(1984) 03 BOM CK 0061

Bombay High Court (Nagpur Bench)

Case No: Second Appeal No. 111 of 1972

Keshaorao Krishnaji Londhe		APPELLANT
	Vs	
Nisha Londhe		RESPONDENT

Date of Decision: March 23, 1984

Acts Referred:

- Hindu Marriage Act, 1955 - Section 13(1)

Citation: AIR 1984 Bom 413 : (1984) 86 BOMLR 339 : (1984) MhLj 576

Hon'ble Judges: Chandurkar, C.J; Mohta, J; Dhabe, J

Bench: Full Bench

Advocate: V.G. Palshikar, for the Appellant; R.R. Pillai, for the Respondent

Judgement

Mohta, J.
Has Madanlal sharma v. Smt. Santosh Sharma 1980 M LJ 391 correctly laid down the law relating to "cruelty" as a ground for divorce as envisaged by S. 13(1)(I-a), Hindu Marriage Act, 1955 ("The Act" for short) is a point which needs answer in this reference to the Full Bench.

2. First of all, the factual back ground. Appellant Dr. K. K. Londhe, married the respondent Mrs. Nisha Londhe in the year 1950. The respondent is Christian by birth but she was converted to Hinduism and the marriage was performed according to Hindu rites. During the period of 16 years of marital life, the couple was blessed with three children. The married life unfortunately was unhappy. The respondent had gone to Bangalore some time after May 1966. In September 1966. She gave a notice to the appellant for restitution of conjugal rights to which no response was given. She therefore, filed a petition for custody of the children and also filed a civil suit for maintenance. In the year 1967, the appellant filed a petition for judicial separation under old S. 10(1)(b) of the Act on the ground of cruelty. The substance of the appellant''s contention was that the respondent was uncultured, she entertained uncultivated ideas of behaviour and had not developed any emotional bond

requisite for a happy married life. She was dogmatic, quarrelsome, selfish, arrogant and had no emotions of affection and love even towards the children. She obtained complete control over the financial situation of the family, insulted the appellant from time to time, exhibited inhuman behaviour towards the children, prevented the children from following Hindu religion, exhibited total lack of attention to the family affairs and gave threats to commit suicide and falsely alleged illegitimate relationship between the appellant and a nurse by name Chellamma. The respondent contended in defence that unhappiness in the family life in only when the appellant became was serving as a medical Officer in the refugee camp at Chandrapur. She denied the allegations of cruelty.

3. The learned trial Judge came to the conclusion on evidence that the appellant had failed to prove such cruelty "as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party" as contemplated under old S. 10(1)(b) of the Act. He further held that the petition was based on the ground of incompatibility and the examples given were of moral cruelty not contemplated under that provision and that unless the cruelty alleged is shown to have endangered appellant''s health, no relief could be granted. He also held that the appellant was having illicit love affair with Chellamma and was leading an adulterous life. The petition was dismissed but the custody of the children was given to the appellant. Both parties filed an appeal which cam eto be dismissed by the Assistant Judge in the year 1971. Reliance was placed on the case of Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane, which had taken a view , as many other High Courts had taken, that cruelty contemplated under old s. 10(1)(b) meant legal cruelty as understood in English Law, namely, injury causing danger to life or limb or health or reasonable apprehension of such injury. The appellant filed the present second appeal in the year 1972. During the pendency of the second appeal, the Marriage Laws (Amendment) Act 1976 (Act No.68 of 1976) was passed. It introduced drastic changes and obliged the Courts to decide pending petitions as if they had been originally instituted under the Act s amended. The Act No. 68 of 1976, inter alia, provided also for divorce on the ground of cruelty as mentioned in the amended provision, viz. S. 13(1)((i-a). The appellant sought an opportunity to amend the pleadings as contemplated under S. 39(2) of the Act No.68 of 1976. This amendment claiming relief of divorce under the new provision was allowed by this Court and thereafter hearing commenced in the second appeal.

4. One development having bearing on the question may be noticed at this stage. The decision given by this Court in Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane, (supra) was reversed by the Supreme Court in Dr. N.G. Dastane Vs. Mrs. S. Dastane, decided on 19th Mar. 1975. The Supreme Court took view that it was risky to rely on foreign decisions on this question, the old English principles of doctrine of danger could not be applied and that the cruelty contemplated was such cruelty as qualified in old s. 10(1)(b), namely, "as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the

respondent". It was further held that danger to life, limb or health or a reasonable apprehension of it is the higher requirement than a reasonable apprehension that it is harmful or injurious for one spousee to live with the other.

5. Now legislative background. The Act originally provided cruelty as a ground only for judicial separation under S. 10 and not for divorce under S 13. It was by the Hindu Marriage (Amendment) Act, 1964 (Act No. 44 of 1964) that the change was introduced in the form of S. 13(1A) by which it became possible to obtain a decree for divorce two years after passing of the decree for judicial separation provided the parties did not resume cohabitation during that period. Old S. 10(1)(b) read as under:

"10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district Court praying for a decree for judicial separation on the ground that the other party -

.....

has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party."

By Act No. 68 of 1976, as mentioned earlier, drastic changes were brought about in the Act. A provision for divorce by mutual consent was introduced. Waiting period for obtaining divorce was reduced from one year right of repudiation of marriage to girls subjected to child marriage was conferred and the Amending Act was applied also to pending proceedings with a view to avoid multiplicity of suits and consequent appeals. New S. 13 is sub situated for the former section and sub-s. (1) (I-a) reads thus :--

"13(1) Any marriage solemnized, whether before or after the commencement of this jAct, may, on a petition presented by either the husband or the wife, lbe dissolved by a decree of divorce on the ground that the other party -

.....

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty ;

(i-b) ....."

The net effect of the amending Act is that any of the spouseees can claim either judicial separation or divorce on the ground of cruelty as contemplated under the aforesaid clause. It may be mentioned that there is an analogous provision, viz., S. 27(1)(d) in the Special Marriage Act, 1954, for obtaining divorce on the ground of cruelty. This provision was also interpreted by various High Courts before Dastane''s decision in Supreme Court by applying the old English concept of doctrine of danger as was applied while interpreting old S. 10(1)(b) of the Act.

6. Before the learned single Judge it was contended one behalf of the respondent that cruelty contemplated under the Act as amended meant cruelty, as it is understood under the old English concept, as the object of the amending Act was to nullify the effect of the decision of the supreme Court in Dr. N.G. Dastane Vs. Mrs. S. Dastane, and to restore the ratio laid down by various Courts prior to the decision and to bring the new provision at par with s. 27(1)(d), Special Marriage Act. proposition on Madanlal''s case 1980 M LJ 391. The learned Judge hearing this appeal did not agree with the view taken in the said decision as a result, the matter was referred to the Division Bench, being unaware of the fact that decision rendered in Madanlal''s case was confirmed by other Division bench in Letters Patent Appeal No. 28 of 1980 decided on 10th Mar. 1980. The Division Bench to which the matter was referred also did not agree with the view taken in Madanlal''s case as according to it the intention of the Amending Act was to liberalize the law of divorce in accordance with the modern trend and not to restore the doctrine of danger which now is discarded even in England and hence this reference to the Full Bench.

7. We are inclined to take a view that Madanalal''s case 1980 M LJ 391 does not correctly lay down the position of law. Here are our reasons. In Madanlal''s case the learned Judge refused to took into the recommendations of the Law Commission as contained in its 59th Report and the Statement of Objects and Reasons of the Amending Act in order to examine the legislative intention, on the ground that this was impermissible except for purposes of finding out what the state of affairs was before the amendment. It was also held that even though the Amending Act generally intended to make and has actually made some provision relating to divorce liberal it may not be liberal "on a particular aspect". It is observed -

"Mr. Vora, however, invited my attention to the statement of objects and reasons accompanying the bill which ultimately amended the Hindu Marriage Act in 1976. The concluding sentence in the statement of objects and reasons reads as follows :--

"The objects of the legislation are mainly. (1) to liberalise the provisions relating to divorce, (2) to enable expeditious disposal of proceedings under the Act; and (3) to remove certain anomalies and handicaps that have come to light after the passing of the Acts". 9See Gazette of India, Extraordinary, Part II, Jan-April 1976, page 780).

Mr. Vora contends that the view which I am taking militates against the intention of the Legislature as is expressed in the Statement of Objects and Reasons. I am unable to accept this contention of Mr. Vora. In the first place, the statement of objects and reasons cannot be referred to except for the purpose of finding out what the state of affairs was before the amendment. It cannot be referred to for under standing the meaning of any particular words in the state itself. The statement of objects and reasons has always been held to be an unsafe guide while interpreting the substantive provisions of land enactmnet. Secondly, even though the Act intended to make and has actually made liberal some provisions relating to divorce, on a particular aspect a provision may not be made liberal. If the provision

of cruelty as a ground of divorce were to be liberal, then in view of the decision of the Supreme Court in Dr. N.G. Dastane Vs. Mrs. S. Dastane, , it was not even necessary to amend the Act. The fact that the Parliament though it fit to amend the ground relating to cruelty and bring it on par with the language used in the Special Marriage Act shows that on this aspect the intention of the Legislature, as it revealed through the words, was not to liberalise the ground relating to cruelty. Furthermore, "where a word has been construed judicially in a certain legal area, it is, I think, right to give it the same meaning if it occurs in a statute dealing with the same general subject matter, unless the context makes it clear that the word must have a different construction". (See Maxwell on The Interpretation of Statutes, 12th Edition, page 278). I have, therefore, no hesitation in holding that the expression to be found in S. 13(1)(i-a), Hindu Marriage Act, endorses necessarily the concept of cruelty as it is understood under the English law."

In the first place, the view that either the recommendations of the Law Commission or the statement of objects and reasons cannot be looked into for judging the legislative intention even in case of doubt, is not correct. The law on the point is no more res integra. No more the old approach is held valid either in India or in Western countries. In the case of Sagnata Investment Ltd. v. Norwich Corporation (1971) 3 WLR 133 Lord Denning freely referred to the report of the Royal Commission on Betting, Lotteries and Gaming and to the Minister''s speech in the House of Commons on the bill for construing the Betting, Gaming and Lotteries Acts of 1963 and 1964. The decision of the House of Lords in Fothergill v. monarch Air lines Ltd. (1980) 2 All ER 696 is an indication of the shift in favour of more liberal use of legislative materials. The position is in no way different in India. In the case of Union of India (UOI) Vs. The Steel Stock Holders Syndicate Poona, free use of the statement of objects and reasons was made while interpreting some of the provisions of the Indian Railways Act pertaining to the provision relating to breach of contract. In K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , not only the Statement of Objects and Reasons of the bill was referred but even the speech made by the mover of the bill was referred.

8. This takes us to the examination of 59th Report and the statement of objects and reasons of the relevant bill. Before we do so, we would like to refer to the social back ground against backdrop of which the bill was introduced. In the Shastrik Hindu Law divorce was unknown. Then came the Act which permitted judicial separation and divorce on some different grounds. On the ground of cruelty only judicial separation was permissible before 1964, after which divorce was permitted after waiting for a period of two years of the passing of decree for judicial separation and that too lon certain conditions. Examination of the grounds either for divorce or for judicial separation would reveal that the "fault theory" predominated. After the passing of the Act as well as the Special Marriage Act, various suggestions for their amendment all directed towards liberalization of law relating to divorce were put forth by members of Parliament as well as the general public. New trend of thinking had

developed in society. The thinking was that there is no use maintaining the marriage as a face in the absence of emotional and other bonds which are the very essence of the marriage. It was considered better in the interest of healthy society to dissolve the marriage than meaninglessly to try it to limp along. The fault theory was thus considered as outdated and the "requested to examine the matter and the Commission presented the 59th Report of the Union Law Minister on 6th Mar. 1974. The committee on Status of Women in India generally supported the amendments proposed by the Law Commission.

9. The Statement of Objects and Reasons in terms refers to all these matters and the 59th Report of the Law Commission. The topic of cruelty as a ground for divorce is contained in paras 2.12. to 2.17 of the Report. It reads thus :

10. A draft on the following lines was suggested during our discussion :

"that the respondent has, since the solemnisation of the marriage, treated the petitioner with such cruelty that the petitioner cannot reasonably be expected to live with the respondent."

We do not, however, think it necessary to add such limiting words, because we consider that the court would, even in the absence of such words broadly adopt the same approach.

It may incidentally be mentioned here that in many countries, matrimonial relief is provided to the aggrieved spouseee on the ground of cruelty. This redress is usually justified on the ground of the principle of production.

to 2.16. Having considered all aspects of the matter, we have come to the conclusion that it is sufficient to provide for cruelty as a ground of divorce, and it should be left to the courts to determine on the facts of each case whether the conduct amounts to cruelty.

Accordingly, we recommended that in S. 13(1), Hindu Marriage Act, a new clause should be added as follows :--

"has treated the petitioner with cruelty".

It would be seen that the above Commission is bodily lifted and put in S. 13(1)(i-a). It is sufficient to notice that the suggestion to add even certain limiting words contained in para 2.12 was rejected because the Commission considered "that the Court would even in the absence of such words broadly adopt the same approach".

In Dr. N.G. Dastane Vs. Mrs. S. Dastane, the standard of cruelty was watered down from doctrine of danger to the "reasonable apprehension that it is harmful or injurious for one spouseee to live with the other" as envisaged in old S. 10(1)(b). Even this legislative standard of cruelty - on which Supreme Court laid great stress - is made to disappear by Act 68 of 1976. Cruelty as a matrimonial offence has now no specified caveat tagged to it. It is now cruelty simpliciter. It is a well-known canon of

interpretation that every amendment is intended to bring about a change in the existing law and is not an exercise in futility. This position is indeed not debated before us. The contention is that intention was to bring back the concept of cruelty on par with the age old English concept of doctrine of danger and to nullify the effect of Dastane''s case. We find it difficult to accept. In the first place, there is not even a Whisper in the Statement of Objects and Reasons directly or indirectly about Dastane''s case or the view that prevailed before that decision. Secondly the bill in terms refers to the recommendation contained in 59theREport which itself is submitted on 6th Mar. 1974 i.e. more than one year before the decision in Dastane''s case. When entire general trend of the Amending Act is towards a forward step of liberalization of divorce it is fallacious to hold that only with relation to cruelty as to ground for divorce intention was to make the law more stringent and to move backward. Indeed in view of law laid down in Dastane''s case, earlier decisions interpreting S. 27(1)(d), Special Marriage Act, are no longer good law and deserve to be reviewed.

11. There is yet another aspect to the question. The whole of the English Law relating to cruelty is judge made. The first Divorce, 9th Edition, page 123, para 79 states the law as under:

"Legal cruelty'' may be defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. Where conduct over a period of years is relied on as constituting cruelty, it is very difficult to prove to the satisfaction of the court that there was reasonable apprehension of danger to health where actual injury is not proved. The fact that a marriage had broken down is no reason in itself for a finding of cruelty."

This definition of cruelty was consistently applied in India while interpreting either provisions of the Act or the Special Marriage Act before Dastane''s case. Legislative history of law in England will indicate that even there, the aforesaid concept has become outdates. Sweeping changes made in England in the law relating to divorce is a pointer matrimonial causes Act, 1965, was amended by the Divorce Reforms Act, 1969, permitting divorce on the sole ground of irretrievable breakdown of marriage. Section 2(1) of the said Act says -

"the Court hearing the petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say -

that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent ;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition ;

that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the

that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition."

The Matrimonial Causes Act, 1973, which repealed the 1969 Act contains analogous provisions. The behaviour of a type that the petitioner cannot reasonably be expected to live with the respondent is a valid ground for divorce even in England. This change in the approach cannot be ignored and it cannot be reasonably held that Indian Parliament in 1976 was oblivious of those development. It is pertinent to notice that changes suggested by the Law Commission and accepted by the Parliament are on almost similar lines. In this background also it is not possible to attribute intention to restore the higher standard of cruelty contemplated under the old concept, viz., danger to life, limb or health or reasonable apprehension thereof.

12. What is cruelty simpliciter? It is not possible to comprehend the human conduct and behaviour for all time to come and to judge it in isolation. A priori definition of cruelty is thus not possible and that explains the general legislative policy - with sole exception of the Dissolution of the Muslim Marriage Act - to avoid such definition and leave it to the Courts to interpret, analyse and define what would constitute cruelty in a given case depending upon many factors such as social status, background, customs, traditions, caste and community, upbringing, public opinion prevailing in the locality etc. It is in this background that the suggestion contained in para 2.12. of the 59 report was turned down and the limiting words, namely, "such cruelty that the petitioner cannot reasonably be expected to live with the respondent" were not incorporated on the view that "the Court would even in the absence of such words broadly adopt the same approach". After referring to the fact that the divorce on the ground of cruelty is "usually justified on the ground of principle of protection'' the final draft as mentioned in para 2.17 was suggested and which, as referred to above, was accepted by the therefore, that will have to be applied in interpreting S. 13(1)(i-a) has to be whether the cruelty is of such type that the petitioner cannot reasonable be expected to live with the respondent or living together of the spouseees had become incompatible.

13. Now brief survey of precedents to which our attention was drawn. A single Judge of this Court in the case of Kalpana Shripati Rao v. Shripati V. Rao (1983) 1 DMC 483 has also taken a view of the matter similar to the one we are taking. The bare reading of the judgement will indicate that the view taken in Madanlal''s case 1980 Mah LJ 391 has not been approved in this judgement. However, without referring the matter to the larger Bench it has been held that by Act, l68 of 1976, not only there is no reversion to the old English concept but there is a forward march

towards liberalisation of the divorce on the ground of cruelty and even the statutory limitations have now been done away with. In ashwini Kumar Sehgal v. Smt. Swatantar Sehgal 1979 M LR 26 (Punj & Har) taking a view that Act, 68 of 1976, has simplified the concept of cruelty, the Punjab and Haryana High Court has aptly observed :--

"Cruelty in such cases has to be of the type which should satisfy the conscience of the court to believe that the relations between the parties had deteriorated to such an extent due to the conduct of one of the spouseees that it has become impossible for them to live together without mental agony torture or distress."

In Balbir Kaur Vs. Dhir Dass, it has been held that cruelty admits in its ambit and scope such acts that might even cause mental agony. Almost on the same lines is the view taken in Srikant Rangacharya Adya Vs. Anuradha, . In Sulekha Bairagi Vs. Prof. Kamala Kanta Bairagi and Another, Calcutta High Court has taken a view that the cruelty need not be of such a character as to cause danger to life, limb or health or to give a rise to and that it has to be of the type contemplated under S 10(1)(b). However, according to this High Court, Act, 68 of 1976 has made no change in the law as declared in Dastane''s case by the Supreme Court. For the reasons which need not be repeated we are not in agreement with the latter part of the view, In Raj Kumar Manocha v. Anskuka Manocha 1983 1 DMC 448 Punjab & Haryana High Court has followed in terms the view take in Madanlal Sharma''s case 1980 M LJ 391 , without giving any additional reasonings. In P. Vs. P. and Others, also decision in LPA No. 28 of 1980 has been followed in substance.

14. To conclude, in our view, the cruelty contemplated under S. 13(1)(i-a) of the Act neither attracts the old English doctrine of danger nor the statutory limits embodies in old S. 10(1)(b). the cruelty contemplated is a conduct of such type that the petitioner cannot reasonably the expected to live with the respondent, and, therefore, Madanlal''s case 1980 Mah LJ 391 does not lay down the law on the point correctly.

15. Reference answered accordingly. The Second Appeal be now placed before the single Judge for decision according to law. No order as to costs.

16. Answer accordingly.