between the parties that not only the appellant failed to impeach the creditability or creditworthiness of the testimony of the witnesses produced by the respondent,

especially the respondent himself, with regard to the alleged incidents of cruelty committed by the appellant but the appellant even did not care to lead any evidence to counter the case of the respondent. The counsel for the appellant very fairly conceded this position and therefore, urged that he will press his plea of condonation on the part of the respondent due to his subsequent acts and also the plea that the acts of cruelty alleged to have been committed by the appellant after the condonation of pervious acts of cruelty cannot be treated as â crueltyâ as envisaged under Section 13(1) (ia) of the Hindu Marriage Act.

11. First dealing with the concept of condonation, it was defined by the Apex Court in the case of Dastane Vs. Dastane, 1975 SC 1534, where it held that: "Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things forgiveness and restoration." MAT APP No. 19/2004 Page 12 of 32

12. It is also a settled legal position that there cannot be condonation if the offending spouse continues to indulge in the commission of further acts of cruelty either physical or mental. Either a temporary stay or even resumption of conjugal rights though may be strong circumstances to infer condonation on the part of the offending spouse but the same by itself would not be sufficient to draw an inference of condonation unless such a stay and resumption of conjugal relationship is with an intent to restore back the marital relationship with a sense of forgiveness and consequently not to indulge in either repeating the previous acts or to inflict more cruelty. In the present case, the counsel for the appellant stated two instances which he contended were acts from which condonation can be clearly inferred. First, was the birth of the child on 22.5.96 and second was the writing of the passionate letters by the respondent to the appellant from 14.11.94 to 22.5.95.

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13. Dealing with the first instance, the birth of the child "Samir" took place on 22.5.96 which means that the appellant must have conceived in the month of August 1995. It can be thus inferred that till August 1995 the parties had normal sexual relationship and that it was not one stray act of intimacy that must have led to the conception of the child. It would be useful here to refer to the observations of the Apex Court in Dastane vs. Dastane (supra) where in similar facts it was held that:

"57. The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's - acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during co-habitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well imagine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. MAT APP No. 19/2004 Page 14 of 32 Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part."

14. Thus it is evident from above and also from the facts of the case at hand that the respondent had condoned the acts of cruelty complained of before August 1995. The conception of the child is thus an unflinching proof of condonation of the acts of the offending spouse. Coming to the second act, the 32 love letters written by the respondent husband to the appellant, which are proved on record, are from the period 14.11.1994 to 22.5.1995. A perusal of the said letters shows that the respondent had no complaint from the appellant and thus had condoned all her previous acts of cruelty. Therefore, the cumulative effect of both the above acts show that the respondent had condoned the cruel acts of the appellant prior to August 1995 and therefore if the acts of cruelty , if any as alleged by the respondent, to establish the MAT APP No. 19/2004 Page 15 of 32 ground of cruelty have to be looked into pertaining to the period only after August, 1995.

15. The acts of cruelty after August, 1995 committed by the appellant as alleged by the respondent can be succinctly stated as under:

ï · The respondent was locked by the appellant three times in August,1995

ï · On the respondent extending a reciprocal invitation for dinner to Appaswamy on 3.9.95 in Chennai, the appellant created a scene and locked the house and the guests had to return seeing the house locked ï · On the day of Diwali, which was on 23.10.95, the respondent was casually asked by Mr. & Mrs. Taneja (in -laws of the brother of the respondent) to do an eye check up on which the appellant raised hue and cry causing embarrassment to the respondent

ï · That the appellant after the delivery of the child stayed at her parents place and due to her callous attitude MAT APP No. 19/2004 Page 16 of 32 towards the new born, the child got dengue on 17/19.10.96

ï · That the appellant refused to come back to the matrimonial home and put a condition that only when the house at Greater Kailash Enclave would be transferred in the name of the appellant would she return to the matrimonial house

ï · That the appellant left the matrimonial house on 28.10.96, one day before karva chauth which is an auspicious festival of the Hindus where the wife observes a fast for the husband

ï · That the appellant had refused to have sexual intercourse with the respondent after 8.10.1996 ï · That the appellant filed a criminal compliant in the Crime Against Women Cell, Nankpura against the respondent in July, 1997

ï · That the appellant used filthy and abusive language for the respondent and his family members in the telephonic MAT APP No. 19/2004 Page 17 of 32 tape recorded conversation on 23.12.1996 which is proved on record as Ex PW1/59 and PW1/60

16. The above acts of cruelty were duly proved by the respondent in his evidence and by producing 4 other witnesses. It is an admitted case between the parties that the appellant did not enter the witness box to present her side of the story. The learned trial court has also categorically observed that the respondent was not cross examined on any of the above mentioned acts of cruelty by the appellant. It is a settled legal position that where the evidence of the witness is allowed to go unchallenged with regard to any point, it may safely be accepted as true. Here it would be pertinent to refer to the observations of the Apex Court with regard to the importance of cross examination in the case of Rajinder Pershad vs. Darshana Devi (2001) 7 SCC 69 where it was held that :

"There is an age old rule that if you dispute the correctness of the statement of a witness you must give him opportunity to explain his statement by drawing his attention to that part of it which is objected to as untrue, otherwise you cannot impeach MAT APP No. 19/2004 Page 18 of 32 his credit. In State of U.P. v. Nahar Singh (dead) : 1998CriLJ2006 , a Bench of this Court (to which I was a party) stated the principle that Section

138 of the Evidence Act confers a valuable right to cross-examine a witness tendered in evidence by opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by permitting a witness to be questioned, inter alia, to test his veracity. It was observed :

The oft quoted observation of Lord Hershell, L.C. in Browne v. Dunn clearly elucidates the principle underlying those provisions. It reads thus :

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross- examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lord, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; arid, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play arid fair dealing with witnesses."

17. Thus as the appellant herself has neither contradicted the alleged acts of cruelty of the respondent to have impeached his testimony and has also chose not to enter the witness box to dispute the correctness of the allegations MAT APP No. 19/2004 Page 19 of 32 leveled by the respondent, this court would thus proceed assuming the above stated alleged acts of cruelty as true.

18. Section 13(1)(ia) of the Hindu Marriage Act, 1955 provides for â crueltyâ as a ground for the dissolution of marriage. Cruelty has no where been defined in the act, and rightly so, as it is difficult to put the concept in a strait jacket formula. It may be physical or mental, intentional or unintentional. In the present case, the respondent has alleged that the acts of the appellant caused him mental cruelty. Mental cruelty can be more harmful than physical cruelty as sometimes even a gesture, the angry look, a sugar coated joke, an ironic overlook may be cruel than actual beating. Here it would be useful to refer to the judgment of the Apex Court in the case of Vinita Saxena vs. Pankaj Pandit where it was held that:

"23. As to what constitute the required mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the MAT APP No. 19/2004 Page 20 of 32 court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

24. The modern view of cruelty of one spouse to another in the eye of law has been summarised as follows in (1977) 42 DRJ 270 Halsbury Laws of England Vol.12, 3rd edition page 270:- The general rule in all kinds of cruelty that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations of taunts. Before coming to a conclusion, the judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from the point of view. In

determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status."

19. Hence, the Apex Court has observed in a catena of judgments, including the above, that cruelty has to be inferred from the facts and circumstances of each case and what may be cruelty in one case may not be cruelty in the other. However the benchmark to judge the conduct of the spouse inflicting cruelty would be that it cannot be expected of parties to live with each other anymore due to the cruel conduct of one of the spouse. It has to be something more MAT APP No. 19/2004 Page 21 of 32 than the ordinary wear and tear of married life and has to touch a pitch of severity. The court has to be satisfied that the relationship between the parties has deteriorated to such an extent that it would be impossible for the parties to live with each other. Here it would be worthwhile to refer to the judgment of the Apex Court in the case of Naveen Kohli vs. Neelu Kohli AIR 2006 SC 1675 where it was held that: "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.

57. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before MAT APP No. 19/2004 Page 22 of 32 it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."

20. The Apex Court in the case of Jaya Ghosh vs. Samar Ghosh (2007)4 SCC 511 analysing all the case laws of India and other countries with regard to mental cruelty enlisted a non exhaustive list of the instances which can be considered as instances inflicting mental cruelty. Giving a treatise on mental cruelty the Apex Court held that: "72. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

73. Human mind is extremely complex and human behavior is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behavior in one MAT APP No. 19/2004 Page 23 of 32 definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from 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. 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."

21. Therefore, it would be manifest from the above that cruelty has to be inferred from the social status, upbringing and educational qualifications of the parties. In the facts of the present case, the parties are highly qualified doctors enjoying good social status. In the background of this fact, the conduct of the appellant has to be examined in the present case. The two main acts of cruelty are the tape recorded conversation of the appellant and the filing of the criminal compliant by the appellant against the respondent. With regard to the tape recorded conversation, the learned trial court in para 58 of the judgment has clearly observed MAT APP No. 19/2004 Page 24 of 32 that the kind of language used by the appellant in her conversation cannot be expected from a very qualified doctor belonging to a reputed family. The learned trial court also observed that the language used by the appellant against the respondent constitutes an act of mental cruelty. It would be appropriate to reproduce relevant paras of the impugned judgment as under:

"58. I have gone through the transcription of this tape recorded conversation. From the transcription it is clear that respondent has used the word "Harmjada" for petitioner as well as his parents. She has also addressed him as "Zanvar". She has also stated that she is not interested in his patient/business. she is bent upon to ruin him. No question has been asked to the petitioner on behalf of the respondent in his cross-examination when he appeared in the witness box in this regard, no suggestion has been given to falsify it, no suggestion has been given with regard to the circumstances in which conversation has been tape recorded. Respondent has not appeared in the witness box to explain/refute the tape recorded conversation.

59. It is argued on behalf of the respondent that this tape recorded conversation cannot be relied upon because petitioner provocated the respondent with the malafide intention and ulterior motive to create evidence in his favour and put words in the month of respondent. He immediately filed the present petition after getting the conversation between the respondent and him tape recorded.

60. Parties are highly qualified. Petitioner and respondent are renowned Doctors of Delhi. Admittedly, respondent belongs to highly educated and respectable family, her two other sisters and brother-in-law are also MAT APP No. 19/2004 Page 25 of 32 Doctor according to the respondent herself. Her father is a Class-I Gazetted Officer. Use of such language cannot be expected from a highly qualified Doctor belonging to a reputed family. The language shows the feeling of the respondent towards the petitioner. According to the social status and educational level of the parties, the language used by respondent against the petitioner is enough to constitute mental cruelty towards the petitioner."

22. I do not find any infirmity or illegality in the abovesaid findings of the learned trial court. I also do not subscribe to the argument of the counsel for the appellant that the said tape recorded conversation was recorded by the respondent to create an evidence in his favour as it was for the appellant to have used decent and temperate language not only for the respondent i.e. her husband but for his parents as well. In any event of the matter, it was for the appellant to have explained under what circumstances such utterances were made by her in the said tape recorded conversation. But since the appellant did not appear in the witness box, therefore, adverse inference has to be drawn against the appellant and in favour of the respondent.

23. The other act of cruelty is the filing of the criminal complaint by the appellant against the respondent in the MAT APP No. 19/2004 Page 26 of 32 Crime Against Women Cell. The argument of the counsel for the appellant was that filing of the complaint cannot be considered as it was not pursued by the appellant which shows that the appellant did not want to create any disharmony in the matrimonial relations. This argument of the counsel for the appellant is totally devoid of any merit and deserves outright rejection. The respondent in his testimony deposed that he was called to the police station time and again and was harassed by the police after filing of the said compliant by the appellant , on which point the appellant did not cross examine the

respondent and even did not enter the witness box to rebut the statement. Hence, the argument of the counsel for the appellant does not appeal to commonsensical notions that the filing of the criminal complaint did not cause harassment to the respondent simply because of the fact that it was not pursued by the appellant.

24. These two above acts are certainly grave acts which were capable of causing mental cruelty to the respondent. The other above enumerated acts, such as the MAT APP No. 19/2004 Page 27 of 32 behaviour of the appellant on the auspicious days of the Hindus like Diwali and Karva Chauth would add to causing serious mental pain to the respondent. The refusal of the appellant for sexual intercourse also contributes to inflicting further cruelty on the respondent. Hence, looking into totality of the circumstances, this court is of the clear view that the respondent has proved cruelty on the part of the appellant as envisaged under section 13(1) (ia) of the Hindu Marriage Act.

25. Now dealing with the other argument of the counsel for the respondent that even though the acts of cruelty were condoned by the respondent, but the same would stand revived by the subsequent acts of the appellant, the learned trial court held that even if it is presumed that the respondent had condoned the past acts of cruelty on the part of the appellant ,the same got revived when a false criminal complaint was lodged by the appellant with Crime Against Women Cell and also because of the said abusive language used by the appellant in said tape recorded conversation. Condonation is a bar to the filing of a petition for divorce as MAT APP No. 19/2004 Page 28 of 32 envisaged under section 23(1) (b) of the act and thus if the cruelty is condoned by the respondent, he cannot be allowed to claim a decree of divorce. However, it is a settled principle of law that the previous acts of cruelty will get revived when the offending party keeps committing or repeating the acts of cruelty towards the other spouse even after the condonation. It was held by the House of Lords in Henderson vs. Henderson (1944) 1 All ER 44 that condonation is subject to the implied condition that if the spouse who has been forgiven for the past matrimonial offences is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as further ground for divorce. In the case of K.J vs. K.J AIR 1952 Nagpur 395, the Full Bench of the Nagpur Bench of the Bombay High Court held that:

"13. We shall now consider the question whether there has been condonation in the case.

.....

..an express promise is not necessary. It is implicit in every case where the husband forgives the wife and receives her once again as his companion in life. But even though the promise may be explicit or may be implicit in the very act of forgiving, it is not to be expected that the offence would be repeated. Indeed, the law is that if the offence is repeated or anything having the semblance of MAT APP No. 19/2004 Page 29 of 32 its future repetition is present, the original guilt of the erring partner is revived."

26. Hence, the law is well settled that the petitioner would not be barred from filing a petition of divorce if the offending spouse does not digress from her piquing conduct. It would be useful here to refer to the celebrated pronouncement of the Apex Court in Dastane vs. Dastane (supra) where the law was explicitly explained as under: "58. But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety. "No matrimonial offence is erased by condonation. It is obscured but not obliterated" See Words and Phrases Legally Defined (Butterworlhs) 1969 Fd., Vol I, p. 305, ("Condonation") Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence See Halsbury's Laws of England, 3rd Ed., Vol. 12, p. 3061. Condoned cruelty can therefore be revived, say, by desertion or adultery."

27. Hence, it would be manifest from above that the condition involved in case of revival of offence after condonation is not only that the same matrimonial offence will not be committed but also that the condoned

spouse will in MAT APP No. 19/2004 Page 30 of 32 future fulfil in all respects the obligations of marriage. In the present case it is clear that despite forgiveness and tolerance on the part of the respondent, the appellant continued her vicious behaviour. From her callousness and brutal remarks about the respondent and his family members, it is clear that her cruelty continued and the previous acts also stood revived in the face of such a conduct. Even though the respondent by resuming connubial relations and showing overtures of forbearance had explicitly condoned the acts of cruelty prior to August, 1995, but in the face of the subsequent conduct of the appellant, the acts of cruelty would stand revived and the respondent would be entitled to the decree of divorce.

28. Before parting with the judgment, I would like to point out that this court found a ray of hope in this case by looking at the amorous epistles of the respondent and considering that the parties have a child whose future would be marred in the operoseness of the legal battle, and sent it for mediation, but in vain. The asset of a wholesome education broadens the MAT APP No. 19/2004 Page 31 of 32 horizons and instills the virtues of tolerance, empathy and understanding in persons and it was expected of the parties, who are highly educated, to make peace with their past and carve out their future together on a clean slate. Unfortunately, the social status and the qualifications became an anathema for the parties in which the child would bear the brunt of clashing egos. The stark realities of matrimony stare in the face through such cases evincing the vagaries and vicissitudes of, once rock steady and now fragile institution that is marriage. More often than not, in cases like the present one, the acrimony of the spouses dims the hope of eternity of the holy union into nothingness.

29. In the light of the above, I do not find merit in the present appeal and the same is hereby dismissed. JANUARY 31, 2011 KAILASH GAMBHIR, J rkr/mg

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