

Bench: D.B.Bhosale, R Ganoo

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.68 OF 2005

Smt Nita alias Nathi .. Appellant Hitendrakumar Sakariya,

aged 24 years, Occ: Household,

Hindu Indian Inhabitant of

Rajasthan, residing at C/o

Kantilal Dhar-Parmar Sumerpur

Main Bazar, Near M.P.Traders,

Dist.Pali, Rajasthan-306902.

Vs

Shri Hitendrakumar Kaluram .. Respondent Sakariya,

aged about 26 years,

Occupation Business, Hindu,

Indian Inhabitant of Mumbai,

residing at 84, Militia

Apartment, Block No.4, 1 floor,

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Mhatar-Pakhadi Road,Mazgaon,

Mumbai-400010.

Mr Vishal Thakkar i/b M/s Kiran Jain & co, for the appellant. Mr V.D.Walawalkar i/b Sameer B Bhalekar, for the respondent. CORAM : D.B.BHOSALE AND R.Y.GANOO,JJ.

DATE : 12 /03/2010.

ORAL JUDGMENT : (Per D.B.BHOSALE,J.)

1. This Family Court Appeal under section 19 of the Family 2

Courts Act, 1984, is directed against the Judgment and order dated 30.3.2005 passed by the Principal Judge, Family Court, Mumbai. By this judgment, a petition, filed by the respondent- husband, being Petition No.A-942 of 1997, has been allowed and the marriage of the appellant-wife and the respondent has been dissolved by a decree of divorce on the ground of cruelty, under section 13 (1)(i-a) of the Hindu Marriage Act, 1955 (for short, "the Act"). While dissolving the marriage, the Family Court held that the appellant-wife is entitled to permanent custody of their son Aniket. The Family Court, however, has negated the appellant's claim of Stridhan and has directed the respondent to pay maintenance of Rs.2500/- per month each to the appellant and to their son Aniket.

2. The respondent has not challenged any part of the impugned Judgment, and, therefore, learned counsel for the parties have not addressed the court on the question of custody of Aniket.

3. The brief facts, which are relevant to dispose of this appeal, are recapitulated as under: The parties were married on 20.5.1994 at Sumerpur, Rajasthan according to Hindu Vedic Rites and Customs of the community. After the marriage, the 3

parties stayed at their native place for about a month and came to Mumbai and started residing in the joint family at Militia Apartment, Mazgaon, Mumbai. They cohabited for a period of about two years and on 29.6.1996 the appellant left the matrimonial home last and thereafter she did not return. During the period of two years, according to the respondent, there were several incidents causing cruelty to the respondent and making it impossible for him to live with the appellant. The respondent, therefore, filed petition for divorce on the ground of cruelty in May, 1997.

After the service of summons, the appellant filed a criminal case under section 498-A of IPC against the respondent and his family members some time in October, 1997 making very serious and wild allegations against the respondent and his family members. She alleged that there is a custom in the respondent's family to share each others wives with other male members in the family and that she was consistently and persistently told by the respondent and the female members in the family to have illicit relations with the brother and the brother in-law of the respondent. She also alleged that the brother of the respondent-Puranmal also outraged her modesty. In this case, all the accused were convicted by the learned 4

Magistrate vide his Judgment and order dated 1.12.2004. Against the order of conviction, the respondent filed appeal and in the appeal the respondent and his family members were acquitted vide Judgment and order dated 13.8.2008. A revision against the order of acquittal is pending. There is no dispute that in connection with this case the respondent and his family members were arrested and released on bail.

4. Before we proceeded to hear this appeal on merits, with a view to see if a settlement or reconciliation was possible, we interviewed the parties in chamber and found that reconciliation was not possible between them.

5. In order to examine and appreciate whether the behaviour of the appellant towards the respondent falls within the legal conception of cruelty, we refer to the recent Judgment of the Supreme Court in Suman Kapur Vs Sudhir Kapur, 2009 (1) SCC 422. In this case, the Supreme court, has observed that if it is mental cruelty, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the other spouse. Whether it caused reasonable apprehension that it will be harmful or injurious for him to live with the respondent ultimately is a 5

matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. (Also see Sbhabha Rani V Madhukar Reddi, (1998) SCC 105). In Dastane Vs Dastane, (1975) 2 SCC 326, the Supreme Court defined the expression "cruelty" as follows. "The enquiry has to be whether the conduct charged as cruelty is of such character as to cause in the mind of the petitioner, a reasonable

apprehension that it will be harmful or injurious for him to live with the respondent." Keeping this in view, we have heard the learned counsel for the parties at considerable length and with their assistance gone through the entire material including depositions of the witnesses examined by both the parties.

6. The respondent-husband, to prove his case, examined himself and his sister Rashmi Jain. On the other hand, the appellant examined herself and her father Kantilal Jain. The parties have also placed several documents on record including complaints lodged by the appellant against the respondent and his family members. We have perused the depositions of all the witnesses so also the documents to which our attention was drawn by the learned counsel for the parties.

7. According to the respondent, right from the beginning the 6

appellant was not willing to stay in the joint family and she started demanding separate residence. She told the respondent that their marriage was against her wish. Her attitude, conduct and behaviour towards him as well as his family members was rude, hostile and annoying. There is no dispute that after the marriage they came to Mumbai and started residing in the joint family house at Militia apartment. The family of the respondent was in jewelry business in partnership. The respondent has deposed that during quarrels the appellant used to assault him with a broom and tear his clothes. The respondent also made an attempt to commit suicide. On one occasion, the appellant tried to hurt him with a knife. This behaviour of the appellant, according to the respondent, was to pursue her demand of separate residence.

In August, 1994, the father of the appellant came to Mumbai and took the appellant to their native place at Sumerpur. Within 15 - 20 days, the respondent along with his sister Rashmi, her husband Pradeep and Pradeep's friend Laxman went to Sumerpur to bring the appellant back. According to the respondent, she was not inclined to come to Mumbai. With great persuasion she joined them and from there they went to Nakoda, the holy place of Jain and from Nakada to 7

Abu and then to Ambaji. From Ambaji they went to Sankeshwar and then came to Mumbai. During this journey from Sumerpur to Mumbai, at every place, the appellant made attempts to run away which forced them to call her brother requesting him to take her to Sumerpur. At Ambaji, according to the respondent, the appellant went to the extent of running away after locking the door from outside when she was in the company of his sister and their friend Laxman. At Abu she threatened the respondent and others that if they prevent her from going away she would create a scene by shouting that she was being raped. After they came to Mumbai in November, 1994, the respondent stated that she stayed with the respondent for 6-7 months and during this period she conceived. In the last week of July, 1995 the brother of the appellant came to Mumbai and took her to their native place for delivery. She delivered the son Aniket on 23.9.1995. A month after her delivery, the respondent's parents went to Sumerpur to bring her back to Mumbai. However, she did not come back to Mumbai with them. After she returned to Mumbai with her father the respondent's father made arrangement of their separate residence in the flat at Vaishali Apartment, Byculla. The said flat was standing in the name of the respondent's brother, who is a doctor. 8

In Vaishali Apartment, the respondent was living with the appellant and their son. There also, according to the respondent, the appellant used to quarrel on every minor issue. On 19.6.1995, there was a quarrel, when the appellant lodged false police complaint with Byculla police station against him. As a matter of fact, according to the respondent, the appellant torn his clothes and slapped him with footwear on that day. On 26.6.1996, the appellant in the morning was allegedly beating the child and when the respondent tried to intervene she assaulted him with footwear and broom. She also took a knife and when the respondent tried to hold her, it hurt him on his left hand. This incident forced the respondent to lodge complaint with the Byculla police station against the appellant. It appears that both were called at the police station and advised to live peacefully. Thereafter on 28.6.1996, a joint meeting was held at Vaishali Apartment, which was attended by the respondent, his father, brother, the appellant, his brother, father and their friends Jayantibhai, Jaichand, Uttam and the son of Jayantibhai. The outcome of the meeting was not happy and the appellant ultimately left

the matrimonial home on 29.6.1996 along with her father.

8. The respondent in his deposition made reference to 9

several criminal complaints lodged by the appellant against him and his family members including the case under section 498-A of IPC. In that case, search warrants were issued and accordingly search of their three houses, three shops was taken. The respondent has also made reference to the defamatory articles published in Marathi newspapers "Mohan Police Times" and "Hindu Version" (Exhibit-16 Colly) in which it was alleged that the appellant was forced to sleep with the respondent's brother, father and the brother-in-law. It was also mentioned in the articles that there is a custom in the respondent's family to share wives of each other by male members in the family and that the respondent's mother and sister-in-law also used to tell the appellant to sleep with the respondent's brother and the brother-in-law (for short "the alleged custom"). After these articles were published in the newspapers (Exhibit-16 'Colly'), the respondent issued a notice to these papers (Exhibit-17).

9. In the cross-examination, the respondent has stated that his parents used to sleep in the living room and the respondent and his brother used to sleep in two independent bed rooms. Insofar as the incidents that occurred at Abu and Ambaji are concerned, the case put to the respondent was replied by him stating that "it is true that at Ambaji the appellant ran away 10

after locking the door from outside". Then the respondent, to one of the questions, replied stating that NC complaints (Exhibits 18,19,20) on 30.6.96, 19.2.96, 30.5.96 and 19.6.96 were lodged by the appellant only against the respondent. It is pertinent to note that in these complaints the appellant did not whisper about the alleged custom in the family. From perusal of the cross-examination, we did not find any admission of the respondent or nothing could be drawn forth in the cross examination so as to either disbelieve or discard the examination-in-chief or any part thereof. As a matter of fact, no case was put to the respondent about certain instances/incidents quoted in his examination-in-chief.

10. The respondent's another witness Rashmi Jain has, by and large, supported the deposition of the respondent. She was one of the persons who accompanied the respondent to Abu, Ambaji, and Sankheshwar. She narrated in detail about the conduct of the appellant at these places. She deposed that at one point of time the appellant threatened that she would raise hue and cry stating that she was being raped. At this stage, we would like to make reference to the evidence of the appellant in respect of the incidents that occurred at Abu, Ambaji and Sankheshwar. She admits their visit to these places. According to her, at one point 11

of time, she was confined in a hotel room since she refused to succumb to the pressure to have sexual intercourse with her sister-in-law's husband. She further stated that when she was confined in the hotel room, the persons in the neighbouring rooms rescued her. She also deposed that during her stay at Abu the respondent disclosed her about the alleged custom in the family and was threatened that if she did not succumb to such demands she would have to face dire consequences. At Abu or at Ambala or at Sarkeshwar, admittedly, she did not lodge any complaint about the alleged illtreatment meted out to her by the respondent and others.

11. The appellant in her deposition has endeavoured to show that she was subjected to cruelty by the respondent and his family members and her emphasis was on the alleged custom in the family. According to the appellant, the respondent's brother Puranmal made attempt to outrage her modesty by gestures, by touching her private part and by forcibly kissing her. She also deposed that Puranmal, at one point of time, asked her to undress and allow him to have sexual intercourse with her. She further deposed that her sister-in-law Bhavna informed her about the alleged family custom. Though the appellant made such a wild and serious allegation against the respondent and 12

his family members, she has not given the details as to when these incidents occurred. From her evidence, it appears that this all happened before she went for her delivery in August, 1995. There she disclosed about the alleged family custom to her father. The father of the respondent has deposed that the appellant did inform him about the alleged custom and cruel treatment meted out to her. The father of the appellant, however, simply advised her to take the respondent in confidence and to tell him about the alleged demand of Puranmal. He claims that he also made attempts to persuade the appellant to desist from such treatment to the appellant but there was no positive response from the respondent. Apart from these allegations, she has also deposed in her examination-in-chief, to the incident of assault dated 19.6.1996. According to the appellant, on this day, she was again assaulted by the respondent and his family members merely because she stated about the intention of Puranmal to have illicit relation with her. In the cross, she reiterated that on 19.6.1996 she was assaulted and that she lodged complaint (Exhibit-20) with the Byculla police station. She, however, admitted that the complaint was lodged only against the respondent and there was no allegation of assault in the complaint. Further in reply to the 13

next question, she stated: "It is not true that I have stated falsely that Puranmal and other family members were intending to have illicit relations with me and, therefore, I was assaulted." Thus, she tried to link the alleged assault with the complaint at Exhibit-20. Further, she claims that she informed about the assault and illtreatment to her sister-in-law Bhavna when Bhavna allegedly asked her to concede to the said demand otherwise her life would become miserable. She thereafter stated that her in-laws stopped her food. We have perused the complaint dated 19.6.1996 (Exhibit-20). This complaint was made only against the respondent and there was nothing in the complaint either about the alleged family custom or the assault or to the demand to have illicit relations with other male members. The complaint speaks about a telephone call received by the appellant, and when the respondent inquired as to whose telephone it was, there was quarrel between the two. We have also perused the other complaints lodged on 19.2.1996 and 30.5.1996 (Exhibits 18 and 19). These complaints were also against the respondent only and there was no allegation about the alleged family custom.

12. When the appellant returned to Mumbai after her delivery, she along with the respondent and their child started 14

residing separately at Vaishali Apartment. Even thereafter, she has stated that the family members of the respondent continued to exert pressure upon her to have illicit relations with other male members in the family. She has also deposed to the incident dated 19.2.1996. It would be relevant to reproduce the relevant portion of her examination-in-chief (paragraph 18) which reads thus:

"I say that on 19.2.1996 I refused to cater to petitioner's brother viz. Puranmal's lust. I lodged a complaint with the Byculla Police Station which is N.C. Complaint bearing N.C.No.417/96. After lodging of the said complaint, the said Puranmal tried to push me from the 2nd floor, because I refused to listen. I was also beaten. I told that I would prefer to die rather than have illicit relations. I say that the said Puranmal on hearing about me rather to die than have illicit relations, told and exhorted that he was the only male in the world who can help me to conceive a child and rest all are impotent. He also told me that what difference it makes if he touches my body."

The N.C complaint referred to in the aforesaid paragraph of the examination-in-chief is at Exhibit-18. We have perused this complaint. It is against the respondent only. It states that there was quarrel between the two when the respondent allegedly abused and assaulted her with fist blows. She has not named Puranmal in this complaint.

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13. The appellant in her deposition, at two different places, has given different explanation as to why in the police complaints (Exhibits-18, 19 and 20) she did not state anything against Puranmal or about the alleged family custom. Firstly, she stated that she wanted to save the family image, and secondly, she stated that

because Puranmal had threatened to kill her brother. The appellant has further deposed that even thereafter she made various complaints on 7.8.1997, (two complaints), 24.9.1997 and 27.9.1997 (two complaints) against the respondent. Originals of these complaints, according to the appellant, were produced in 498-A case, being C.C.No.433/P of 2002 and photocopies thereof have been placed on record in these proceedings. None of the complaints, namely, the complaints at Exhibits 18,19,20 or the complaints dated 7.8.1997, 24.1.1997 and 27.9.1997 makes any reference to the alleged custom in the family. Considering to the number of complaints, she lodged against the respondent and his family members, and even her subsequent conduct in making the complaint under section 498-A of IPC and making such a wild and serious allegations against the respondent and his family members, her explanation for not stating anything about the alleged family custom deserves to be rejected outright. 16

It is true, the appellant in her cross examination denied that she filed false criminal cases against the respondent and his family members only because the respondent filed the present petition for divorce. She further denied that she filed the criminal case only to harass the respondent and his entire family. A specific case was put to the appellant in the cross- examination that "she filed false cases against the respondent and his family members only with a view to harass them mentally and to spoil their image and reputation in the society." This was also denied by the appellant. She further denied that the respondent lost his father only because of the false and dirty allegations made against him. Merely because she denied the suggestions made and/or did not admit the case put to her, does not mean that her allegations stand proved, as tried to be canvassed by Mr.Thakkar, learned counsel for the respondent. As is seen from the evidence referred to in the foregoing paragraphs, the allegations about the family custom and the allegations against Puranmal, it is clear that they were made for the first time after the respondent filed the present petition for divorce against her and after the summons in this case was served on her. While she was staying with the respondent and his family members, she filed several complaints against them and in none of those complaints she made any such allegation 17

against his family members. She had ample opportunities to lodge complaint at every stage. Even after she left matrimonial home last in June 1996, she took almost one and half year to make these allegations against the respondent and his family members. Having regard to the totality of the evidence and the circumstances established thereby, we are of the view that the appellant has miserably failed to substantiate these nasty allegations against the respondent and his family. We are satisfied that the allegations against the respondent, Puranmal and other members of the family at various places and from stage to stage made by the appellant are absolutely baseless, irresponsible, wanton and scandalous and they were made for the reasons best known to the appellant.

14. Mr.Thakkar, learned counsel for the appellant, vehemently submitted that the respondent is not entitled for a decree of divorce on the basis of the allegations made by the appellant in her written statement and that the Family Court was wrong in taking those allegations into consideration for allowing the petition of the respondent. He submitted that the respondent failed to amend his pleadings raising a plea that he suffered cruelty in view of the appellant's allegations in her written Statement or for that matter in her complaint under section 18

498-A of IPC and in the articles published in the newspapers. He then submitted that the respondent has miserably failed to prove the ground of cruelty for seeking divorce. He submitted that after the appellant filed her written statement bringing on record the alleged custom in the family, the respondent ought to have amended his petition to contend that the said allegations amount to cruelty. He submitted that merely because there are allegations made by the appellant in her written statement, a decree of divorce cannot follow unless the spouse seeking divorce amends his pleadings and incorporates that as a ground for constituting cruelty. In support of this contention, he placed reliance upon the judgment of the Supreme Court in Pushpavathi @ Lalitha Vs Manickasamy, 2001 (4) Supreme 581.

15. In Pushpavathi @ Lalitha's case, the Supreme Court was dealing with the appeal filed by the wife challenging the orders passed by the courts below. The petition filed by the husband on the ground of cruelty and desertion was ultimately dismissed. While dismissing the petition, in paragraph 5, it was held thus: "5. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts 19

and circumstances of that case. If it is a case of accusations and allegations regard must also be had to the context in which they were made, V.Bhagat v. D.Bhagat (Mrs.). In the present case the husband has not even taken a ground in the memo of

appeal that the averments made by the wife

constituted mental cruelty. Each and every

allegation made against husband by the wife in the written statement defending a petition for divorce filed against her cannot constitute mental cruelty. The decision in V.Bhagat's case referred by the High Court in reversing the judgment and decree of the first Appellate Court has no relevance in the present case for coming to the conclusion that the

allegations made by wife in the written statement constitute mental cruelty. The Court had cautioned in that case that unusual step of granting the divorce was being taken only to clear up the insoluble mess when the Court finds it in the interests of both the parties. The Court also opined that merely because there are allegations and counter-allegations, a decree of divorce cannot follow nor can it follow merely on account of delay in disposal of divorce proceedings. The parties have not lived together as husband-wife for last number of years by itself cannot be a ground for annulling a marriage by granting decree of divorce in absence of the existence of one or the other ground permissible under the Hindu Marriage Act, 1955. It is clear that in this case the marriage has been dissolved and decree of divorce passed by the High Court on the facts on which it was not even sought by the respondent-husband."

(emphasis supplied)

16. In the case before the Supreme Court, it appears that the husband's petition was initially decreed and the decree was reversed by the District Judge. Against the judgment of the District Judge, the Second Appeal filed by the husband was 20

allowed by the High Court and that judgment was set aside by the Supreme Court in the appeal and the order passed by the first appellate court setting aside the decree of divorce was confirmed. It is against this backdrop, the Supreme Court has observed that no plea was made either "in the plaint or in the Memo of Appeal" before the High Court that any allegations made by the wife in the written statement constitute mental cruelty.

17. It is now well settled that the expression "treating the other party with cruelty" in section 13(1)(i-a) of the Act, is wide enough to cover a cruel treatment even subsequent to the filing of the petition by making wild and serious allegations in the written statement which, according to the spouse against whom they are made, are false, baseless, wanton and scandalous, and a decree could be passed based on such allegations. The question is whether such allegations could be relied upon to claim a decree of divorce on the ground of cruelty without amending the petition and contending that those allegations constitute cruelty.

18. In the present case, it is true that no amendment to the pleadings was sought by the respondent after the wild 21

allegations were brought on record by the appellant in the written statement to contend that those allegations constitute mental cruelty. But it cannot be overlooked that the respondent had no occasion to raise this plea in appeal since he had no reason to file appeal against the impugned judgment. That apart, it is pertinent to note that the appellant in her deposition has repeated these allegations against the respondent so also cross examined the respondent and his witnesses in respect of these allegations. On the other hand, the respondent while cross examining the appellant and her witness, challenged and denied the allegations about the family custom and put a specific case to the respondent that the criminal complaints and the allegations made by the appellant in the written statement caused harassment to him and his family members and that spoiled their reputation in the society and as a result of the allegations he lost his father. Thus, it cannot be said that it was not the respondent's case that the allegations in the written statement did not cause cruelty and harassment to him and his family members. We are of the opinion that the amendment of the pleadings in such a situation was not necessary and in the absence thereof the respondent-husband can rely upon the allegations made in the written statement to contend that he and his family members were subjected to cruelty and/or those 22

allegations constitute mental cruelty. The judgment of the Supreme Court in Pushpawati Latila's case, in our opinion, is of no avail to the appellant in view of the peculiar facts and circumstances of the case in hand.

19. This Court in Manisha Sandeep Gade Vs Sandeep Vinayak Gade, 2005 (1) Bom.C.R. 554, while dealing with the question whether the Family Court was right in granting divorce merely on the basis of the allegations made by the appellant- wife in her written statement, after referring to the Judgment of the Supreme Court in V Bhagat V D Bhagat, 1994(1) SCC 337, which was also referred by the Supreme court in Pushpavathi @ Lalitha's case, observed that "where serious allegations are made in pleadings, the consequent irretrievable break down of the marriage (though not a ground by itself) will be a very important circumstance to be considered while deciding whether divorce should be granted or not. Once such serious allegations are made, it becomes clear that there is no chance of parties coming together or living together again. Making of the allegations and yet opposing divorce would mean a resolve to live in agony only to make the life miserable for both the parties." The Division Bench further made reference to the following observations made by this court in Jaishree Mohan 23

Otavenkar V. Mohan G.Otavenkar 1987 Mh.L.J.160 : "the fact that the respondent-husband had made the allegations in his written statement is an admitted fact. Hence, it is not as if the amendment of the petition is an absolute imperative. It was not considered to be very much imperative to incorporate the same in the petition by way of amendment. All that the court was required to see was as to whether the mental torture or cruelty had resulted to the other spouse due to such wanton allegations or not". After referring to these observations so also to some other judgments, the Division Bench further observed that "the moment such serious allegations are made in the written statement, it becomes clear that there is an irretrievable break down of the marriage". The Division Bench further observed that "when one party to the petition has sought divorce on some ground and the respondent to that petition does not merely defend it to get it defeated, but makes further serious allegations against the petitioner, it becomes a clear step towards the dissolution of the marriage." The Division Bench further held that burden to prove allegations in the written statement was on the wife. Once she failed to prove them, and if they are not in consonance with matrimonial relationship, and the husband complained that they have caused him agony, inference that they constitute cruelty has to follow. 24

20. In the present case, the petitioner has approached the court seeking dissolution of his marriage. It is his case that there is a failure of marriage and he seeks to point it out by invoking a ground available under the law. The respondent, in order to oppose the prayer for divorce, made a counter allegation in the written statement which, in our opinion, clearly show a failure of the marriage. Parties have led their evidence on the allegations made by them in their pleadings. Insofar as the allegations made by the appellant in her written statement are concerned, at no point of time before filing the complaint under section 498-A, were made against the respondent or his family members. The appellant started making such allegations only after the respondent filed the petition for divorce on the ground of cruelty. If these allegations were true, neither the



appellant nor her father would have kept quite for such a long time. The learned Judge was right in coming to the conclusion that these allegations were baseless and false. He was, therefore, right in granting the decree of divorce on the ground of cruelty.

21. Even if it is assumed that the allegations made by the appellant in her written statement cannot be relied upon to hold 25

that they constitute cruelty, in our opinion, the allegations made by the respondents in the petition and in his evidence are also sufficient to hold that the ground of cruelty has been proved. The conduct of the appellant clearly shows that she had made the life of the respondent and his family members miserable. The manner in which she used to lodge criminal complaints one after another against the respondent undoubtedly would constitute mental cruelty. We are satisfied that there is no chance of their coming together and living together again and, therefore, their marriage has been rightly dissolved by the trial court under section 13(1)(i-a) of the Hindu Marriage Act.

22. That takes us to consider the issue of Stridhan and the maintenance. The word "Stridhan" includes gifts made to the wife at the time of marriage by her parents, brother, in-laws, husband etc. She is absolute owner of her Stridhan property and she can deal with it in any manner she likes. In the event of divorce or desertion, she is entitled for her Stridhan and her claim in respect thereof, if proved, must be allowed and necessary directions to return the same must be issued by the courts. In the present case, there is no dispute that the certain ornaments were gifted to the appellant by her parents in the 26

marriage, as stated by her in her written statement and in her evidence. The respondent has also deposed that some ornaments were gifted by him at the time of marriage to the appellant. The appellant in her written statement and in her evidence, however, has made reference only to the ornaments/gifts made by her parents as Stridhan. There are six articles, mentioned in paragraph 11(O) of the written statement and in paragraph 23 of her deposition, as Stridhan. She has not claimed ornaments/gifts made by the respondent in the marriage as Stridhan.

According to the respondent, all the ornaments were taken away by her while leaving the house. As against this, the appellant in her examination in chief has deposed that when she left the house the respondent and his relatives removed her all ornaments and refused to return them. This all happened when she last left the matrimonial home in June, 1996. Since then till the complaint under section 498A was filed by her in October, 1997 and/or till she filed the written statement in the present case on 23.6.1998 she did not complain to the police about the alleged removal of her ornaments. The appellant, who had approached police on several occasions, would have definitely approached the police either immediately or atleast within a 27

reasonable time and lodged complaint against the respondent and his family members for snatching her all ornaments. It has come in evidence that when she left the house, she left it with her father who was accompanied by his four friends, still no complaint regarding the alleged removal of ornaments was made and she kept quite for almost one and half year. Moreover, though the appellant has deposed that her ornaments were removed by the respondent and his family members, the father of the appellant who was also present with the appellant at that time, has not stated in his deposition about the alleged removal of ornaments. The appellant could have examined an independent witness, viz one of the friends of her father who was present at the relevant time. In our opinion, the appellant has miserably failed to prove that she was not allowed to take away her Stridhan while leaving the house and it is still with the respondent and his family members. Learned counsel for the appellant took us through the relevant portion of the evidence in support of the appellant's claim regarding Stridhan. However, we are satisfied that there is no evidence on record to hold that the appellant's stridhan was retained by the respondent when she left the matrimonial home last.

23. Insofar as maintenance is concerned, the respondent has 28

deposed that their joint family is having a shop of gold jewelery and he was partner in the jewelery business of the family. He has also stated that he was having 55% share in the said business but the said shop was closed in 1998 and since then he has been doing repairing work of jewelery from his residence. His income before the shop was closed was Rs.30,000/- per annum and thereafter he started earning 3000-4000 rupees per month by doing repairing work of jewelery. He has stated that he is not in a position to pay the maintenance, as prayed by the appellant. In the cross-examination, he has admitted that there was raid on their shop in December, 1996 and that the case filed by the Income Tax department is pending in the Esplanade Court. He has also admitted that he was called upon to pay Rs. seventy five lacs by way of income-tax, which he could not pay and the case is still pending. He has further stated that because of the raid, he had to close his shop. The raid was against him and his partner Dinesh Singhvi. He has admitted in the cross that in the raid 4.1/2kgs gold was found in the shop and the gold is now in the custody of the Income-tax department. He has further explained that he had taken gold from 10-12 persons from the market and that he gave names of those persons to the Income tax department.

Further in the cross-examination, he has admitted that the 29

shop by name Nakoda jewellers is standing in his name. This is the same shop which, he was required to close in 1998. He has further admitted that the second shop, by name Sakaria Jewellers, is of his brothers Ramesh and Puranmal. There is yet another shop Amirchand Beharaji, which, according to the appellant, is of his father. He has further admitted that his brother Puranmal has started a new shop, by name Rajendra Jewellers and Mart at Kalbadevi. It is thus clear that except the shop by name Nakoda Jewellers there is no other shop standing in the name of the respondent. The respondent was also asked about other properties standing in the name of different members in the family and their income also. However, that information, in our opinion, would not help the appellant in any manner for seeking enhancement of maintenance from the respondent.

The appellant, in her deposition, has stated that initially by the judgment and order dated 15.3.1999 the respondent was directed to pay Rs.1500/- pm to herself and Rs.1200/- to her son Aniket. On 20.5.2003, she filed an application for enhancement of maintenance pending the hearing and final disposal of the petition and sought maintenance of Rs.15000/- each for herself and her son. Over and above this, the appellant has not stated 30

anything further in her affidavit of evidence on the issue of maintenance. She has not produced any evidence in support of her claim of maintenance of Rs.15,000/- each for herself and her son. In the cross-examination, she denied the case put to her that the enhanced maintenance claimed by her, is exorbitant and that the respondent has no capacity to pay the same. Over and above this, there is no evidence on record about the income of the respondent. It is thus clear that the income of the respondent as per the evidence on record is certainly not sufficient enough to enhance the maintenance, as prayed by the appellant. The evidence shows that after the raid in 1998 the respondent stopped filing Income Tax returns. The appellant has not stated about any other source of income of the respondent. Mr Walawalkar, learned counsel for the respondent, however, submitted that the appellant is prepared to pay little more than what has been awarded by the Family Court and he left that to the court. Keeping that in view and having considered the background of the family from which the respondent comes from and looking to their family business so also his income in 1994, as stated by him, in his examination-in- chief, we deem it appropriate to direct the respondent to pay Rs. 5000/- each to the appellant and her son Aniket from the date of this order. This shall not preclude the appellant, if so advised, 31

from seeking enhancement of the maintenance amount in accordance with law.

24. In the result, the appeal is partly allowed. The decree of divorce on the ground of cruelty is confirmed. The appellant's claim of stridhan is rejected. The respondent shall pay Rs.5000/- each to the appellant and her son Aniket from the date of this order.

There shall be no order as to costs. Decree be drawn accordingly.

At this stage, learned counsel for the appellant-wife prays for stay of the judgment for a period of eight weeks from today. Learned counsel for the respondent-husband has not opposed the prayer. Instead of granting a stay, as prayed, we are inclined to injunct the respondent-husband from remarrying for a period of eight weeks from today. Order accordingly.

(R.Y.GANOO,J.) (D.B.BHOSALE,J.)