

(1995) 06 BOM CK 0006
In the Bombay High Court
Case No : Family Court Appeal No. 46 of 1993

Arlene Uday Heble

APPELLANT

Vs

Uday Laxman Heble

RESPONDENT

Date of Decision : 15-06-1995

Acts Referred:

Foreign Marriage Act, 1969 — Section 15
Special Marriage Act, 1954 — Section 27(1)

Citation : (1995) 4 BomCR 219

Hon'ble Judges : P.S. Patankar, J;A.V. Savant, J

Bench : Division Bench

Advocate : A.G. Pawar, for the Appellant; P.M. Bhatt, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Savant, J.—This is an appeal filed by the wife-Arlene Heble against the Judgment and Decree dated 27th April, 1983 passed by the Family Court, Bombay, in Petition No. A-85/90. The said petition was filed by the respondent/husband - Uday Laxman Heble on January 30, 1990 claiming that the marriage solemnised with the appellant on the 7th August, 1981, at Muscat, be dissolved by a decree of divorce and that the custody of their two minor children : Namrata - born on 11th August, 1983 and Sidharth -born on 15th September, 1986 be given to him. The brief facts leading to the dispute are as under :

2. The appellant-wife has passed her senior Cambridge Examination from a convent school at Deolali, Nasik, whereas the respondent-husband has passed B.A. (Hons) with Economics from Delhi University. The wife is an Anglo Indian Christian and the husband is a Hindu. The husband was a bachelor working in Muscat in 1981. The wife was a divorcee, having two daughters Melissa and Merelyn from her earlier husband. She was working in the same Departmental Store as a sales girl where the husband was working as the Manager. Having come in contact with each other, they were married on the 7th August, 1981 at Muscat under the Foreign Marriage Act, 1969. They lived at Muscat and daughter

Namrata was born on 11th August, 1983 at Muscat, whereas the second child Sidharth was born on the 15th September, 1986 at New Delhi. The husband alleges that soon after the marriage the wife started behaving indifferently and exhibited her adamant and stubborn attitude in the day to day routine matters in life and picked up quarrels and used to break and throw costly glasswares. The husband has then narrated certain instances which amount to cruelty in matrimonial law. He alleged that her conduct was such that he cannot reasonably be expected to live with her.

3. "Cruelty" under matrimonial law consists of conduct so grave and weighty as to lead one to the conclusion that the husband cannot reasonably be expected to live with the wife. It must be more serious than the ordinary wear and tear of married life. The cumulative conduct, taking into consideration all the circumstances and background of the parties, had to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in matrimonial law. While doing so, several factors such as social status, family background, customs, tradition, caste and community, upbringing, public opinion prevailing in the locality etc. will have to be taken into account. As held by the Supreme Court in the case of *Dr. N.G. Dastane Vs. Mrs. S. Dastane*, we are not concerned with simple trivialities which can truly be described as a reasonable wear and tear of married life. It is in the context of such trivialities that one can say that the spouses take each other for better or worse. One can only consider the grave and weighty incidents to find what place they occupy on the marriage canvas. Recently in the case of *V. Bhagat Vs. Mrs. D. Bhagat*, the Supreme Court has observed that mental cruelty can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live together. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together. In case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case.

4. The first instance alleged by the respondent is of December 1981 when the couple had come to India and the respondent had gone to his brother Col. Anil Heble's flat at Colaba, Bombay. Respondent had another brother Vinay who was an Air Force Officer, but had died in an air-crash in 1979. Vinay's widow Leena came to meet this couple at Col. Anil Heble's flat at Colaba. The appellant-wife did not appreciate Leena's visiting them and picked up a quarrel and exhibited her temper. She started abusing respondent-Uday and also his brother Col. Anil and his aged parents. She latter on picked up her luggage and went from Colaba

to Worli to stay with her male bachelor friend Mr. George Chandy. This incident is deposed to by the respondent, his brother Col. Anil and their mother Nirmala Heble.

5. The second incident is of the alleged ill-treatment by the wife to her parents-in-law when they visited Muscat before the birth of their first grand child-Namrata. As stated earlier, Namrata was born on 11th August, 1983. Uday's parents visited Muscat in July 1983 and stayed only till September 1983. It is alleged by the husband that the appellant-wife was none too happy to find her parents-in-law at Muscat and insulted them repeatedly. When they all returned to India in September 1983 Col. Anil & his wife had gone to the Airport to receive this couple, as also the aged parents. Appellant straight away drove from the Airport in a taxi and went to her male bachelor friend Mr. George Chandy, at Worli, and did not even allow Anil and his wife to touch the new born baby Namrata.

6. The father of the respondent died on 6th October, 1985. The first death anniversary of the respondent's father was to be performed on 6th October, 1986 at his Versova flat where the respondent used to live with his mother Nirmala, who is witness No. 3 for the respondent. On that day certain religious ceremonies were to be performed in connection with the first death anniversary. It so happened that the appellant's first husband arrived on the scene with an order from the High Court directing the appellant to hand over the custody of his two daughters from the appellant to him. As stated earlier, the wife has two daughters from her first husband, viz. Melissa and Merelyn. They were aged approximately 15 and 13years in October 1986. The first husband of the appellant came armed with the High Court order and also with a lady police constable and demanded the custody of his two daughters Melissa and Merelyn. The appellant was reluctant to part with the custody of the said two daughters but her first husband took away his two daughters from the appellant. The appellant was enraged at this and, surprisingly, started screaming and abusing the respondent her second husband, his brother Col. Anil as also their mother. The result was that the religious ceremonies in connection with the first death anniversary of the father of the respondent could not be performed and the family had to leave the Versova flat without performing the religious ceremonies.

7. The next incident alleged is of 21st June, 1988 when the couple came to India. Admittedly, all the four children viz. Melissa, Merelyn, Namrata and Sidharth were staying with the couple. When the couple came to India and was staying at the Versova flat, the appellant alleged that the respondent had an extra-marital affair with his widowed sister-in-law Leena Heble. When the respondent denied the allegation, the wife attacked and assaulted him. This resulted in the respondent leaving his own house late in the night and going to his brother Col. Anil Heble's flat at Sleater Road where he stayed for a short while. By this time, Col. Heble had shifted from his Colaba Quarters to his own flat at Sleater Road.

8. In September 1988, the wife quarreled with the husband regarding

arrangement of furniture and when the spouses disagreed, she physically attacked him, resulting in the husband's spectacles being broken, leaving him without spectacles for about three days.

9. The next incident is of 12th September, 1989 when the wife alleged that the husband had an affair with his neighbour Miss Sandhya Singh, who was an Air-hostess. The husband did not have a telephone at his Versova flat and when he got calls at his neighbour's house, he had to go to receive the telephone calls. The wife went to their neighbour Sandhya Singh's house, accused the husband, Sandhya Singh and her mother and fought with Sandhya Singh and her mother. This caused severe embarrassment to the husband and the secretary of the Housing Society also questioned the husband in respect of the conduct on the part of his wife, the appellant.

10. The next incident is of 2nd December, 1989 when the husband came home late at night and the wife suspecting the husband's conduct physically attacked him and scratched his face with her nails. The two young children got up. It was about 2.00 A.M. by that time. The wife took her luggage and the younger child Sidharth and went to Worli. The husband took his daughter Namrata and went to his brother Col. Anil Heble's flat at Sleater Road.

11. There are some other minor instances referred to in the petition filed by the husband. But we are not referring to them since, in our view, they constitute the normal wear and tear of matrimonial life. On these grounds, the husband sought a decree for dissolution of the marriage u/s 27(1)(d) of the Special Marriage Act, 1954 read with section 18 of the Foreign Marriage Act, 1969.

12. The wife filed per written statement on 5th February, 1992. She has admitted that she was a divorcee, having two daughters from her first husband when she married respondent Uday at Muscat. She has, however, denied the allegations of cruelty attributed to her by the respondent. On the contrary, she alleges that the respondent had an extra-marital affair with the widow of his brother Vinay. She has suggested that on the death of Vinay in the air-crash, there was a suggestion from Leena's mother that Uday should marry Leena. However, Uday's mother Nirmala opposed the suggestion, which was turned down.

13. In para 4(d) of her written statement, the wife has referred to the extra-marital affair of Uday and Leena and she has repeated the allegations in para 11 of her written statement in the following words :-

"It was only as recent as April, 1990 when the petitioner started having his extra-marital affairs with the widowed sister-in-law which was the main cause for the souring of relation between the respondent and the petitioner, that the allegation of the petitioner being accused of having such a clandestine affair with the widowed sister-in-law, was made by the respondent and none-the-less there has been no doubt about it no matter what pain and anguish it caused the petitioner."

Again in para 15 of the written statement, the wife says as under :

"It must be stated that the question of the petitioner having extra-marital relationship with his widowed sister-in-law, has only surfaced in April, 1990."

14. With reference to the incident of 12th September, 1989 in Sandhya Singh's flat, the wife reiterated that it was not a case of simple use of neighbour's telephone, but that it was her husband's extra-marital affair. She has stated so in para 20 of her written statement.

"It is not a fact to say that the respondent had a fight with the petitioner over the simple use of the neighbour's telephone by the petitioner, and instead, an argument ensued between the petitioner and the respondent, because on some excuse or another, the petitioner would clandestinely go to meet the widowed sister-in-law and spend hours with her at a time on the pretext that he was searching for a job."

15. Thus, the main case sought to be made out in the written statement is, apart from denial of allegations made by the husband, that of the husband's extra marital relations with either Leena Heble or Sandhya Singh. There is no whisper in the written statement about the husband coming home late at night in a drunken state.

16. In support of his petition, the husband examined himself at Exh. 39, as witness No. 1. His second witness is his brother Col. Anil Heble, at Exh. 64 and the third witness is his mother Nirmala Heble at Exh. 70. Wife Arlene examined herself as Exh. 74 and has also put up her young daughter Namrata, aged barely 9 years, as her witness at Exh. 75 to depose to the alleged extra-marital affair of Uday with Leena. The learned trial Judge, who had the benefit of watching the witnesses depose had also directed the Marriage Counsellor to visit the residence of the spouses, meet the concerned people, including the children and Leena Heble and make a report. Accordingly, first report dated 13th March, 1991 is by Miss P.D. Gheewala, Marriage Counsellor. This report shows that both Namrata and Sidharth were apparently attached to the father. However, Namrata appeared to be echoing her mother's views in respect of the "other woman" involved with her father Uday. After this report was made on 13th March, 1991, the learned Judge had passed another order on 23rd July, 1991 appointing Mrs. M.S. Desai, another Marriage Counsellor, for local inspection and report. She has made a report of her impressions. Mrs. Desai has also referred to the fact that both the children Namrata and Sidharth appeared to be attached to the father, though they appeared to be influenced more by the mother and daughter Namrata seemed to echo her mother's views in her talks.

17. On appreciation of the above evidence, the learned trial Judge came to the conclusion that certain instances amounting to cruelty were fully established and in this behalf, a reference is made to the incident of December 1981 when on their first visit to Col. Anil Heble's flat at Colaba, the appellant had taken objection to Leena's visit and had abused the respondent and all other family members. Similarly, the treatment meted out to the parents of the husband

when they visited Muscat in July/September 1983, the conduct of the appellant on arriving in India in September 1983 and proceeding to Worli in a taxi alone was held proved. The incident of 6th October, 1986, when the appellant misbehaved and started abusing the respondent and his brother and mother resulting in the death anniversary ceremonies being abandoned was also held to be proved by the learned trial Judge. The incident of going to Sandhya Singh's flat in September 1989 and abusing her and her mother has been held proved.

18. On the question of the wife making wild and baseless allegations against the husband, the learned trial Judge has referred to the fact that though the wife had made the allegations in her written statement, as reproduced above, there was nothing in her examination-in-chief to support the same and she had not made herself bold to depose to those allegations. Instead, she preferred to put up her minor daughter Namrata, aged 9 years, to say that when she was staying with the respondent at Versova flat, she had once seen Uday and Leena on the bed. The learned trial Judge came to the conclusion that Namrata was a tutored child witness, as is clear from her evidence. Referring to the standard of proof required for proving such serious allegations, the learned Judge came to the conclusion that the appellant-wife had not discharged the burden, though she had chosen to make wild and reckless allegations against the husband, involving two other women Leena Heble and Sandhya Singh. In the result, the learned Judge allowed the husband's petition and ordered that the marriage solemnised on 7th August, 1981 was dissolved.

19. On the question of custody of the two children, the learned Judge has granted the custody to the appellant-wife. There is no dispute before us on that count. On the question of maintenance, an order has been passed directing the husband to pay Rs. 4000/- to the wife and there is no controversy before us on that count either. Each of the two children has been granted maintenance of Rs. 1000/- p.m. Apart from that, all the school fees and other expenses in connection with the education of the children such as their uniforms, transport to school etc. is to be borne by the husband and is being borne by the husband alone. The flat at Versova is in the name of the respondent-husband and he has been directed to pay the outgoings of the said flat, as also the electricity charges. Thus, it is admitted that an amount of approximately Rs. 8000/- per month is being paid by the husband on various counts mentioned above. There is an application before us for enhancement of the children's maintenance from Rs. 1000/- to Rs. 1500/- per child per month and we will separately deal with this application at the end of the judgment.

20. When this matter was called out for arguments on the 8th June, 1995, we enquired from both the learned Counsel-Mr. Pawar and Mr. Bhatt as to whether in view of the passage of time it was possible to settle the matter. Both the learned Counsel mentioned to us their respective versions of the proposed settlement and the matter was adjourned to next day. On the 9th June, 1995, however, we were told that though the husband was willing to transfer the Versova flat in the

name of the wife and his two children and make a lumpsum payment of Rs. 4 lacs to the wife and still bear his two children's educational expenses, the wife was insisting on being paid Rs. 10 lacs to secure her maintenance. Admittedly, the wife is occupying the Versova flat with her four children. When both the learned Counsel expressed their inability to arrive at any settlement, we proceeded with the hearing of the matter. Yesterday, on 13th June, when arguments concluded for the day, we again requested both the learned Counsel to try to bring about a settlement. The husband stood by his offer made earlier, but the wife raised her demand from Rs. 10 lacs to Rs. 20 lacs. This is in addition to the fact that the flat is to be transferred to her and the two children's name. In the result, we are left with no alternative but to decide the matter on merits.

21. We have heard both the learned Counsel at length; Mr. Pawar for the appellant-wife and Mr. Bhatt for the respondent-husband. They have taken us through the entire oral evidence, which consists of three witnesses on the husband's side and two on the wife's side. Mr. Pawar has raised only 3 contentions before us, namely, (1) the incidents alleged do not amount to cruelty in matrimonial law; (ii) assuming that the said incidents amount to cruelty, the incidents are stale and (iii) at any rate, the husband must be deemed to have condoned the conduct of the wife and resumed co-habitation with her. We will consider these contentions in the light of the law laid down by the Supreme Court referred to in para 3 above on the basis of the above evidence.

22. "Cruelty" under matrimonial law consists of conduct so grave and weighty as to lead one to the conclusion that the husband cannot reasonably be expected to live with the wife. It must be more serious than the ordinary wear and tear of married life. The cumulative conduct, taking into consideration all the circumstances and background of the parties, has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in matrimonial law. While doing so, several factors such as social status, family background, customs, tradition, caste and community, upbringing, public opinion prevailing in the locality etc. will have to be taken into account. As held by the Supreme Court in the case of Dr. N.G. Dastane Vs. Mrs. S. Dastane, , we are not concerned with simple trivialities which can truly be described as a reasonable wear and tear of married life. It is in the context of such trivialities that one can say that the spouses take each other for better or worse. One can only consider the grave and weighty incidents to find what place they occupy on the marriage canvas. Applying the test laid down by the Supreme Court in Dr. Dastane's case (supra), we have no alternative but to hold that the acts complained of by the husband amount to "cruelty" within the meaning of section 27(1)(d) of the Special Marriage Act, 1954.

23. As stated earlier, barring the trivialities which amount to the ordinary wear and tear of matrimonial life, the incidents on which the evidence has been concentrated are as under : The spouses were married in Muscat on the 7th August, 1981. They came to India in December 1981. They went to Col. Anil

Heble's flat at Colaba. Leena, widow of deceased brother of Uday viz. Vinay called on the couple. The wife took objection and created a scene and left the house with her baggage and went to stay with her male bachelor friend, at Worli, viz. Mr. George Chandy. This incident is deposed to by the husband himself, his brother Anil and their mother Nirmala.

24. The second incident of cruelty, relates to the treatment given to the husband's parents during their stay at Muscat in July/September 1983 on the eve of the birth of the first child of the appellant. She delivered her first child Namrata on the 11th August, 1983. She did not appear to be very happy on the visit of her parents-in-law to Muscat and the evidence suggests that she insulted and ill-treated them. This is deposed to not only by the husband and the mother herself (the father of the husband is no more having died on 6th October, 1985), but this is also deposed to by Col. Anil Heble, to whom the mother reported her embarrassment. So bitter was the relationship between the appellant and her parents in law at Muscat that on reaching India in September 1983, she did not allow her child to be taken to Col. Anil's place, but straightaway drove in a taxi with the child to Mr. George Chandy's place, at Worli. Though on the evidence before us we find nothing in the cross-examination of the witnesses to disbelieve their consistent version in that behalf, we are not attaching much importance to these incidents which took place between December 1981 and September 1983, because it may be possible to contend that these facts of cruelty have been condoned on account of the subsequent conduct of the spouses. We do not, therefore, propose to dilate on this aspect of the matter any longer.

25. On the 6th October, 1986, however, when the family met at the Versova flat in connection with the first death anniversary of the father of Uday, certain religious ceremonies were to be performed. To the misfortune of all of them, the first husband of the appellant arrived on the scene with an order from the High Court, directing the wife to hand over the custody of the two daughters Melissa and Merelyn to her first husband. The first husband came with a lady police constable and a woman activist with him and despite the appellant's reluctance, she was forced to hand over custody of her two daughters to the first husband. However, we find no reason whatsoever to justify her abusing the respondent-her second husband, his brother Col. Anil and Anil's wife and more particularly, their mother Nirmala. Uday, Anil and mother Nirmala have deposed consistently that they were required to abandon the death anniversary ceremonies and had to leave the Versova flat.

26. Similar is the incident of 21st June, 1988 when the wife made allegation that the husband had extra marital relations with Leena and when the husband denied the said allegation, she physically attacked him. The husband's evidence in the examination-in-chief in this respect has not been questioned in the cross-examination. Again, in September, 1988, the wife physically attacked the husband on a dispute regarding the position of the furniture in the house, resulting in the spectacles of the husband being broken and his going without

them, for about 3 days. As stated earlier, we are ignoring the earlier incidents between 1981 and 1983 and we are concerned only with the conduct of 6th October, 1986 and onwards. The evidence in respect of the allegation of assault on the husband on 21st June, 1988, at Bombay, as also the evidence in respect of physical assault in September, 1988, resulting in the spectacles of the respondent being broken is, in our view, quite satisfactory.

27. Then comes the incident in neighbour Sandhya's flat. If the husband received a call at the neighbour's flat, the wife may have prevented the husband from going to Sandhya Singh's flat. However, we see no justification for the appellant to go to Sandhya Singh's flat and quarrel with her and her mother and abuse them. The appellant did not stop there. She made allegation of the respondent having extra-marital relationship also with Sandhya Singh. However, she has not ventured to say anything in her examination-in-chief in respect of the allegation of extra-marital relations of her husband, either with Leena Heble or with Sandhya Singh. It is true that in the examination-in-chief the wife has tried to suggest that the husband was coming late at night in a drunken state. This is not stated in the written statement. What is stated in the written statement is the extra-marital relations of Uday with Leena Heble and Sandhya Singh, but there is not even a whisper in the examination-in-chief. What is sought to be stated in the examination-in-chief regarding drunkenness is not stated in the written statement.

28. The evidence of the husband that the wife was making allegations against him regarding his having extra-marital relations is also supported by the evidence of his mother Nirmala, which refers to the fact that whenever Uday came home late, the appellant used to pick up quarrel with him and allege that he had relations with other woman. There is nothing in the cross-examination of either Uday or his mother Nirmala to detract from the correctness of their version.

29. Even the incident of 2nd December, 1989 referred to in the petition by the husband is clearly deposed by the husband that when he returned late at night, his wife attacked him physically and started scratching his face with nails. These incidents of 6th October, 1986, 21st June, 1988, September 1988, the incident in Sandhya Singh's flat on 12th September, 1989 as also the incident of 2nd December, 1989, in our view, clearly show that the wife has treated the husband with cruelty within the meaning of section 27(1)(d) of the Special Marriage Act, 1954.

30. As we have stated earlier, though the incidents of December 1981 and September, 1983 have been held proved, we are ignoring these incidents because it may be possible to contend that either these incidents are stale or that the conduct has been condoned on account of the subsequent co-habitation. It must be borne in mind that the first child Namrata was born on 11th August, 1983 and the second child Sidharth was born on 15th September, 1986. However, what happened on 6th October, 1986 and thereafter is a matter which cannot be

brushed aside. These incidents of 6th October, 1986 onwards have been held proved by us and it is not possible to accept Mr. Pawar's contention that the incidents do not amount to cruelty in law. The incidents continued from 6th October, 1986 till December 1989. The petition has been filed on 30th January, 1990. We are, therefore, unable to accept the second contention of Mr. Pawar that the said incidents are stale and must, therefore, either be ignored or deemed to have been condoned. We are of the view that the conduct of the wife reflected from these incidents between 6th October, 1986 and 2nd December, 1989 was clearly such that she has repeatedly treated the husband with cruelty within the meaning of section 27(1)(d) of the Special Marriage Act, 1954.

31. Apart from the above, we must bear in mind that the wife has chosen to make allegations against the husband of his having extra marital relations with both Leena Heble and Sandhya Singh. As reproduced earlier in paras 13 and 14 above, these specific allegations are contained in the written statement in para 4(b), para 11, para 15, and para 20 of the written statement. Having made these serious allegations, casting aspersions not only on the character of her husband, but on the character of two other women, it is strange that the appellant has not even whispered anything in her examination-in-chief in this behalf. On the contrary, a different story is sought to be made out for the first time in the evidence regarding his coming home late at night in a drunken state, which is not at all mentioned in the written statement. It is true that in the cross-examination, the wife was constrained to admit that she came to know of Leena's relations with her husband for the first time in April, 1990. The incident in Sandhya Singh's flat in September 1989 also shows that she is now trying to prevaricate by suggesting that she came to know of Leena's relation with her husband for the first time in April, 1990. If what she now says in her cross-examination is to be believed, we fail to understand any justification for her conduct between 1988 and 1990, leave alone her conduct in December 1981 in Col. Anil Heble's flat at Colaba when Leena Heble came to meet them and the appellant disliked it and started quarreling.

32. What is, however, worse and unfortunate is that the appellant has put up her minor daughter Namrata to depose to something which does not stand to reason. Not having had the courage to depose about her husband's relationship with his widowed sister-in-law Leena, Namrata was tutored to say that whenever the father had access to the children, he used to take the children to Leena Heble's flat at Khar. The flat belongs to the respondent's brother Vinay. That flat has two bedrooms. The mother of Uday used to sleep in one bed-room. Uday and Leena were supposed to be sleeping in the other bed-room, in which itself, it is suggested that, the two children were made to sleep. We are further told to believe that when Namrata once got up in the midst of night, she saw her father Uday and Leena sleeping on the same bed. The learned Judge has referred to this evidence and in the light of the answers given by Namrata in her cross-examination, one cannot but agree with the conclusion of the learned trial Judge that the child witness was completely tutored to say something which she had

not seen. It is relevant to note that this important incident was not pleaded in the written statement. Had Namrata really seen respondent Uday and Leena on one bed at night, in our view, she would not have failed to mention this incident immediately to her grand-mother in the adjoining room and particularly to her own mother. If that be so, the appellant would not have failed to mention this incident in the written statement since it is the only direct circumstance alleged in support of the allegation of extra-marital relations between Uday and Leena. It is relevant to note that in para 8 of her cross-examination, Nirmala, the mother of the respondent, has categorically denied that Uday and Leena were sharing the same bed in the Khar flat.

33. The reports of the two Marriage Counsellors show that the two children had apparently no grievance with either the mother or the father. Namrata is sought to be used to malign her father and reading her cross-examination, we have no doubt whatsoever that she has been tutored to say something which is absurd. In the first place, if Uday wanted to sleep with Leena when his young children were around, he would have taken the elementary care of putting the children with his mother in the adjoining bed-room. Secondly, he would have taken care of locking his bed-room from inside. Nothing of the kind was suggested and what was suggested was that despite the fact that the husband wanted to sleep with Leena, he kept the children in the same bed-room. All this is supposed to be at a time when the proceedings were already pending in the Family Court. An occasional access was provided to the father under the orders of the Court, which right he was exercising. It is unfortunate that the mind of the young girl Namrata is tried to be prejudiced by such absurd stories. We have no hesitation in rejecting the evidence of Namrata. Under the circumstances, we are of the opinion that the appellant has indulged in making wild and reckless allegations against her husband that he was having extra-marital affairs with Leena Heble and Sandhya Singh.

34. In this behalf, we may refer to the Supreme Court decision in the case of V. Bhagat Vs. Mrs. D. Bhagat, . The Supreme Court has dealt with what constitutes mental cruelty in matrimonial law, though it was a case under the Hindu Marriage Act, 1955. What the Supreme Court has observed is that mental cruelty can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live together. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one cause may not amount

to cruelty in another case. After observing as above, the Supreme Court has dealt with the allegations made by the wife in the written statement and the questions put by her Counsel to the husband in the case before the Supreme Court. The wife had made allegations that the husband was not a normal person, that he required psychological treatment to restore his mental health, that he is suffering from paranoid disorder and mental hallucinations and that he and members of his family were a bunch of lunatics. The Supreme Court observed that the allegations were not made in a fit of anger and they were made in formal pleadings and questions were sought to be put in support of the averments. On rejecting the case of the wife, the Supreme Court held that making of such wild and baseless allegations in the written statement amounted to mental cruelty of such a nature that the husband cannot reasonably be asked to live with the wife.

35. We have carefully considered the ratio of the Supreme Court decision in Bhagat's case (supra). We are of the view, that the said ratio would apply to the facts of the case before us on the question as to whether the conduct of the wife in making wild and baseless allegations against the husband in the written statement amounts to cruelty in law. The appellant-wife has made wild and baseless allegations against the respondent-husband that he was having extra-marital relations with Leena Heble and Sandhya Singh. She did not even attempt herself to depose to these allegations in her evidence. We have already indicated above, that we are not satisfied with the evidence of Namrata, who appeared to be wholly tutored. The result is that the wife has indulged in making wild and baseless allegations without herself attempting to prove them. This Court also has taken a similar view in the case of Smt. Nirmala Manohar Jagesha Vs. Manohar Shivram Jagesha, of the Judgment at page 272 of the report it is observed as under :---

"In view of the above, I am of the opinion that though the husband has failed to prove point Nos. 1 and 2 framed above, he would be entitled to a decree for divorce on the third point namely, cruelty, as a result of the wife's having made wild, reckless and baseless allegations in the written statement. Though, therefore, the husband has failed to prove on the averments made by him in the petition and on his evidence that the wife has treated him with cruelty, still he is entitled to succeed u/s 13(1)(i). Similarly, the husband has failed to prove that his wife was suffering continuously or intermittently from mental disorder of such a kind and to such an extent that he cannot reasonably be expected to live with the wife. The decree of the learned trial Judge on both these grounds will have to be reversed."

A similar view has been taken by another Division Bench of this Court in the case of Rajan Vasant Revankar v. Mrs. Shobha Rajan Revankar, (Family Court First Appeal No. 37 of 1993) decided on 24th and 25th March, 1994.

36. Having considered the entire material on record and observed the conduct of the parties including the attitude adopted by the appellant-wife in the trial Court

and in this Court, we are of the view, that there is an irretrievable break down of the marriage. The learned trial Judge has referred to the conduct of the wife when the petition was pending in the trial Court for about 3 years. The findings of the learned trial Judge in paras 27 and 28 are some what disturbing though we are not basing our conclusions on the said findings. As we have mentioned earlier in para 20 above, even in this Court the wife's attitude appeared to be extremely un-reasonable despite the fact that the husband had taken a very reasonable attitude. We are reminded of the observations of the Supreme Court in paras 22 and 23 of the judgment in Bhagat's case at pages AIR 1994 S C 719. As in Bhagat's case so in this case it is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together or living together again. We are aware that irretrievable break down of the marriage is not a ground by itself for granting a decree for divorce. However, after having appreciated the entire evidence and recorded our findings, we are mentioning this additional factor which needs to be borne in mind.

37. Mr. Bhatt, the learned Counsel for the respondent-husband is justified in contending that the incidents between 6th October, 1986 and 2nd December, 1989 constitute cruelty on the part of the wife. Counsel is also justified in contending that these incidents are not at all stale since the petition was filed on 30th January, 1990. Having rejected the first two contentions of Mr. Pawar, Namely, (i) the incidents alleged could not amount to cruelty in matrimonial law; and (ii) assuming that the said incidents amount to cruelty, these incidents are stale, we must consider the last submission of Mr. Pawar. The submission is that at any rate the husband must be deemed to have condoned the conduct of the wife and resumed co-habitation with her. In the first place, as far as making of wild and baseless allegations in the written statement is concerned, there is no condonation pleaded after the filing of the written statement. Nothing has been suggested to show that the husband has condoned the making of the wild and baseless allegations in the written statement, which was filed as recently as on the 5th February, 1992. The plea of condonation, if any, could therefore relate to the acts of cruelty such as those of 6th October, 1986, 21st June, 1988, September, 1988, 12th September, 1989 and 2nd December, 1989. The learned trial Judge has already recorded a finding that there was no legal impediment u/s 34 of the Special Marriage Act, 1954, to pass a decree for divorce.

38. Apart from the fact that there is not even a plea of condonation in the written statement in respect of the acts of cruelty referred to above, nothing has been said in the examination-in-chief by the wife herself. Mere passage of some time is not by itself, condonation. The conduct complained of is from 6th October, 1986 till 2nd December, 1989. The petition for divorce was filed on 30th January, 1990. In our view, no case has been made to content that there was condonation by the husband of the wife's cruel conduct.

39. In this behalf, we may only refer to the observations of the Supreme Court in Dastane's case where it has been observed that "condonation" means

forgiveness of the matrimonial offence and restoration of the offending spouses to the same position as he or she occupied before the offence was committed. To constitute "condonation", there must be two things:---(i) forgiveness and (ii) restoration. There is no evidence of condonation led at all. In fact, there is no pleading in that behalf, but we are not taking a technical view of the matter. Having considered the entire evidence on record, we are of the view that even if we are to ignore the earlier incidents from December, 1981 to September, 1983, as far as the incidents from 6th October, 1986 to 2nd December, 1989 are concerned, there is neither any plea nor any evidence of condonation.

40. At any rate, as far as the alleged wild and baseless allegations in the written statement are concerned, in the facts of this case, there is no question of any condonation at all. The wife must be held guilty of having treated the husband with cruelty also by reason of her having made wild and baseless allegations of the husband having extra marital relations with Leena Heble and Sandhya Singh. In fact, after making those wild and baseless allegations in different paras of the written statement quoted above, namely, paras 4(d), 11, 15 and 20 of the written statement, the appellant/wife has herself stated in para 26 of the written statement that the relationship between the spouses had not only soured but took a downward dive towards destruction of their marriage mainly because of the husband's adulterous relationship with his widowed sister-in-law. There is thus no doubt, in our mind, that there is an irretrievable break down of the marriage between the spouses. The averments in para 26 referred to above, specifically refer to the destruction of the relationship during the last 11/2 to 2 years. Thus there is not even a faint suggestion of any condonation of the conduct of the wife which we have held to amount to cruelty. Under the circumstances, Mr. Pawar's last contention that the husband must be deemed to have condoned even the subsequent acts of cruelty between 1986 to 1989 cannot be accepted.

41. In conclusion, we are of the view that the incidents of 6th October, 1986, 21st June, 1988, September, 1988, 12th September, 1988 and 2nd December, 1989 amount to such conduct in law as would inflict upon the husband such mental pain and suffering as would make it impossible for him to live with the appellant/wife. The situation is such that the husband cannot reasonably be asked to put up with such repeated conduct and continue to live with the wife. The alternate submission that the incidents are stale has no merit. In fact, we are ignoring the conduct between December, 1981 and September, 1983. One of the reasons being that the first child was born on 11th August, 1983 at Muscat and the second child was born on 15th September, 1986 at New Delhi. As stated above, the plea of condonation has to be stated merely for the purpose of being rejected. Thus there is no merit in any of the three contentions raised on behalf of the appellant. The appeal must fail and is accordingly dismissed. In the circumstances of the case, however, there will be no order as to costs.

42. As far as the question of permanent alimony and maintenance to the wife and children is concerned, we are passing a separate order in Civil Application

No. 3507 of 1994.