

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE
SHRI JUSTICE SUJOY PAUL
&
SHRI JUSTICE PRAKASH CHANDRA GUPTA
FIRST APPEAL NO.445 OF 2020

BETWEEN :-

LEE ANNE ELTON D/O DOUGLAS
ELTON, 11 MARTIN CRESCENT
SAINT JOHNS, NEWFOUNDLAND,
CANADA AND FLAT NO.102, FIRST
FLOOR, ASHMITA, 15 V ROAD,
KHAR, WEST MUMBAI- 400052.

....APPELLANT

*(BY SHRI ADITYA SANGHI WITH MS. NAIN JYOTI NORIYA,
ADVOCATE)*

AND

ARUNODAY SINGH S/O SHRI AJAY
SINGH, R/O C-19, SHIVAJI NAGAR,
BHOPAL (M.P.)-462016.

....RESPONDENT

*(BY SHRI KISHORE SHRIVASTAVA, SENIOR ADVOCATE WITH
SHRI RASHID SUHAIL SIDDIQUI AND MS. ADITI SHRIVASTAVA
OBEROY)*

Reserved on : 07/7/2022

Delivered on : 09/7/2022

*This First Appeal coming on for hearing this day, JUSTICE
SUJOY PAUL, passed the following :*

J U D G M E N T

This is an appeal filed under Section 39 of the **Special Marriage Act, 1954** (herein after referred as '**Act of 1954**') r/w Section 19 of the **Family Courts Act, 1984** against the judgment and decree dated 18/12/2019 passed by the Family Court, Bhopal in Regular Civil Suit No.89-A/2019 (Arunoday Singh vs. Lee Anne Elton).

2. Draped in brevity, the facts are that the appellant, a citizen of Canada met with respondent in the winters of 2012 in a Retreat in Goa. The appellant was working as Manager and Instructor in Ayurvedik Spa and Detox Centre at Goa. The appellant and respondent started dating from August 2013. In 2013, the respondent introduced the appellant to his family members as his girlfriend. In April 2016, the respondent visited Canada and met with the family members of the appellant. Both of them after meeting the family members decided to bind themselves in a wedlock. The respondent provided Rs.5,00,000/- to appellant for running a cafe. The cafe business suffered huge loss. Despite that both of them solemnized marriage at Bhopal on 13/12/2016 under the provisions of Act of 1954. The Additional District Magistrate & Marriage Officer registered the said marriage.

3. Soon after the marriage, as per the stand of respondent, there were series of incidents which shows cruelty on the part of the appellant. In view of serious matrimonial discord, desertion and cruelty, the respondent filed Regular Civil Suit No.89-A/2019 before the Family Court, Bhopal. The Family Court put the other side to notice and decided the matter in favour of the respondent. Aggrieved, this appeal is filed.

4. Shri Aditya Sanghi, learned counsel for the appellant submits that the said suit was filed in the Family Court on 10/05/2019 and was decided on 18/12/2019. The extraordinary speed with which Family Court proceeded and decided the matter is unheard of and unusual. This itself shows that sufficient opportunity has not been granted to the appellant to contest the matter.

5. Learned counsel for the appellant by taking this Court to the order sheets of Family Court submits that although notice of the case was served on the appellant, she could not engage a lawyer and in this backdrop, the Court below should have waited for a reasonable period to enable the appellant to engage a lawyer. He also criticized the order of the Court below whereby Court below proceeded *ex-parte* against the appellant.

6. **AIR 2013 SCC 2239 (United Engineers and Contractors vs. Secretary to Government of Andhra Pradesh and others)** is relied upon to contend that appellate Court is obliged to independently assess the evidence and reach to its own conclusion. The appellant's multiple embryo are kept in a hospital in Bombay. The appellant is still interested to continue with the marriage. The Family Court has considered her certain e-mails and on the strength of that reached to an erroneous conclusion. The respondent did not produce few e-mails sent by the appellant to him. Extract of such e-mails are filed along with written submissions. Thus, the impugned judgment is liable to be interfered with.

7. Representing the husband, Shri Kishore Shrivastava, learned Senior Advocate submits that the Court below granted sufficient opportunity to the appellant to defend herself. He also placed reliance on the order sheets of Court below. It is urged that the notices were duly

served on the appellant. Her e-mails show that she was not interested to continue with the marriage. She made a request to adjourn the proceedings on the pretext that she is filing a petition before the Supreme Court for transferring the matter from Madhya Pradesh.

8. It is argued that a petition was indeed filed by the appellant in the Supreme Court Transfer Petition(s) (Civil) No(s) 2109/2019 which was entertained on 03/09/2019 for limited purpose of sending the parties for mediation. It is submitted that the matter was fixed before the Supreme Court Mediation Centre on 14/10/2019 but appellant did not appear before the Mediation Centre. This conduct of appellant clearly shows that she was only buying time.

9. The Supreme Court on 24/02/2020 dismissed the above Transfer Petition filed by the appellant as infructuous.

10. Shri Kishore Shrivastava, learned Senior Advocate placed reliance on Section 40(B) of **Act of 1954** and urged that as per the statutory mandate flowing from this provision, the Court below rightly proceeded with the matter and merely because matter was decided within short time, no fault can be found in the impugned judgment.

11. The next limb of argument is that in view of Section 39 of Act of 1954 read with Section 96 of Code of Civil Procedure (CPC), in this appeal, the appellant cannot be permitted to raise the argument that the Court below has committed an error in proceeding *ex-parte* without there being any sufficient cause. The said argument could have been subject matter of an application filed under Order 9 Rule 13 of CPC, but by no stretch of imagination, it can become a ground of attack in a regular first appeal. To bolster the submission, reliance is placed on a Division Bench

judgment of this Court reported in **1966 MPLJ 11 507 (Ramlal Chourasia and others Vs. Rewa Coal Field Ltd. Calcutta)** and judgment of Supreme Court reported in **(2005) 1 SCC 787 (Bhanu Kumar Jain Vs. Archana Kumar And Another)**.

12. Supporting the impugned judgment on merits, learned senior counsel placed reliance on certain paragraphs of divorce petition and urged that a specific and clear case of cruelty and desertion was made out by the respondent. As per Order 8 Rule 5 of CPC, in absence of any written statement, the averments must be treated to be admitted. Yet as per Clause- 2 of Rule 5 of Order 8 of CPC, it was Court's discretion to direct the plaintiff/respondent to substantiate its case by leading evidence. The plaintiff led evidence and substantiated its case. A division Bench judgment of this court reported in **AIR 1978 MP 39 (Mathew Elenjical and Another Vs. Nagpur Roman Catholic Diocesan Corporation (P) Ltd.)** was relied upon to submit that in a matrimonial matter this Court came to hold that non-rebuttal by filing written statement may amount to admission of pleadings.

13. It is further argued by respondent that although appellant failed to file written statement at the initial stage of proceedings before the Court below, could have very well participated at the stage of evidence to demolish the case of the appellant on merits. Learned Sr. counsel has taken pains to read various paragraphs of plaint averments and relied various documentary evidences supported by certificates under Section 65(B) of Indian Evidence Act. **(2007) 4 SCC 511 (Samar Ghosh Vs. Jaya Ghosh)**, **(2016) 9 SCC 455 (Narendra VS. K. Meena)**, **(2017) 9 SCC 632 (Sukhendu Das Vs. Rita Mukherjee)** were referred to contend that the law was summarized in these judgments and broad parameters

are laid down to determine the aspect of 'cruelty'. The present case is squarely covered by such parameters and 'cruelty' on the part of appellant was duly established.

14. Shri Aditya Sanghi, learned counsel for the appellant in his rejoinder submissions submits that although this Court in this appellate proceedings cannot look into the e-mails reproduced in the written submissions/synopsis for the first time, it is too apt to go through the said e-mails which were sent by the appellant to the husband but husband selectively filed certain e-mails in the Court and did not produce these e-mails. He strenuously contended that the appellant still wants to spend a happy married life with the respondent. The so called cruelty is based on a dog fight between the dog of appellant and respondent which resulted into some injury to the appellant's dog because of which respondent had to take assistance of a doctor to kill his dog. The said incident, by no stretch of imagination can be said to be a 'cruelty' on the part of the appellant.

15. Learned counsel for the parties confined their arguments to the extent indicated above.

16. We have heard learned counsel for the parties at length and perused the record.

17. The appellant has raised eye-brows on the speed with which the family Court has decided the matter. In the teeth of Section 40-B of the Act of 1954, the proceedings cannot be jettisoned merely because it were conducted with quite promptitude. Relevant portion of Section 40-B of the Act of 1954 reads as under:-

“40B. Special provisions relating to trial and disposal of petitions under the Act.— (1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day, until its conclusions, unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

(Emphasis Supplied)

18. The legislative mandate ingrained in this provision makes it obligatory to conduct the proceeding on day-to-day basis until its conclusion. The Court below, infact has not proceeded with that speed and ensured that the appellant/defendant had received notices, got sufficient opportunity to participate in conciliation proceedings and in the Court proceedings. Sub-section 2 of Section 40-B puts an obligation to the family Court to make endeavour to decide the trial within six months. Thus, on this account no fault can be found in the proceedings of the Court below.

19. The legislative intent in inserting Section 40-B is to ensure that the trial and appellate proceedings arising out of Special Marriage Act are decided within a time frame. Sub-section 3 of Section 40-B makes it obligatory for the appellate Court to make endeavour to conclude the

hearing within three months from the date of service of notice of appeal on the respondent. Thus, speed and acceleration of proceeding is requirement of the enactment. The only aspect which needs to be taken care of is service of notice to the other side and adjournments which are necessary in the interest of justice.

20. Indisputably, the appellant/defendant received notices issued by the court below. The order sheet of court below dated 2.8.2019 clearly shows that the notices were served on the appellant/defendant. She made a request through e-mail that she is thinking to get the matter transferred from the Family Court, Bhopal and for this purpose, she prayed for further time. On 16.8.2019 and 20.8.2019, the court below recorded that the appellant/defendant prayed for time on the ground that she has filed a case before Supreme Court seeking transfer of the matter from the Family Court, Bhopal and till decision of Supreme Court, the matter before the Family Court, Bhopal be kept in abeyance.

21. The order of the Court below dated 20.8.2019 shows that the Court below took a plausible view, adjourned the proceeding for 6.9.2019 and in the meantime directed the appellant/defendant to produce the order of Supreme Court so that adequate decision can be taken, else the defendant should remain present for conciliation.

22. On 6.9.2019, the appellant/defendant remained absent. The family court after going through the website of the Supreme Court recorded that the Supreme Court did not grant any stay to the appellant. Indeed, the Supreme Court directed the parties to remain present before the Supreme Court Mediation Centre on 14.10.2019. In this view of the matter, the

court below proceeded *ex-parte* against the respondent. As noticed above, the appellant did not appear before the Mediation Centre of the Supreme Court and thereafter the Supreme Court by order dated 24/02/2020 dismissed her Transfer Petition.

23. The Division Bench of this Court in **Ramlal Chaurasia and others Vs. Rewa Coal Fields Ltd., Calcutta** reported in **1966 M.P.L.J. 11, 507** opined as under :-

‘7. In our opinion, it is open to a defendant, who had filed an appeal against an *ex parte* decree under section 96 (2) of the Code, to show from the record as it stands that there is, in the order proceeding *ex parte* against him, any error, defect or irregularity which has affected the decision of the case. If he succeeds in so doing, the *ex parte* decree will be set aside and the case will be remitted for retrial. But, in the appeal against the *ex parte* decree he cannot be allowed to show that he was prevented by any sufficient cause from appearing at the hearing. For that purpose, he must have recourse to the special procedure under Order 9, rule 13 of the Code for setting aside the said decree.’

(Emphasis Supplied)

24. The Supreme Court in **Bhanu Kumar Jain Vs. Archana Kumar and another** reported in **(2005) 1 SCC 787**, poignantly held as under :-

“38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for *ex parte* hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend

that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr Chaudhari that the “Explanation” appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in *Rani Choudhury* [(1982) 2 SCC 596] , *P. Kiran Kumar* [(2002) 5 SCC 161] and *Shyam Sundar Sarma v. Pannalal Jaiswal* [(2005) 1 SCC 436 : (2004) 9 Scale 270].”

(Emphasis Supplied)

25. As per *ratio* of this judgment, we find substance in the argument of learned Senior Counsel for the respondent that in this regular first appeal which is analogous to a first appeal under Section 96 (2) of CPC, it is not open to the appellant to argue that the family court has committed an error in proceeding *ex parte*. The appellant can only attack the findings given on merits or on the aspect of jurisdiction of Court below as per the material available on record. For this reason, even otherwise, the order of proceeding *ex parte* by the Court below cannot be a subject matter of judicial review in this appeal.

26. Our attention was drawn on the plaint averments and the evidence led by the respondent/plaintiff. We are unable to hold that such unrebutted pleadings and evidence do not constitute ‘cruelty’. The Apex Court laid down broad principles regarding ‘cruelty’. In **Samar Ghosh (supra)** the Apex Court held as under:-

“101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases

of “mental cruelty”. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive : -

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of

marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.’

(Emphasis Supplied)

These broad parameters were reiterated in **(2016) 9 SCC 455 (Narendra Vs. K. Meena)**.

27. The Court below in the impugned judgment reproduced the e-mails sent by the appellant/defendant. The relevant portions read as under :-

“Hey,

You had mentioned on the 19th of may that you had filed a divorce petition in the Bhopal Court. I have yet to receive a summons from the court so I am wondering what’s going on.

Has it been withdrawn now that we’ve agreed to mutual consent divorce or is the date still going ahead?

Let me know what’s going on.”

“After speaking with the police this morning and having heard what you had to say, I’ve decided that I’am no longer interested in trying to fix our marriage or interested in you. I’ve already advised my lawyer of same. Let’s meet before you head back to Bhopal to discuss the logistics of finishing this. I’ve done all I can to save our marriage. My Karma is clear.

If you’re uncomfortable with meeting me, just have your lawyer send my lawyer a detailed outline of what you’re proposing for settlement, so we can start negotiation the terms of dissolving this marriage.’

(Emphasis Supplied)

28. The e-mail (Ex.P/15) shows that the appellant was aware of filing of divorce petition by the respondent in Bhopal Court. The only intention

shown by her was to go for a mutual consent divorce. Another email (Ex.P/16), in no uncertain terms, makes it clear that the appellant was not interested to continue with marriage. She in clear terms stated that she is neither interested in marriage nor in her husband and intends to dissolve the marriage. The only question was relating to deciding modalities/logistics of the same. Thus, by no stretch of imagination, it can be said that divorce claim came to her as a bolt from blue. The appellant/defendant was fully aware about of nature of litigation filed against her. She was also aware about the averments of such divorce suit. She had an opportunity to send a W.S. also through email. Email, (Ex.P-16), further shows that she was in contact with a lawyer. In this backdrop, it cannot be said that she could not contest the matter in an effective manner for want of opportunity before the Family Court, Bhopal.

29. During the course of hearing, Shri Kishore Shrivastava, learned Senior counsel also placed reliance on **(2017) 9 SCC 632, (Sukhendu Das Vs. Rita Mukherjee)**. Para-7 of this judgment reads as under:-

‘7. The respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of notice, the respondent did not show any interest to appear in this Court also. This conduct of the respondent by itself would indicate that she is not interested in living with the appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty (Samar Ghosh v. Jaya Ghosh [Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, p. 547, para 101(xiv)]).’

(Emphasis Supplied)

30. In the instant case also, the appellant did not file written statement before the Family Court and even did not participate in the mediation proceeding before the Supreme Court Mediation Centre despite the fact that said mediation was directed in a petition filed by appellant herself. Shri Shrivastava, learned Senior Counsel urged that the respondent/plaintiff in obedience of Supreme Court's direction appeared in the mediation proceeding on 14.10.2019. Pertinently, Shri Sanghi did not dispute the same.

31. The Court below in the impugned judgment considered the e-mails sent by the appellant and also considered the un rebutted plaint averments and the evidence led by the respondent/plaintiff in sufficient details. We have gone through the pleadings, evidence and the findings of court below. In our considered opinion, the court below has appreciated the evidence on correct and permissible parameters and rightly came to hold that the respondent/plaintiff could make out a strong case of 'cruelty' on the part of appellant. We do not find any perversity in the said finding.

32. It is noteworthy that learned counsel for appellant did not assail the findings of Court below regarding 'cruelty' on merits beyond a point. His main plank of attack was on the speed with which Court below decided the matter and on the order whereby the Court below proceeded *ex-parte*. At the cost of repetition, in this first appeal, the aforesaid aspect relating to *ex-parte* proceedings cannot be gone into.

33. The un rebutted pleadings and evidence led before Court below by respondent/plaintiff could establish a strong case of 'cruelty' on the part of the wife. As per the broad parameters laid down by the Supreme Court in the case of **Samar Ghosh (supra)**.

34. Shri Aditya Sanghi, learned counsel for the appellant touched the merits of the matter only to the extent he referred about attack on the dog of appellant by the dog of respondent. The said incident is a small incident in the series of incidents cited by the plaintiff in order to establish 'cruelty' on the part of the appellant. No iota of argument was advanced in relation to those pleadings and evidence which deals with the merits of the case. In absence thereof, no useful purpose would be served in reproducing the entire pleadings and evidence at appellate stage.

35. In view of foregoing analysis, the interference is declined. The appeal is **dismissed**. No cost.

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE