

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

FAMILY COURT APPEAL NO. 13 OF 2002  
IN  
PETITION NO. B-75 OF 1996  
AND  
FAMILY COURT APPEAL NO. 104 OF 2001  
IN  
PETITION NO. A-85 OF 1997

Govardhan Kapoor .....Appellant  
versus  
Veena Kapoor .....Respondent.

Mr. G.S. Godbole adv. for the Appellant.

Mr. Puneet Chaturvery & Ms. Loshika Bulchadani adv. for the Respondent.

**CORAM: A.P. DESHPANDE  
AND**

**SMT. R.P. SONDUR BALDOTA, JJ.**

**DATED : 26th March, 2010.**

**JUDG MENT (Per A.P.Deshpande,J.):**

1. These appeals are directed against a common judgment delivered by Family Court dismissing the petition filed by the appellant/husband for permanent injunction seeking to restrain the respondent from dispossessing the appellant from the matrimonial house and allowing the petition filed by the respondent/wife granting divorce to her on the ground of desertion and cruelty. The parties are common in both the appeals and as

the questions involved also overlapped, we are disposing of both the appeals by this common judgment.

2. The marriage between the appellant and the respondent was solemnised at Delhi on 26-4-1969 according to Hindu vedic rites. Out of the marital wedlock two sons are born to the couple by name Navin and Sachin and their date of birth is 9-5-1974 and 27-9-1977 respectively. Both the sons are now major. Elder son Navin is staying in U.S.A.

3. According to the appellant/husband he has taken the matrimonial flat on rent on 26-2-1969 i.e. prior to the marriage with the respondent and in the said flat the appellant was staying along with his younger brother. It is the case of the appellant/husband that he has purchased the flat in the name of respondent vide agreement dated 24-12-1969. It is also the case of the appellant/husband that he has made all the payments for purchase of the flat. According to the appellant, he was carrying on business of export of footwear and was earning good profit till the year 1979. In the year 1979 he suffered losses and could not provide for the luxurious life style of the respondent to which the respondent was used to. Hence differences cropped up in the matrimonial relations. In the year 1979 the respondent along with the two minor sons went to her parent's house at Delhi. The appellant claims to have brought her back to Bombay in 1981. In December 1982 the respondent again left for Delhi and filed a petition for divorce against the appellant on the ground of cruelty. The appellant filed petition for custody of the two minor children.

Subsequent thereto the appellant filed a suit in Bombay City Civil Court bearing no. 874/83 for declaration that he is the lawful owner of the suit flat and also claimed other reliefs. During pendency of the said suit, parties arrived at a settlement and resolved the dispute. Consent Terms dated 21-6-1985 were filed and thus the suit came to be disposed of in consent terms. We will refer to the consent terms in the later part of our judgment. In July 1985 parties returned to the matrimonial flat. Though the suit was disposed of in consent terms, differences between the parties continued and sometime in the year 1996 the appellant/husband filed a petition bearing no. B-75/96 in the Family Court at Bombay for declaration and injunction. The injunction sought for against the respondent/wife was to the effect that the respondent herself or through her agent, servants etc. should not throw the appellant/husband out of the matrimonial house and should not cause any impediment or obstruction in the peaceful use and enjoyment of the flat by the appellant. Interim relief was granted by the trial court.

4. The respondent then filed a petition for divorce on the ground of desertion and cruelty being M.J. Petition No. A-85/97.

In the petition filed by the wife, an application was moved seeking an injunction against the appellant restraining him from entering the matrimonial house. During pendency of the petitions, consent terms were filed in both the petitions on 16-7-1997 providing for interim arrangement till disposal of petitions, whereunder the suit flat was partitioned according to the map annexed to the consent

terms, and the kitchen was to be jointly used by both the parties. Issues were framed and parties agreed to lead common evidence in both the petitions. Parties led evidence and the Family Court by the impugned judgment and decree dismissed the petition filed by the appellant claiming injunction whereas the petition filed by the wife for divorce was decreed as prayed for.

5. While admitting the appeals, the parties arrived at an understanding and Minutes of the Order duly signed by the parties and their advocates were placed on record along with the sketch plan annexed to the Minutes of Order. As per the understanding reached by the parties and embodied in the Minutes of the Order, both the parties were to occupy the house as per the sketch plan after putting a wooden partition in between. The Minutes of the order and the sketch plan form part of the record. Separate electric meter was to be obtained by the appellant/husband and thus an interim arrangement was arrived at till the decision of the appeals. It can thus be clearly seen that since beginning till date, parties are in occupation of respective part of the premises viz. Matrimonial house. To us it does appear that the main bone of contention between the parties is the ownership and/or user and possession of the flat. The parties are now in the advanced age, the husband is nearing 70 years whereas the wife is 65 years. In the above factual matrix the question that falls for determination in the petition filed by the appellant/husband is, whether the appellant/husband is entitled to permanent injunction restraining the respondent, her agent, servant, relatives from dispossessing the

appellant from the matrimonial house viz. Flat no. 20 C situated in Garibdas Co-operative Housing Society Limited, 5<sup>th</sup> N.S. Road, Juhu Scheme, Mumbai 400 049 and from creating any hindrance, impediment or obstruction in the appellant's occupation and enjoyment of the said flat ? To seek an answer to the said question, one has to refer to the consent terms and the consequential compromise decree passed by the Bombay City Civil Court in suit no. 874/83 filed by the appellant/husband for declaration that he is the owner of the suit flat.

6. The relevant clause in the consent terms which relate to the matrimonial flat are reproduced herein below:

a) The plaintiff (husband) withdraws the above mentioned suit filed by him in this Honourable court and declares that the defendant is the rightful owner in possession of the flat being flat no. 20-C situate in the Garib Co-operative Housing Society Ltd, Juhu Tara Road, Bombay 400 049. The plaintiff withdraws his claim in the said flat.

b) The plaintiff and the defendant will live in the matrimonial home i.e. suit premises in the above suit.

7. From the consent terms reproduced above, it can be seen that the appellant/husband has given up his claim to the suit flat by accepting the defendant to be the lawful owner. Parties have also agreed that both of them will live in the matrimonial house i.e. the suit premises. Thus in one hand the appellant accepted the

lawful ownership of the respondent/wife and the respondent/wife in turn agreed to the sharing of the flat with the appellant. In the said consent terms a legal right is created in the appellant to reside in the premises. Relying on the said terms, the appellant/husband has instituted a suit claiming injunction against the respondent/wife not to throw him out of the matrimonial house. As referred to herein above under the consent terms filed before the family court providing an interim arrangement and the understanding reached by the parties at the time of admission of these appeals, the appellant has been residing in the matrimonial house and both the parties are sharing their respective areas which are demarcated by putting a wooden partition in between. One more fact, which remains to be stated and which has a bearing on the issue framed herein above, is that the respondent/wife in her M.J.Petition no. A-85/97 has made the following substantive prayer in prayer clause (d) which reads thus:

“The respondent be restrained by an order and injunction of this Honourable court from entering into flat no. C-20 in Garibdas Co-operative Housing Society at 5<sup>th</sup> N.S. Road, Juhu Scheme, Mumbai 400 049.”

8. Perusal of the impugned judgment and decree passed by the Family Court reveals that the said relief has not been granted to the respondent/wife. Meaning thereby the said relief prayed for has been rejected. On the one hand the trial court has declined to grant injunction claimed by the wife seeking to restrain the entry of

the appellant/husband in the matrimonial house whereas on the other hand by dismissing the petition filed by the husband seeking injunction the relief is also refused to the appellant. The respondent/wife has not filed any appeal against that part of the judgment and decree which goes to deny the relief of injunction nor has the respondent/wife filed any cross objection in relation thereto. The Family Court has dealt with the claim of the appellant/husband for permanent injunction in para 75 of the judgment. Two reasons are assigned for refusing the relief. The first is that the respondent/husband pleaded that he owns the flat but the evidence shows contrary. It is also observed that the appellant has admitted at various stages that the flat is owned by the wife and the other reason assigned is that the prayer of the wife for dissolution of marriage on the ground of cruelty and desertion is granted. It is then observed that the husband has not made out prima facie case, balance of convenience is not in his favour and therefore the issues are answered against the husband. In the first place the Family Court has dealt with this aspect of the matter in a very cryptic manner. Admission of ownership of the flat to be that of the wife does not by itself dis-entitle the husband from claiming, the relief of injunction. Perusal of the judgment reveals that the counsel for the appellant/husband had contended that though the flat is owned by the wife, the husband has a right to reside therein and the said submission is not properly considered. Granting of a decree of dissolution of marriage on the ground of cruelty and desertion has nothing to do with the right of

the husband to reside in the flat. The Family Court has also tried to deal with the aspect of ownership of the flat which, in our view was wholly unwarranted in view of the decree passed in Consent Terms in the earlier disposed of suit filed by the husband bearing No. 874/93. On the one hand the husband admitted the ownership of the wife and on the other hand the wife agreed to the right of the husband to reside in the matrimonial flat. If that was the decree passed in consent terms in an earlier suit filed by the husband, the same issue cannot be gone into again, more so in an incidental and ancillary proceedings such as the petitions filed by the husband and wife against which these appeals have arisen. By the operation of the principle of res judicata, parties would be estopped from resiling from the consent terms arrived at in the above referred suit. Relying on the above extracted consent terms, we hold that the wife is the owner of the flat whereas the husband has right to reside therein. Wife cannot claim exclusive right of enjoyment of the flat. Hence the appellant/husband's suit to the extent he seeks injunction restraining the wife from dispossessing the appellant/husband from the matrimonial house deserves to be allowed.

9. Now we proceed to deal with the correctness of the judgment and decree passed by the family court in petition no. A-85/97 from which arises the Family Court appeal No. 104/2001 granting a decree of dissolution of marriage in favour of the wife on the ground of cruelty and desertion. As seen from the record and which is not disputed the position that emerges is that since

the year 1985 onwards till date the husband and wife are staying separately, though residing in the same flat. The marriage is irretrievably broken down. Both the sons have attained the age of majority long back. Bearing these facts in mind we proceed to consider the case of the respondent/wife in regard to cruelty which is accepted by the Family Court resulting in passing of a decree of dissolution of marriage.

10. Besides various other circumstances in relation to the act of cruelty attributed to the husband, a glaring circumstance which constitute the act of mental cruelty is emphatically pressed in service by the learned counsel appearing for the wife. The said circumstance is the allegation made by the husband in the written statement filed by him in the petition filed by the wife bearing no. A-85/97. From perusal of the written statement, what is stated at the outset by the respondent is :-

“The petitioner lives openly adulterous life with Sarfaraz Khan. The petitioner has personally seen on many occasions in the car too with enclosed dark glasses, the petitioner, in the company of the said Sarfaraz Khan. Sarfaraz Khan and the petitioner remain closed in the bed room even when the petitioner in the petitioner’s present in the house..... The petitioner has also pointed out the said Sarfaraz Khan in the bed room to the bailiff on 6-11-1996 when the bailiff of this Honourable court came to serve the notice.....”

The above extracted averments casts serious aspersions against the character of the wife.

The husband had also deposed on these lines before the court. The husband has not stopped at that but he also caused his son to be examined as a witness with a view to substantiate the allegations that the wife is leading adulterous life. The younger son of the parties by name Sachin has stepped into the witness box and has tried to support the case of the father/husband. Relying on the pleading and the evidence, the learned counsel appearing for the wife submitted that this act on the part of the husband by itself constitute an act of mental cruelty which has caused utmost pain, suffering, humiliation and enbracement to the wife. The son who stepped into the witness box to testify the loose character of his mother , was staying with the father for quite sometime and thus was under his influence, and was of a tender age. According to the learned counsel, the father has polluted the mind of the son and instigated him to be a witness. Such pleading in regard to adulterous life by itself singularly constitutes an act of mental cruelty and would be good enough a circumstance to substantiate the case of the wife for a decree for divorce on the ground of cruelty. The husband has utterly failed to establish that the wife was leading adulterous life. There is absolutely no evidence, worth placing reliance, to even infer that the wife had loose character. It can thus be said that the husband has levelled a false charge against the wife that she was living in adultery. The question that arises for consideration is whether levelling of allegations and leading of evidence that the wife is living adulterous life, when not established would constitute mental cruelty ?

11. Reliance is placed on the following judgments:

First Judgment is in the case of **V. Bhagat Vs. Mrs. D. Bhagat reported in AIR 1994 S.C. 710**. In the said case the petitioner was the husband and the wife was Vice President in a Public Sector Corporation. The wife alleged in the written statement that the husband and all the members of his family are lunatics. In the context of the said case the allegations were construed so as to cause him intense mental pain and anguish. It is observed by the Apex court that the allegations were not made in a fit of anger or under an emotional stress. They were made in a formal pleading filed in the court and the questions to that effect were put by the counsel for the wife on instructions from her. Thereby the wife has gone far beyond the reasonable limit of her defence.

13. In yet another judgment of the Supreme Court in the case of **Vijaykumar Ramchandra Bhate Vs. Neela Vijaykumar Bhate reported in (2003) 6 S.C.C. 334**, a similar issue had arisen. The issue was as to whether character assassination in or during divorce proceedings if amounted to cruelty. Answering the same in the affirmative Supreme Court held that in wife's petition for divorce on the ground of cruelty, the husband in the written statement made allegations against wife of unchastity, indecent familiarity with another person and extramarital relationship. It is decisively held that judged in the Indian conditions such false allegations amount to worst form of insult, a grave assault on character, honour, reputation and status of the wife. Even if such

allegations are later on withdrawn by seeking amendment of written statement which were allowed, by carrying out those amendments, that would be of no consequence.

14. The next judgment relied upon by the counsel is a judgment of Bombay High Court in the case of **Jaishree Mohan Otavnekar Vs. Mohan Govind Otavnekar** reported in AIR 1987 BOMBAY 220. In the said case the petition was filed by the wife seeking divorce on the ground of cruelty on the part of the husband. In the written statement, the husband alleged that the wife is leading adulterous life. The trial court dismissed the petition filed by the wife whereas the High Court allowed the petition, and decreed the claim of the wife for divorce and dissolved the marriage by observing thus:

“Where a petition is filed by the wife for divorce on the ground of cruelty on the part of her husband, the defence to such petition cannot be that the petitioner/wife is living an adulterous conduct. If the husband had in fact practiced cruelty against the wife, the fact that the wife has been guilty of adulterous conduct would not be little or nullify the effect of cruelty practiced by the husband, If, on the other hand, the allegations of cruelty made by the wife are not proved, her petition for divorce will have to be dismissed even if she was a paragon of virtue. This is the legal position and inspite of this position, for no rhyme or reason as it were, the husband had come out, in the instant case, before the court making these unwarranted allegations against his wife.”

The court held that the allegations made by the husband in the written statement constitute mental torture and cruelty. Thus the court inferred torture and mental agony and decreed the petition.

15. Similar is the view taken by the Division Bench of Bombay High court in the case of **Mrs. Manisha Sandeep Gade Vs. Sandeep Vinayak Gade** reported in AIR 2005 BOMBAY 180.

In the said case as well, petition was filed by the husband for divorce and the wife while making contrary allegations in the written statement made serious allegations and as the allegations were not found to be in consonance with the matrimonial relationship, and as it resulted in agony and torture, inference of cruelty was drawn.

16. Placing reliance on the judgments, it is strenuously contended by the learned counsel for the wife that leave aside the other acts of cruelty dealt with by the Family court, the pleadings of the husband in the written statement and the evidence adduced before the court and his conduct of examination of the son of the parties as witness to prove the adulterous character of wife, would by itself be a good ground to grant divorce, as the said acts constitute mental cruelty.

17. This is an additional circumstance, which goes to establish mental cruelty and the conclusions drawn by the Family Court that the husband has treated the wife with utmost mental cruelty are wholly justified. The judgment and decree passed by the Family Court which directs dissolution of marriage by a

decree of divorce, on the ground of cruelty does not call for any interference .

18. The Family Court has also granted the decree of divorce on the ground of desertion, by holding that the husband has deserted the wife for no sufficient cause also, does not call for any interference. A possible view of the matter has taken by the Family Court having regard to the attending circumstances. After reaching a finding that there existed *animus deserendi*. i.e. the intention to desert the wife permanently, has dealt with the matter on merit. There is one more reason as to why no interference with the judgment and decree passed by the Family Court is called for is that the marriage is irretrievably broken down. We are aware that irretrievable break down of marriage is no ground by itself, but it is one of the factors which can be borne in mind while considering grant of relief in a given case.

19. As stated herein above, the parties to the appeals are neither cohabiting nor residing together since the year 1985 onwards. Though staying under the same roof they are separate. As of now they are staying in two separate premises carved out in the said flat by erecting wooden partition. Both the sons are now major and are of middle age. Taking into consideration all the facts and circumstances, though we are allowing the appeal filed by the husband seeking injunction against the wife, we are dismissing the appeal filed by the husband challenging the judgment and decree passed by the Family Court dissolving the marriage by a decree of divorce.

20. In the result Family Court Appeal No.13-2002 is allowed. The respondent wife is permanently restrained from dispossessing the appellant husband from the matrimonial house (suit house) either by herself or through servants, agents etc. and declare that the husband has right to reside in the matrimonial house. Family Court Appeal No.104/2001 is dismissed and the decree of divorce granted by the Family Court is confirmed.

Parties to bear their own costs.

(A.P.DESHPANDE, J.)

(R.P. SONDUR BALDOTA )