
(1983) 03 BOM CK 0025
In the Bombay High Court
Case No : First Appeal No. 621 of 1981

Kalpana Shripati Rao (Smt.)	Vs	APPELLANT
Shripati V. Rao		RESPONDENT

Date of Decision : 14-03-1983

Acts Referred:

Hindu Marriage Act, 1955 — Section 10(1), 13(1)

Citation : (1983) ARBLR 458 : (1983) 2 BomCR 375

Hon'ble Judges : R.D. Tulpule, J

Bench : Single Bench

Advocate : H. Suresh, instructed by I.B. Joshi and Co, for the Appellant; Y.N. Govilkar, for the Respondent

Judgement

R.D. Tulupe, J.—This is an appeal by the wife against the judgment and order passed by the Judge, City Civil Court, Bombay in M.J. Petition No. 107 of 1979 for judicial separation u/s 10 of the Hindu Marriage Act, which was dismissed.

2. A marriage was celebrated on 28th February, 1966 and there were two children, one born on 28th October, 1966 and the other on 20th September, 1968. The petitioner-wife's complaint against her husband-respondent was that her husband was suspicious of her, used to pick up quarrels on and off on minor trifle matters. Besides, he used to dominate her saying that he would not allow her to even have relations with any female outsiders. He used to look at her activities with suspicion. She then refers to an incident of the year 1971, when one Jadhav had come to her house and stopped there because it was raining. He was allowed to sit there. After sometime the husband-respondent came to the house, scolded her, and asked Jadhav to get out, abused her and also assaulted her. The husband also, according to her, suspected her of having friendship with one Lalji Mistry, who was her brother's family friend. Respondent used to make wild allegations against the petitioner that she was having intimacy and illicit relations with Lalji Mistry. He started making these allegations in the presence of everybody and called the petitioner of easy virtue. In 1976 while she was walking

on the Cadel Road, she accidentally met Lalji and both were involved in an accident of motor car which had run them over. She was removed to the hospital and was in hospital. After her discharge from the hospital, she went and stayed at her mother's place and after some time came back to the matrimonial house. The respondent, however, continued to tease her and inflict mental agony on the petitioner by alleging that she was having intimacy and illicit relations with said Lalji. This went on till about March 1978.

3. In March 1978 the petitioner had gone for a function to her parent's place. That at that time the respondent came later, assaulted her and cast serious aspersions against the character of the petitioner. As she suggested the returning of the loan taken by the respondent from her brother, respondent took away from her the keys of the house and prohibited her from coming to his house, as he wanted no relations with the petitioner. The parties thus are staying separately from March 1978. Nevertheless, it is the contention of the petitioner that she used to receive threats of physical violence and of acid throwing by the respondent against her. She lodged a complaint at Mahim Police Station in April 1978. In August 1978 a notice was served upon the petitioner to which she replied on 31st August, 1978. The further reply to that reply was sent by the respondent-husband. It thereafter that in January 1979 the petitioner filed this petition on the ground of cruelty, on threats of physical violence by respondent to her and on that account the life of the petitioner had become miserable and impossible to continue with the husband. The two daughters who were living with her after the parties were separated, according to the petitioner, were taken away by the respondent. She sued, therefore, for divorce u/s 13 of the Hindu Marriage Act and also for the custody of the two minor children born out of the marriage.

4. The respondent denied the behaviour and conduct attributed to him. He denied that he was suspicious or was harassing or even assaulting the petitioner. He denied the incident about Jadhav as per petitioner's version and alleged that he had "ample evidence to disprove the facts alleged by the petitioner in that behalf". He contended that he could "not be wrong and was justified if he expressed displeasure at the behaviour of the petitioner which was objectionable and she had undue intimacy or relation on her part with persons such as the said Jadhav and Lalji". According to him, the story of the accidental meeting on Cadel Road with Lalji was absolutely false and can be proved on the basis of "the report of the police and application before the Motor Accident Claims Tribunal filed in this behalf". He contended that the petitioner was "licentious in her behaviour that she was thoroughly exposed by the accident", and is also expressed by the petitioner herself in a diary where she confessed of her immoral acts and acknowledged them.

5. As regards the children he claimed that the custody was rightly given to him. It was he who looked after the children. That the petitioner did not look after them and it is undesirable in the circumstances of the petitioner's behaviour that

the minor daughters should remain with her. He denied the incident also in March 1978 when he is alleged to have assaulted the petitioner or having stated that he wanted nothing to do with her and denied the alleged incident at her mother's place.

6. He then proceeded to say that he thought the petitioner was doing serious mistakes and causing annoyance, wrath and displeasure to him, he was also looking towards her with love and affection and like dutiful husband ""he had pardoned her for the acts of infidelity and had always tried to persuade and bring her on right path"". According to him, petitioner was misguided and if she was brought out of the influence of such people then it is possible that she might return to the matrimonial house.

7. On the basis of these allegations, the parties went to the trial. The petitioner examined herself and her mother. Respondent satisfied by examining himself. Besides, the notices and replies exchanged between the parties were also produced during the course of the trial and the respondent also relied upon a diary which the petitioner seems to have been keeping for the year 1977 and relied upon the certain entries therein to substantiate his contentions. No other evidence either oral or documentary was produced.

8. The learned Judge held that the petitioner had failed to prove cruelty on the part of the husband. He seems to have held that the cruelty alleged viz. of false allegations of intimacy with Jadhav and Lalji was not proved, meaning thereby that there was no such intimacy between the petitioner and Jadhav and Lalji. He also held that the petitioner had failed to prove the assault, or abuses or threats given by the respondent. In that view of the matter, he dismissed the petitioner's petition and granted the custody of the children to the respondent.

9. On behalf of the petitioner-wife, the learned Counsel, who appeared, contended that the learned Judge was in error and was unnecessarily led away and imported his own view about what is proper and improper behaviour on the part of the wife. He contended that the judgment of the learned Judge seems to have been influenced largely upon the background of the parties which he had taken for granted. He contended that though there was no evidence in that behalf, expecting the solitary statement on the part of the petitioner, the learned Judge drew freely a conclusion that the petitioner had grown in an atmosphere of freedom while the respondent came from orthodox surrounding. This according to the learned Counsel has considerably clouded the appreciation of the evidence and affected the conclusions reached by the learned Judge.

10. On evidence, the learned Counsel urged that there is absolutely no evidence and nothing to show that there was any intimacy, much less illicit connection or relations between the petitioner and Jadhav. The learned Judge has unnecessarily jumped to the conclusion presumably on the basis of what he thought. The petitioner was a free lady and should not have mixed generally and in this manner with persons from the other sex. What may at the most be a liberal and free behaviour has been construed as licentious illicit intimacy, not

only by the husband but by the learned Judge.

11. As regards the two incidents in which Lalji was involved, it was pointed out that the first incident was totally innocuous. Lalji was a family friend and the petitioner knew him even before her marriage as the friend of her brother. She was on visiting terms with Lalji because of family relations and there was nothing wrong to go and ride in the car of Lalji. In the year 1974, if the petitioner had travelled along with Lalji to the house of the parties, it would be highly speculative and un-justifying guess-work to conclude from that they had intimate relations. The same is the position with regard to the second incident on Cadel Road.

12. The learned Counsel further pointed out that the entry in the diary upon which reliance was placed is a solitary entry. The petitioner's contention in that behalf is that she was forced to write that entry. The entry is much later than the incident and does not convey anything except a vague statement in regard to some alleged sin. In the absence of anything to indicate, and in the absence of any explanation in cross-examination of the petitioner with regard to the statements in that diary, from the entry, it was hazardous to come to the conclusion that an admission could be spelt out of illicit intimacy with Lalji therefrom.

13. An unjustified allegation of infidelity or misbehaviour and particularly of immorality on the part of the wife by the husband is mental cruelty, which the petitioner had undergone. In the present case the mental torture must have naturally disturbed her peace of mind and physique as well as endurance and patience and thereby must have produced anxiety and tension. The result would be mental unhappiness and ill-health. The learned Counsel further submitted that under the amendment to the Hindu Marriage Act of the year 1976, it is not necessary for the petitioner to prove that the cruelty was of such character as to put the petitioner in danger of life or limb as was required under the former section 10(1)(b) of the Act. It was not necessary for the petitioner to prove that "it will be harmful or injurious for the petitioner to live with the other party". Even otherwise it was the contention of the learned Counsel for the petitioner that the evidence in the witness-box of the petitioner supported by the mother indicated that the respondent was of violent temperament, capable of physical outrage, short-tempered and was of aggressive disposition. That he had assuaged the petitioner and had threatened her, on account of which she lodged the complaint at Mahim Police Station. That the respondent was behaving towards the petitioner in this manner even according to the respondent as averred in the written statement and in the notice for a number of years, the contention of misbehaviour by the petitioner with Jadhav and Lalji was not supported by any evidence whatsoever. He continued to consider with suspicion and tease the petitioner and repeated those allegations against her notwithstanding that he had no material to support them, not only in the notices and replies but also in the written statement.

14. For the respondent it was urged that direct evidence with regard to misconduct of the petitioner would be extremely difficult to compile. The evidence in this case which the respondent was able to lead before the Court and the circumstances in which the petitioner was found with Jadhav and Lalji Mistry and her own confessional note in the diary was adequate evidence to establish the truth of the respondent's allegation in regard to his suspicion. If the respondent was justified in entertaining the suspicion for which there was material and the suspicion was reasonable the conduct and behaviour of the respondent was not unreasonable. If such suspicion was legitimate for a reasonable prudent man to express it would be no cruelty. If the respondent admonished the petitioner and told her repeatedly to be faithful and to behave in a proper manner, the respondent cannot be blamed. It was stoutly contended that there was no case of violence much less any intimidating, nagging conduct on the part of the respondent which would have made the life of the parties miserable together. On the other hand, notwithstanding the incident of Jadhav in 1971 and incident in the year 1974 with Lalji Mistry which the respondent came to know later and also the accident in 1976 at Cadel Road, the respondent had put up with lapses to preserve harmony and had even condoned the petitioner's guilt and had resumed cohabitation until the break came in the year 1978. He, therefore, contended that the petitioner was not entitled to divorce or a decree for judicial separation.

15. Before proceeding to deal with the rival contentions, I would firstly refer to the exchange of notices between the parties which have been placed on record of 31 August, 1978 addressed by the petitioner to the respondent and the respondent's notice to her on 19th August, 1978. The positions taken by the parties in these two documents will disclose, in my opinion, the dispositions of each of them towards each other.

16. Referring firstly to the notice dated 19th August, 1978 addressed by the respondent to the petitioner, he made a reference to 1971 incident in which the respondent stated that in the 2nd week of June, 1971 the respondent was not likely to return for the night to the house but for certain reasons came at about mid-night and found that the door of the house was locked and inspite of knocking was not opened for some time. That Jadhav was found inside the house and that the respondent chastised him and also chastised the petitioner, who ""touched his feet and begged his pardon"". The respondent then proceeded to say that ""he has ample evidence and sufficient proof in this behalf"" which he stated that he was going to adduce at the proper stage. In para 9 of the notice he referred to 1974 incident in which Lalji met with an accident near Mannamwar Nagar, where the parties were staying and alleged therein that apart from moving in the car of Lalji, the petitioner was also in the habit of drinking liquor and that when she was confronted with this evidence and moving with Lalji, she ""cried loudly and asked the respondent to pardon her and once again she assured that she would not repeat such ugly incidents in future"". His further complaint in the notice was that not only with Lalji but others she ""developed

keeping relations with other persons, than the husband"". He then referred to the incident on Cadel Road and stated that notwithstanding an accident and thinking that hereinafter the petitioner would have taken a lesson of not indulging in such sort of behaviour, she neglected the advice of the respondent ""once again started resuming relations with said Laljibhai without any fear with all the boldness"". Therefore, the respondent described her behaviour as unfaithful, shabby and ugly resulting in mental agony and disturbance to the respondent. He even suspected and alleges that the petitioner, on the pretext of going to her mother's house used to be away for some days without anybody knowing her whereabouts. It would only be sufficient to say that though the respondent stated that he had ample evidence and proof, and had made statements in regard to the petitioner keeping relations with others and even with Lalji after 1976 accident, ""without fear and boldness"", he had not adduced any evidence whatsoever in that behalf including his own during the course of his testimony.

17. If the respondent was wild in making his allegations, the petitioner did not lag behind. In her reply dated 31st August, 1978 apart from denying the allegation against her character and her companionship or friendship with Lalji and the incident of Jadhav as well as her addiction to drinking liquor, she went to the wild length of stating that the respondent suspected her character falsely and ""with a view to annoy, insult and punish and/or take alleged revenge against her"" used to have relations with other women in the presence of the petitioner. The petitioner also similarly did not make any attempt whatsoever to prove such wild statements made before the institution of the present suit.

18. As pointed out earlier the Hindu Marriage Act, 1956 was amended by Act No. 68 of 1976. As to what is required to be proved as a result of the amendment became a matter of considerable debate in this Court, and as to whether on the basis of the evidence that requirement of law was proved by the petitioner. Section 10 of the Hindu Marriage Act before the amendment laid down grounds for judicial separation. Sub-clause (b) of sub-section (1) of section 13 of the Hindu Marriage Act required the petitioner to prove cruelty which must be such ""as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious"" for the petitioner to live with the other spouse. Section 10 has now undergone a drastic amendment. The cruelty clause as available in section 10(1)(b) has now been transferred but not in the same form, to section 13, wherein the amendments were carried out. Cruelty was not a ground for divorce before 1976 amendment. After 1976 amendment, section 13 which also underwent a change includes cruelty as a ground in section 13(1)(ia) as a ground for divorce. It permits at the instance of either the husband or the wife a decree for dissolution of marriage to be passed on the ground that the respondent ""after solemnization of the marriage treated the petitioner with cruelty"". The character and kind, and its nature has nowhere been specified in section 13. As to what is the import of this amendment and as to what is required to be proved by the husband or wife who seeks a divorce or

judicial separation on the ground of cruelty has, therefore, naturally become a matter of controversy.

19. On behalf of the petitioner-appellant, it was contended, that in consequence of the amendment, the petitioner in this case has to prove only the fact the respondent acted towards her in a cruel manner or perpetrated cruelty upon her. It was not necessary after the amendment to prove either that there was reasonable apprehension as contemplated under old section 10 of it ""being harmful or injurious to live with the other spouse"". If the conduct of the respondent towards the petitioner was proved by the evidence put forth before the Court to be of cruelty, then it is urged that the petitioner was entitled to a divorce or judicial separation. In the context of the contentions and the amendment, it was not required by the petitioner to prove either physical torture or harm to the life and its reasonable apprehension. It was also not necessary for her to prove that it was harmful or injurious for the petitioner to live with the husband. Reliance in this behalf was placed for the petitioner on the decision reported in *Dr. N.G. Dastane Vs. Mrs. S. Dastane, and Smt. Kaushalya Devi Vs. Masat Ram*, . It was contended that the allegation of infidelity on the part of the wife by the husband if proceeded over a period of years, and it is not established as a fact or even founded upon reasonable suspicion, that itself was an act of cruelty. Cruelty need not, and is not physical but also can be and is mental also being legal cruelty. Where a person is subject to a behaviour and way of life founded on continuous suspicion then the person is living, as in the present case under the constant surveillance and suspiciously watched by the seeing and unseeing eyes of the respondent husband, anxiety of possibility of quarrels in the family leading to the bickerings and tension being always present at the back would make life miserable. It was, therefore, urged that the petitioner having in this case successfully established, that the respondent unsuccessfully and without reasonable justification suspected the petitioner's morality and faithfulness and subjected her to treatment based on suspicion must be held to have treated her in a cruel inhuman manner.

20. Placing reliance in the case reported in *Dastane v. Dastane*, it was pointed out that the English notions of what is meant by cruelty, and requisite kind of cruelty and nature of cruelty required to be proved and established in English divorce case is unnecessary under the Indian Law. That this was specifically pointed out by the Supreme Court in *Dastane v. Dastane*'s case where it was said that though awareness of the decisions of the Foreign courts is relevant and useful, what is required in the case on the facts is the application of statutory law prevailing and applicable to the parties. Requirement of the kind and character of cruelty as required u/s 10(1)(b) as held by the Supreme Court was of lesser degree than what is under English law, which says ""it is not necessary as under the English Law, that the cruelty must be of such a character as to cause danger to life, limb or health or as to give rise to a reasonable apprehension of such danger"". The kind of cruelty which is described u/s 10(1)(b) as laid down by the Supreme Court was not the standard laid by English Law in India before, but

merely of such reasonable apprehension of such life together being harmful or injurious. The degree of cruelty and the character under the English Law is of a higher requirement than the postulated by the Indian statute. There is no absolute standard of cruelty irrespective of persons concerned. What is to be seen, examined and considered is whether with reference to the man and woman concerned considering their circumstances, pattern of life background, behaviour and other factors, it would be cruelty in their case. The standard is individual and specific so far as they are concerned. Naturally the consequence would, therefore, be that no formula or standard or strait-jacket regarding the standard of the cruelty can be laid down.

21. Nevertheless, it is common ground and cannot be disputed, that unjustified allegation against the wife of loss of chastity or improper moral behaviour and breach of marital duty for a long unreasonable period may amount to persecution. It would be subjecting the wife to an unnecessary harassment and suspicion inhibiting freedom of behaviour, feeling of exasperation and loss of natural freedom of life. Were a person to lead a life of constant anxiety and under the watchful eyes of the other spouse the very happiness of life together is denied and taken away. It is more like life of a prisoner and his warden.

22. Reliance on other hand was placed for the respondent on a judgment reported in *Madanlal Sharma v. Smt. Santosh Sharma* 1980 Bom.C.R. 218 : 1980 M.L.J. 391 by Jahagirdar, J. Before this learned Judge the decision in *Dastane v. Dastane*, (supra), was referred and relied upon and the circumstances that the amendment to the Act was made thereafter was also referred to and relied upon. It was pointed out and urged in that case that as a consequence of the amendment, instead of the law as laid down in *Dastane's* case, which was less stringent was applicable. The effect of the amendment upon the law as to the nature of cruelty requisite for relief was considered by the learned Judge who held that it resulted in the reversion to the former law, namely, that cruelty must be of such a kind as to endanger life or limb or reasonable apprehension of danger to it. It was urged that would mean a higher degree of cruelty of physical kind. Reliance was also placed in this behalf on another decision reported in *P. Vs. P. and Others*, , where the learned Judge though found that the behaviour of the respondent was tantamount to cruelty in the legal sense of the term, yet held there was no evidence "of any danger to the life of the petitioner" or any "reasonable apprehension of such danger". It was on that account pointed out that the suit was dismissed and cruelty was found not proved. It was, therefore, urged that the consequence of the amendment was that the law became more stringent with certain emphasis on the physical aspect of the import.

23. It is common ground in the present case that the petitioner has led no acceptable evidence whatsoever to show that whatever conduct respondent inflicted upon her, the petitioner had at any moment apprehended danger to her life or limb or health and that there was any reasonable apprehension thereof. So far as such danger to her life is concerned, her case of physical assault and

threat has not been substantiated at all. It is not her case, and there is no such evidence that as a consequence of his nagging suspicious behaviour, and resulting inhibition and continual fear and loss of freedom of behaviour, the petitioner in any way suffered in her mental or physical health. The question, therefore, only is whether if it is proved that the respondent behaved towards the petitioner in such a manner as can be described as legal cruelty by continually entertaining a persistent suspicion about her chastity and morality which is unjust and long would be sufficient to entitle the petitioner to a decree for divorce.

24. I am unable to agree that as a consequence of the amendment to the Hindu Marriage Act there is any revision to the English concept of cruelty as required as required to be proved or established in divorce or judicial separation proceedings by the petitioner. In holding so in Madanlal Sharma's case 1980 M.L.J. 391 the learned Judge has referred to a number of decisions rendered under the Special Marriage Act, section 27(1)(b) which are a ground for divorce. In several decisions referred to in that case and in Dastane's judgment which went to the Supreme Court this concept of English divorce law as to cruelty was referred and adopted. The statutory provisions in the Hindu Marriage Act prior to its amendment as held in Dastane's case by the Supreme Court did not require that standard of proof. The learned Judge took the view that by deleting the words following cruelty the change intended by the Parliament was to revert to the former position. It may be noted that as between the two Supreme Court held that the statutory provision was less stringent on the burden of proof.

25. In the circumstances in which the amendment to the Hindu Marriage Act, Act No. 68 of 1976 was brought, I am unable to think that the approach is justified. It must be borne in mind in this connection as pointed out in Dastane v. Dastane's case that the statutory requirement of the Hindu Marriage Act with regard to the cruelty in section 10(1)(b), it was not of the character and standard as was contemplated by the English law. As I have pointed out earlier, the provisions as regards cruelty appearing in section 10 have been transferred to section 13 of the Hindu Marriage Act not in their entirety. Section 10, on the other hand has undergone a considerable change. Section 10 provides grounds under Clauses 1(a) to 1(f). According to the present provisions, there are no separate grounds provided for petitioner for judicial separation but that almost all grounds available for divorce are also available for petitioner for judicial separation and in the case of wife those provisions which are mentioned in sub-section (2) of section 13. A decree for divorce could be obtained even u/s 10(1)(b) as is also provided presently u/s 13(1)(ia). However, the period after which decree for divorce can be obtained has now been reduced to a period of one year from the former period of two years.

26. In the statement of objects and reasons which accompanied the bill and which was subsequently passed as the amendment, the Legislature stated that the object in bringing forth that amendment was to ""liberalise the provisions

relating to the divorce""'. There were other objects also. But it is important to note that if the object in introducing the amendment was said to liberalise the provisions relating to the divorce, then the divorce must be therefore, easier to get and not made more difficult. As observed under English law or under the Special Marriage Act the cruelty provisions were more stringent. This was known to the Legislature. It then amends law in such manner as not to incorporate even the less stringent provision which was available. Then it seems that it cannot be its intention that by deleting those words there should be a reversion back to the original stringent provision relating to cruelty. It cannot be disputed that the Legislature was aware as to what was defined and what was considered as cruelty as obtaining under the Special Marriage Act. By reason of the pronouncement of the Supreme Court in *Dastane v. Dastane*'s case, it must be also aware of the interpretation and statutory requirement relating to cruelty as obtaining in section 10(1)(b) of the Act. It proceeded to liberalise the law relating to divorce when the amendment was made to the enactment. Where the Legislature makes an amendment to the law aware of the two different interpretations of an enactment which it is deemed to be aware of, it is said to make a preference of one or the other view. If it, therefore, professed and intended to liberalise the provisions relating to divorce and proceeded to make certain changes in the statutory provisions, then it is difficult to see how by deleting the less stringent requirement of cruelty, the legislature can be said to have intended to indicate its preference for the more stringent concept obtaining under the English law as interpreted under the Special Marriage Act. Cruelty by itself does not mean either any danger to life, limb or health and upon or its reasonable apprehension. The additional requirement of this character of cruelty is its physical impact upon the marital tie the breaking of which the law did not look with favour. Even with regard to the requirement of proof of cruelty of such character as being harmful and injurious to live with the other spouse, the standard which has been laid down in the case of *Dastane v. Dastane*'s is a personal standard which can be spelt out from the circumstances, behaviour, education, culture, manner of life to which the parties are accustomed and so on. If it was intended to liberalise the law I fail to see how it could be done by discarding a more elastic, liberal, less stringent interpretation and substituting in its place a higher degree of standard of proof to obtain relief. There can be no denying that as between the wording of the section before and the suggested interpretation of cruelty, the suggested interpretation is more demanding, more difficult to prove than the former. The position in law, therefore, before the amendment was better from the point of view of liberalisation.

27. There is yet one more reason why this contention cannot be accepted. The Legislature was fully aware of the interpretation of cruelty as made in the Special Marriage Act u/s 27. It was also aware of the decision of the Supreme Court holding that the character and standard of proof required u/s 10(1)(b) of the Hindu Marriage Act was less stringent from that required under the English law as laid down by the judicial decisions. The Legislature intended that cruelty must

be of such a kind as to cause danger to life, limb or health of reasonable apprehension thereto, nothing would have prevented it from saying so in those words in section 13(1)(ia) instead of leaving it vague and open to speculation to do so. That would be consistent more with the object of liberalisation further than of making it difficult.

28. Cruelty is really insensitivity and indifference to the feeling and suffering of another. It is not mere indifference but infliction of injury upon another and absence of feeling for the suffering of victims and consideration of the consequence of the injury inflicted proportional to the wrong. It is a course of conduct which the party knowing very well inflicts the injury and pain, and is indifferent towards that suffering or pain. It is insensitivity to such suffering and desire to inflict repeatedly such injury or harm. Cruelty is defined as insensitivity, a desire to inflict suffering and an outlook of indifference to the suffering of others. It would not, however, mean any single act of cruelty or any single act which has resulted in inflicting suffering and pain. It has to be a course of conduct between two persons who are wedded. A single act of cruelty could not provide ground for separation. The vow to be together for better or worse cannot be so lightly broken.

29. Cruelty has not been defined under the Hindu Marriage Act or Special Marriage Act. It is the interpretation placed by the judicial decisions in matrimonial cases on what is cruelty. Basically, cruelty is a kind of attitude towards another and towards suffering of others and consists in a desire of inflicting harm or injury without feeling for that harm and suffering inflicted. A comprehensive definition of cruelty which would be applicable to all facts and can be applied as a formula or applicable to all the cases is difficult. Each case will have to be judged on its own merits as to whether that particular conduct and pattern of behaviour and series of acts spell out such cruelty as between concerned person. The standard of sensibility as well as sensitivity varies from person to persons. It is with reference to particular persons involved that cruelty has to be determined. In this context, following observations in *Windeatt v. Windeatt* (1962) 1 All.E.R. 776 may be usefully reproduced :---

"...It is, in my view, equally undesirable if not impossible by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies."

30. Assuming, therefore, that the petitioner in this case is not required to establish that the behaviour of the respondent or his conduct resulted in any

danger to her life, limb or health or reasonable apprehension thereof, the question is whether the petitioner has succeeded in proving that there was any cruelty on the part of the respondent which can be said to be in the circumstances an unjustified course of conduct or behaviour which inflicted pain, suffering and agony upon the petitioner. I have already pointed out that the petitioner had not succeeded in proving, as was held by the learned Judge any instance of physical harm or assault, I do not see any reason to differ from the view of the learned Judge in that behalf. That leaves the matter of suspicion entertained by the respondent and vehemently asserted by him in the notice dated 19th August, 1978 and the written statement. In all three, instances have been referred to and relied upon by the parties indicating the conduct or behaviour on the part of the petitioner which gave rise to the suspicion and accusation on the part of the respondent which he claims is justified and for which he had ample proof. As pointed out, the only material which he produced and relied upon is the entry in the diary relating to the incident with Lalji Mistry and nothing more.

31. Of the three instances, the first occurred in 1971, in which Jadhav was involved, the second in the year 1974 near the house of the parties on the Eastern Express Highway, and the third in the year 1976 on Cadel Road. These were referred and relied upon by the parties. I do not propose to go into the evidence led by the parties in any detail. The learned Judge described the petitioner as not a reliable person. In the circumstances of her evidence, I do not think that the comment was unjustified. As between the petitioner and the respondent who have vied with each other in exaggeration of their story and the suspicions and wild accusation against each other, which are equally unsupported, it must be said that the petitioner has come out worse than the respondent.

32. I would briefly and particularly refer to each instance and the evidence in that behalf in that behalf. It is quite clear that if it is held that the respondent's story about the incident in which Jadhav was concerned is accepted, it no doubt raises a degree of suspicion. But it is equally clear that the respondent has not succeeded in proving all the circumstances in connection with the incident. It is admitted that Jadhav had visited the house of the petitioner on that night in June 1971. So far as the version that he came to her house because it was raining is absurd and cannot be believed. According to her, Jadhav was in her house at about 9 p.m. and waited there for half an hour, saying that he would go after meeting the respondent. There is reason to think that the respondent was not likely to reach earlier on that night and would be away from the house. But there is no clear evidence to show that the respondent reached the house at about mid-night when Jadhav was inside and that the house was locked. The respondent did not examine any of his neighbours who he says, collected on hearing knocking of the door and must have also seen Jadhav going away from his house. Jadhav's house is about 30 paces from the house of the petitioner. Therefore, if the incident occurred at about mid-night and the manner in which the respondent

says it did, it would make out a case of grave suspicion. It is equally not so suspicious and may not be so strange or difficult to comprehend in a modern society if Jadhav was in house at about 9 p.m. or so. Besides, it is quite clear that in 1971 notwithstanding this incident, the parties had lived together and had normal relationship. It is also nobody's case that except for the above incident there was any repetition or continuing conduct with Jadhav. It has neither been alleged nor proved.

33. Similar is the position with regard to the second incident of the year 1974. By itself if the petitioner had travelled in the car of Lalji Mistry on that day, it is difficult to see, what was wrong about it. Nothing further and beyond is alleged except that Lalji asked the petitioner to telephone to his residence. The respondent has alleged in this connection that Lalji was drunk to such an extent that he became unconscious and the petitioner had also given him company in that act. There is no lota of evidence to substantiate his contention which the respondent had undertaken to establish by ample proof.

34. The only material circumstance which is relied upon by the learned Judge as well as by the respondent is the entry with regard to 1976 incident in the diary dated 6th April, 1977. The entries of the diary are admittedly in the hand writing of the petitioner. The petitioners stated that the entry dated 6th April was forcibly got written by the respondent from her. I am unable to think that there is any truth as was held by the learned Judge in this connection. This was not a solitary entry, the petitioner seems to have made. She was in the habit of making entries of what transpired on particular day or earlier or whatever feelings came in her mind or were uppermost on that day or earlier. She has chosen to commemorate them on the pages of her diary which is a general purpose diary. Apart from the writing of 6th April to which reference is made by the learned Judge similar entries on 28th February, 1977 and 29th January, 1977 are also made in the diary. I do not wish to refer to either of the entries of 28th February or 29th January, 1977 as they were not used during the course of the evidence though the entire diary had been exhibited. The reading of those entries will however, go to show that the petitioner was in the habit, as I have observed of writing whatever she felt on that day in the diary.

35. Concerned writing on 6th April, 1977 is not a case of direct confession of any guilt though there is an admission of a guilt which was of such kind that no retribution would be good enough to make the petitioner free from ambition. The occasion for the entry is the hearing of the accident case. She expresses her sense of shame and pretension as incapable of purification. The accused in that case had admitted his guilt on that date and that brought forth this expression on the part of the petitioner. The statements dated 29th January, 1977 and 28th February, 1977 are equally repentant though they record demeanour or failure on her part described by her as a sin. As to what it must be can only be inferred and is not expressed. In any event the diary entry dated 28th February, 1977 shows that it is the respondent, who is more wronged than the petitioner. That in

substance is the story of this unfortunate, marriage.

36. Several attempts were made during the course of the hearing of this appeal to find out if there could be a solution to this marriage which seems to have broken beyond resurrection. The petitioner did not want any alimony and was content with the custody, and wanted amicable settlement of this irretrievable marriage. This, however, could not be brought as the respondent appears to be insisting upon continuing the marital tie which seems to have been as good as lost. From what I have pointed out, it is not possible to hold that the respondent's conduct in this case, even if suspicion was totally unjustified. She cannot take advantage of her own wrong. It is she who has brought this suit u/s 13(1)(ia). The petitioner would not be granted relief even if the circumstances entitling her to reliefs are shown to exist as it would be tantamount to petitioner taking advantage of her own wrong. That seems to be a complete bar to any relief to the petitioner. The petition was rightly dismissed.

37. The appeal fails and is also dismissed. There will be no order as to costs.