
(1998) 07 AP CK 0074
In the Andhra Pradesh High Court
Case No : AAO No. 1239 of 1997

Naval Kishore Somani

APPELLANT

Vs

Poonam Somani

RESPONDENT

Date of Decision : 29-07-1998

Acts Referred:

Evidence Act, 1872 — Section 3
Hindu Marriage Act, 1955 — Section 13, 13(1)
Penal Code, 1860 (IPC) — Section 498

Citation : AIR 1999 AP 1 : (1998) 5 ALD 349 : (1998) 5 ALT 234 : (1998) 3 APLJ 244 : (1998) 3 CivCC 179 : (1999) 1 DMC 415 : (1998) 4 RCR(Civil) 689

Hon'ble Judges : D. Reddeppa Reddi, J;A.S. Bhate, J

Bench : Division Bench

Advocate : Mr. T. Veerabhadrayya, for the Appellant; Mr. Pratap Narayana Sanghi, for the Respondent

Judgement

A.S. Bhate, J.—The appeal before us raises one important point amongst others. The important point that arises before us is:

"Whether a petitioner in a petition seeking divorce on the ground of "cruelty", is entitled to claim such a decree under any circumstances, merely on the ground that the respondent has failed to prove the charges of "cruelty" levelled in the counter by way of defence, against the petitioner?"

2. This point, along with others on facts, arises in the present appeal in the following circumstances:

The appellant is the original petitioner in OP No.9 of 1996. It is not disputed that marriage between petitioner and respondent took place under the provisions of the Hindu Marriage Act, 1955, (hereinafter referred to as the "Act") and was performed on 26-1-1989 at Visakhapatnam. The spouses are not residing together since April, 1990. It is petitioner's case that immediately after marriage, both of them went for honeymoon. The petitioner is resident of Secunderabad. The honeymoon planned by him was at Udaipur but the

respondent rejected the trip to Udaipur and instead suggested Nepal. Though petitioner was hurt by this, he planned the visit to Nepal. It is alleged that in the trip the respondent was uncooperative on all occasions and picked up quarrels with the petitioner. The parties had to return to Secunderabad before the planned day of return. This was due to the uncooperative conduct of the respondent throughout. On return to Secunderabad, the respondent continued her quarrelsome nature. She picked up quarrels with all the members in the family. She misbehaved and disrespected the parents of the petitioner. She often asked that she should be reached to her parents. She showed apathy for matrimonial life and suggested that marriage be dissolved. One Sri Kishan Chandji, who is uncle of respondent, was informed about this in his visit at Secunderabad. The said uncle and petitioner took respondent to a Psychiatrist, who diagnosed respondent as a patient "Adjustment Reaclia". Treatment was given to respondent. The respondent did not improve and continued her conduct of picking quarrels, and giving threats. She continued to suggest that marriage be dissolved. The petitioner thus suffered continuous mental torture which amounted to mental cruelty towards him. The respondent left for Visakhapatnam on 12-4-1990. A detailed letter was sent to the father of the respondent on 7-7-1990. A legal notice was sent on 25-7-1990. By this notice, the petitioner called upon the respondent to agree to a divorce by a mutual consent. The respondent instead of agreeing to such request approached "Manila Dakshata Samithi" headed by the First Lady of the State (wife of the then Governor Sri Krishna Kant). The petitioner was time and again called at the Governor's house by the said Samithi. The petitioner states that as per the dictates of the First Lady he was forced to write that he shall return all the jewellery to the respondent and also pay Rs.700/- p.m. for pocket expenses of the respondent if the marriage was dissolved and shall further pay an amount of five lakh of rupees and arrange for a Flat at Hyderabad as a part of permanent alimony. A threat was given by the First Lady that the petitioner would be prosecuted for an offence u/s 498A of the Indian Penal Code (for short the "IPC"). Thus the petitioner has been subjected to cruelty by variety of means. The petitioner ultimately filed this petition on 4-12-1990 for seeking dissolution of marriage on ground of aforesaid "mental cruelty".

3. Respondent-wife denied all the allegations against her. It was stated by her that during the honeymoon trip, calls from sister and father of the petitioner were received quite often in Nepal calling upon the petitioner to return immediately to Secunderabad for business purpose. She was completely cooperative in the trip. She was attending to all household work at her matrimonial house with care. She stated that though she was never treated with dignity by the mother-in-law and though she was abused, she as a dutiful wife continued to do all the household t work. The mother-in-law then started beating and abusing her. Thus apart from mental cruelty she was victim of physical cruelty also. She became pregnant in August, 1990. Though this was a matter of joy, the petitioner and members of his family surprisingly became quite unhappy

with this news. The mother-in-law was all the while desirous of bringing a new daughter-in-law, who would bring large dowry and money in the family. As respondent was not in a position to bring any such dowry, she was being coerced to agree for divorce. When she became pregnant, she was taken to some doctor on pretext of being got examined. When taken to doctor, a plan was hatched to carry out abortion. She refused to get such abortion done. Her staunch opposition to the abortion has been given colour as a behaviour of psychic nature. In December she was beaten very severely by the petitioner causing injury to her hand. She felt danger to her life and went to a nearby house of one Smt. Kishore, When she tried to return to matrimonial house, she was not given entry. She was forced to go to her relative and she then sought help of "Mahila Dakshata Samithi". Allegations against Samithi are false. The Samithi made efforts to bring about reconciliation. She claimed that she was very much desirous of matrimonial life. She has given birth to a male child on 2nd May, 1991. It is alleged that as the petitioner was refusing to admit her to matrimonial house, she filed a case u/s 498-A of IPC for the cruelty suffered by her. In short, it is the contention of respondent that it is the petitioner, who has treated the respondent with cruelty and he is not allowing her to resume cohabitation. It is alleged that petitioner cannot take advantage of his own wrong. He wants to get rid of respondent in some manner or other.

4. The learned Family Court, Secunderabad before whom the trial of the petition took place, dismissed the petition holding that petitioner failed to establish the alleged charges of "cruelty". The Court observed that having regard to the existence of a small child aged two years, and the fact that cruelty alleged by the petitioner was not proved, it was better that both parties should live together for the sake of child at least- Thus holding the petition was dismissed.

4A. Now in the appeal, it is argued by Sri Veerabhadraiah, the learned Counsel for the appellant/petitioner, that petitioner has proved "cruelty" alleged by him. Sri Veerabhadraiah emphasised that whether petitioner has established his claim or not, the fact remains that the respondent charged petitioner of having ill-treated her and these charges were not proved. Failure to prove such charges of ill-treatment amounts to "cruelty" towards the husband and therefore, the petitioner should have been granted a decree for failure of respondent to prove the allegations levelled against the petitioner. Sri Veerabhadraiah has relied on the decisions of this Court for contending that petitioner can claim divorce on the ground of "cruelty" basing on the unproved allegations in the counter levelled by the respondent. The first case is K. Lalitha Kumari v. K. Ramprasad Rao, 1992 ALT 631 and the second is Jayakrishna Panigrahi v. Surekha Panigrahi, 1995 (3) ALD 195.

5. As against this Mr. Sanghi, the learned Counsel for respondent has contended that the petitioner has failed to establish charges levelled against the respondent, as rightly held by the learned Family Court. He contends that even though the allegations in the respondent are held as not proved, that will not be a sufficient

ground for granting a decree in favour of the petitioner. The petitioner has to prove that the allegations/charges levelled in the counter are false, vexatious, baseless and defamatory. In the instant case in the evidence the petitioner has nowhere even glibly stated that the averments made by the respondent in the counter suffer from any of these vices. It is urged that in fact the petitioner has never made out a case that the pleas raised by the respondent amount to "mental cruelty" to him. Sri Sanghi on the other hand says that having regard to the evidence in the case the averments made by the respondent have been duly proved.

6. It is necessary to remember that the term "cruelty" has nowhere been defined in the Act. It is also not possible to define the same. Human conduct is so complex that a rigid definition of "cruelty" is not possible. The Legislature has purposely avoided to define "cruelty". It is for the Courts to interpret, analyse and define as to what would constitute "cruelty" in the facts of a particular case. While deciding, so many factors have to be borne in mind. In particular social status, customs, traditions, caste and the community, upbringing and the public opinion which prevails in particular society, as well as in the particular locality. Thus before deciding as to whether "cruelty" has been proved or not variety of factors have to be considered. It is however, almost accepted by and large that cruelty means such conduct of the other side by which the petitioner cannot reasonably be expected to live with the respondent. This is of course a very broad approach. When a petitioner comes to the Court for seeking relief on the ground of "cruelty", it is expected that the petitioner would give particulars of the alleged cruelty. It is not that by merely averring in the petition that the respondent treated the petitioner with cruelty, the petitioner can hope to make out his case. Particulars of "cruelty" have to be given. The mere fact that parties are unhappy of some usual wear and tear or due to some failings in the tempor, would not be sufficient to spell out a case of cruelty. This is because different temperaments is always the Rule. Cohabitation cannot be disrupted merely because of different temperaments of spouses. The expression "cruelty" comprehends both physical and mental cruelty. It is not possible to say that every averment or allegations made against the other party showing some incompatibility amount necessarily to "cruelty". It is of course true that of finding out whether conduct of one party towards other amounts of "cruelty" it is not necessary to prove the intention of the respondent Irrespective of the intention of the respondent if his/her conduct or behaviour makes it impossible to cohabit for any reasonable person, that would constitute "cruelty". It is the result which is more important. Therefore, it is for the petitioner to state and prove as to what was the effect on him of the alleged conduct or behaviour of the respondent. As pointed out earlier, it is quite possible that a particular conduct may amount of "cruelty" in one case but the same conduct necessarily may not amount to "cruelty" due to change of various factors, in different set of circumstances. We are therefore of the view that it is essential for the petitioner, who claims relief, to prove that a particular/ part of conduct or behaviour

resulted in "cruelty" to him. No prior assumptions can be made in such matters. Meaning thereby that it cannot be assumed that particular conduct will under all circumstances amount to "cruelty" vis-à-vis the other party. The aggrieved party has to make a specific case that the conduct of which exception is taken amounts to cruelty".

7. There is no doubt whatsoever that false, scandalous, malicious and baseless charges leveled by one party against other party do amount to "cruelty". The decisions relied upon by Sri Veeraabhadraiah, the learned Counsel for the petitioner/appellant, also make the proposition very clear. As far as this Court is concerned, it has to be held as the settled legal position that the allegations made for the first time in the Counter/written statement, by the respondent can be foundation for granting a decree of divorce in favour of the petitioner. If those all allegation are found to be false and baseless. This is irrespective of the fact that the petitioner has failed to establish any of the charges made by him on ground of "cruelty" against the respondent. To that extent the law as far as this Court is concerned, is settled. Though all the High Courts are not of the same view we are bound by the proposition enunciated in the aforesaid two decisions namely K. Lalitha Kumari's case (supra) and Jayakrishna Panigrahi's case (supra).

8. The proposition aforesaid is tried to be expanded by the learned Counsel for the appellant before us. It is argued that as soon as the respondent fails to prove the averments of serious charges leveled against the petitioner in a petition in a petition based on grounds of cruelty, the petitioner is entitled automatically to claim a decree of divorce on the ground that such unproved charges amount to "cruelty" towards him. We do not think that we can expand the proposition to such an unlimited extent. Sri Veerabhadraiah has repeatedly drawn our attention to the aforesaid cases for urging that the ratio of those two cases is wholly supports his contention. We must deal with this contention in some more detail.

9. We think that it is well recognised that the effect of a precedent has to be studied minutely. Any isolated consideration shorn of its context, of any precedent is likely to lead to risk of reaching improper conclusion. We think that the correct position in Jurisprudence regarding the value of precedents regarding the value of precedents is that a judgment has to be read as a whole and any observations in the judgment have to be considered in the light of the facts and circumstances of that case. It is trite to say that ratio decidendi is binding in subsequent cases. All general observations made in a case are not binding. On the other hand, the later Court is well advised not to expand unnecessarily the scope and authority of a precedent, In Amar Nath Om Prakash and Others Vs. State of Punjab and Others, his Lordship Justice O. Chinnappa Reddy had observed.

"Judgments of Courts are not to be construed as Statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to

define Judges interpret statutes, they do not interpret judgments. They interpret words of Statutes; their words are not to be interpreted as statutes."

10. It will thus be seen that every word and every observation made in a judgment is not to be considered as a precedent or an authority in all subsequent cases. The Court has to find out the ratio-decidenti and, the true principle enunciated in the precedent. Each and every sentence or each and every observation is not to be considered or to be construed as precedent for all times to come. The observations or finding in a particular case have to be restricted to the facts and circumstances of that case. In *Prakash Amichand Shah Vs. State of Gujarat and Others*, , the supreme Court pointed out as follows:

"A decision ordinarily is a decision on the case before the Court while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Hence while applying the decision to a later case, the Court which is dealing with it should carefully try to ascertain the true principle laid down by the previous decision. A decision often takes its colour from the questions involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation."

In the words of Lord Halsbury, L.C. (*Orinn*) v. *Leathem*, 1901 AC 495, 506) at page 506; 1901 AC:

".....there are two observations of a general character which I wish to make and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

11. It will thus be seen that what is the ratio decidendi in *K. Lalitha Kumari's* case (supra) and *Jayakrishna Panigrahi's* case (supra) relied upon by the learned Counsel for the appellant has to be found out. The second case is necessarily based on the first case. Justice P. Venkatarama Reddi in *Jayakrishna Panigrahi's* case (supra) has very specifically referred to the ratio of the judgment in *Lalitha Kumari's* case (supra). The passage which was referred to from *Lalitha Kumari's* case (supra) is as follows:

"Once the allegation of adultery made in the written statement are found to be false, the petitioner is entitled to relief even if the allegation are for the first time made only in the written statement. It should also be remembered that in the present case there are various allegations which are of a very scandalous nature and the appellant-wife never made any effort to substantiate those allegations."

These observations were made by Justice Sri D.J. Jagannadha Raju. Second learned Judge decided the case of *Lalitha Kumari's* case (supra) was Justice Sri

Upendralal Waghray. In his separate but concurring judgment, his Lordship said:

"It cannot be doubted that such an allegation, if unproved, will furnish a cause of action to the petitioner. Is it necessary to drive him to a fresh petition, when the attempt should be to avoid multiplicity of proceeding. The need for amendment of the petition will have to be considered if such allegations if improved amount to desertion or cruelty, which is not pleaded as a ground. If such allegations, if unproved furnish a new ground like cruelty or desertion etc., which is not pleaded probably in an appropriate case amendment may be necessary."

12. His Lordship Justice Sri Upendralal Waghray thus agreed with the proposition of Justice Sri D. Jagannadha Kaju that if the allegations in the written statement are found to be false the petitioner is entitled to relief. Justice Sri Upendralal Waghray probably foresaw the correct position of law in his separate but concurring judgment- His Lordship rightly observed that to furnish a new ground like "cruelty" or "desertion" which is not pleaded in the petition, it would be necessary for the petitioner to amend his case so as to take advantage of the allegations made in the counter as a new ground of cruelty. Thus the parties as well as the Court dealing with the case would be aware of what are the true points for determination in the case. In Jayakrishna Partigrahi's case (supra) His Lordship Justice P. Venkatarama Reddi, in the facts and circumstances of the case before the Bench, had observed that there was no semblance of justification in making the wild allegations against the appellant. In para-13 the Bench observed that the respondent went on hurling baseless allegations. (Underlined to give emphasis). It will thus be seen that in Lalitha Kumari's case (supra) the Bench found that the allegations made by the respondent were false. In the Jayakrishna Panigrahi's case (supra) also the Court found that the allegations made by the respondent were either without semblance of justification or wild and baseless. The proposition now sought to be put forth is that mere failure of respondent to prove the allegation also amounts to "Cruelty" towards the petitioner. We are of the view that the mere fact that the allegations taken in defence are not proved will not amount to saying that the allegations are wild, baseless, false or like. The essential ingredient in such case to constitute "mental cruelty" is that the allegations levelled must be false, wild, baseless and scandalous. All these ingredients must co-exist.

13. In our view a fact which is not proved does not necessarily mean that it is a false one. We may refer to the provisions of Section 3 of the Evidence Act. Section 3 of the Evidence Act gives definitions of various words and expressions. The expression "proved" is followed by the definition of the expression "disproved". This is followed by the definition of "not proved". A fact is said "not proved" when it is neither proved nor disproved. On the other hand, a fact is said to be disproved when, after considering matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. The word "disproved" is akin to word

"false". What is "disproved" is normally said to be a false thing. It will thus be seen that a fact not proved is not necessarily a fact disproved. A fact which is not proved may be true or may be false, A doubt lingers about its truth. Merely because it not proved, one may not jump to the conclusion that it is disproved. A fact is disproved normally by the person, who claims that an alleged fact is not true. For disproving a fact the burden is always on the person, who alleges dial the fact is not true. What we wish to emphasise is that the ratio of the cases relied upon by the learned Counsel for the petitioner/appellant is only to this effect that allegations made in the written statement, though they are subsequent to the filing of the petition, if are false and baseless then only the petitioner can claim that such false and baseless allegations have caused "mental cruelty" to him. Merely because they are not proved it cannot be said that they amount to causing of "mental cruelty". In fact in *Paras Ram v. Kamlesh*, AIR 1982 Punjab & Haryana 60 the Punjab and Haryana High Court observed:

"However a mere allegations by way of a defence in the written statement, irrespective of its falsity or otherwise, is not in the same category unless of course, such an issue is specifically put to trial and the firm finding arrived at whether the allegation was false or substantiated."

This observation has been approved by this Court in *Lalitha Kumari's* case (supra). In *Paras Rain's* case (supra) the Punjab and Haryana High Court has further observed:

" It is manifest that in order to succeed on this ground, the petitioner must establish the falsity of such an allegation."

At another place the Court said:

"Unless the truth or falsity of such allegation made in the written statement is put to trial in the manner aforesaid and it is established one way or the other no legal consequences can flow therefrom for the purpose of Section 13(1)(ia) of the Act."

14. It will thus be seen that it is not sufficient to contend that charges made in the written statement are unproved, and therefore, amount to "cruelty". What is further necessary for the petitioner to prove is that the said charges are false. The burden is on the petitioner to show that the charges are false. The burden cannot be thrown on the respondent because respondent has not come to the Court for seeking any relief. It is settled law that in all matrimonial causes burden of proof is on the petitioner. Particularly in cases of "cruelty" it is for the petitioner to prove the element of "legal cruelty". If in the facts and circumstances of the case from evidence led on both sides, the Court comes to the conclusion that irrespective of the burden of the proof there is sufficient material from either side to prove that a particular allegation is not only not proved but is false, it will be open for the petitioner to take advantage of such finding. However, it is *sine-qua-non* that the petitioner must show that respondent's allegations are false and therefore, they amount to "mental

cruelty" towards him. It was contended that such a negative burden cannot be placed on the petitioner. This is not wholly correct. The general rule of evidence is that if in order to seek a relief the petitioner has to prove certain ingredients though negative, then it is for the petitioner to prove the same. We may give an example of a suit for malicious prosecution. The burden though in negative in nature, is on the plaintiff to prove that a false charge was brought against him, of which he was acquitted. The burden is light no doubt but the burden is certainly on the petitioner. Petitioner cannot escape from the duty of proving negative.

15. We propose to give some examples as to how the proposition sought to be advanced by the learned Counsel for the appellant, if taken to its logical end would create an untenable situation.

If the proposition of the appellant that every case when the respondent fails to prove the allegations in the counter in a petition for divorce on ground of "cruelty", would necessarily result in granting of decree of divorce in favour of the petitioner then, the petitioners would be instigated to file utterly false petitions on the ground of "cruelty" by giving untrue particulars in the hope that the respondent would raise some defence by making some allegations and would be unable to prove the same. Such inability to prove the allegations by the respondent may be due to variety of grounds. Merely because the respondent would not be in a position to prove the allegations should not give a premium to the petitioner. Particularly if the petition is filed by the husband on ground of "cruelty" against the wife and if the wife alleges "cruelty" of different type in her counter, it is quite foreseeable that the wife on many occasions would not be able to prove the allegations of "cruelty". Because such "cruelty" more often than not, is meted out to her at the matrimonial house where except her, there will be no other witness to help her. Can it be said that merely because the wife raises true defence but is unable to prove it, she can be visited with penalty?

16. Another illustration can be given. A case is instituted on totally untrue allegations by a petition on ground of "cruelty" against the respondent. Thereafter the respondent in the counter states certain instances of "cruelty" towards the respondent. The petitioner does not choose to rely, till the end of the trial, on the averments made by the respondent as a ground of "cruelty". In the course of evidence respondent is able to bring out squarely in the cross-examination of the petitioner that his petition is totally untrue. Is it necessary under such circumstances for respondent, still to lead evidence in support of defence? The law does not require that though the petitioner has filed in his petition, the respondent should lead his evidence in support of his/her case. In such circumstances, if on the face of it, petitioner's case must fail, how can the failure of respondent of lead evidence in support of defence give advantage to the petitioner for claiming a decree for divorce?

17. A third illustration may be given. Suppose in a petition various particulars of "cruelty" are given. In answer of such petition the respondent denies the

allegations in the petition but given instances of "cruelty" by the petitioner towards respondent, of different nature. The petitioner is claiming divorce on the ground of "cruelty" alleged by him. The respondent is claiming divorce on the ground of "cruelty" towards respondent in counter-claim u/s 23A of the Act. The petitioner fails to prove the allegations of "cruelty" leveled by him, so also respondent fails to prove allegations of "cruelty" leveled in the counter against the petitioner. Will it be that a decree of divorce in favour of each of the parties, (claim and counter claim) will be passed merely because the other side was failed to prove that "cruelty" alleged by it? Such a situation is not imaginary. It is not, that when both the spouses want divorce they always come to Court u/s 13B of the Act. It is experienced quite often in the matrimonial causes that even though both the parties are unable to carry on life with each other, they cannot come together even for purposes of filing a joint consent petition. As is well known mere break down or mere incompatibility is not a ground for divorce. Therefore, it is perfectly possible and indeed has been experienced on quite a few occasions, that divorce is claimed on ground of "cruelty" on basis of different particulars alleged by the rival parties. If the proposition tried to be argued by the learned Counsel for the appellant is accepted, funny decision would arise where divorce decree is granted in favour of the each party merely because either party has failed to prove its charges not because the complainant party has failed to prove its case.

18. Particularly when respondent happens to be a wife in cases of this type, it is not imaginary to think that after having made true allegations in the defence against the husband, but when put under oath she may refuse to state all the facts merely to save the honour of her husband and to save the matrimonial life if possible. In Indian Society it is not difficult to envisage such a situation. The Indian Woman is by nature willing to sacrifice for purpose of saving matrimonial life. There are umpteenth cases wherein the female has undergone all the torture silently but has failed to raise voice against injustice caused to her. Her mere failure to prove the charges, though true against the husband, cannot lead to disastrous result, as is tried to be argued.

19. Having regard to all aforesaid discussion, we are of the view that though the subsequent event of making allegations in the written statement against the petitioner can be a ground for claiming a decree of divorce in a petition on ground of "cruelty", it is for the petitioner to prove that the allegations are false, baseless, malicious etc. The fact that the respondent could not prove the charges leveled in the defence may not supply a ground in favour of the petitioner to grant a decree of divorce. We agree with what Justice Sri Upendralal Waghray in Lalitha Kumari's case (supra) has observed that the proper way in such cases would be to make a specific claim on ground of charges leveled in the defence before the Trial Court itself.

20. Sri Veerabhadraiah referred to cases of various other High Courts also to support his point of view. We can point out that in all the cases relied upon by

him the point was raised in the Trial Court itself and in all those cases the charges leveled by the respondent against the petitioner apart from being very serious like adultery, impotency, malicious prosecution etc., were found to be either false or baseless in each of those cases.

21. Turning to the facts of the present case the evidence adduced before the Trial Court consisted on the side of the petitioner that of petitioner only. Similarly on respondent's side it consisted only of respondent. There were certain letters relied upon. The learned Counsel for the petitioner/appellant was unable to show as to how the petitioner's case be accepted on the grounds set out by the petitioner. The evidence was clearly unacceptable for proving the various allegations. He could nor persuade us in making us accept the petitioner's version.

As pointer out earlier it was argued that the respondent made false allegation that when she conceived, the petitioner and members of her family were not happy and wanted to carry out her abortion. The learned Counsel says that there is no proof of such allegation and this amounts of "cruelty". Reading of the evidence shows that the petitioner throughout his evidence has nowhere stated that the allegation made by the respondent was false.

His examination-in-chief is totally silent about each and every allegation made by the respondent in her written statement. In the cross-examination when the respondent suggested that attempt to carry out abortion of respondent was made, he simply said that it was not true. On the other hand, the respondent has stated about it positively. Her evidence has remained unscathed in her cross-examination. Sri Veerabhadraiah, however argues that the respondent has referred in her evidence about a visit to Dr. Neena Desai for purposes of terminating the pregnancy. It is argued by the appellant that she should have examined Dr. Neena Desai for purposes of proving attempt of terminating the pregnancy. Her failure to bring Dr. Neena Desai makes her allegation false. We are not inclined to accept such far-fetched argument. As pointed out by us it was for the petitioner to prove that the allegation was false. If really the petitioner wanted to show that the allegation is false, he could have examined Dr. Neena Desai to prove the falsity. This is in addition to what we have said earlier that petitioner in his evidence has nowhere said that the allegation of respondent about abortion was false. The same is case with all other allegations. The petitioner nowhere stated even once in his examination-in-chief that the particulars of "cruelty" alleged in the written statement are false. We are in fact inclined to think that when the evidence consisted of only oath against oath and when the petitioner failed to say on oath that respondent's evidence was false, the evidence of respondent need not be thrown out. Assuming for the sake of argument that it is not sufficient for proving the charges, it cannot be said that the charges are "disproved" or "false". They only remain unproved and nothing further. Similarly is the case regarding the charge of demand of dowry. It is true that if a demand of dowry is proved that amounts to "cruelty" against the victim

of such demand i.e. other spouse. Similarly if a false allegation is made about demand of dowry, such allegation will also constitute "cruelty" towards the person who is alleged to have made demand, But the falsity of such charge has to be proved. It is argued in the instant case that respondent has initiated a proceeding u/s 498-A of IPC and has also filed other proceedings and that instituting such proceeding amounts to "cruelty". We, cannot accept such a wide proposition. The said proceedings are still pending. It is only after decision in those proceedings that petitioner can say as to whether false charges were made or not. At this juncture it is not possible to say that mere initiation of proceedings amounts to "cruelty".

21A. In fact in the present case it appears to us that no attempt was made to raise the point in the Trial Court that allegations made by the respondent in the counter amounted to making of false charges and thus constituted "cruelty" towards the petitioner. Apart from the fact that even after the filing of the counter, there was no amendment to the petition for making the charges in the counter as the basis for alleging "cruelty", the judgment given by the Trial Court shows that even at the time of argument such plea was not advanced. At the stage of arguments before us Sri Veerabhadraiah produced a copy of written note of argument alleged to have been given to the Trial Court. The record of the Trial Court does not show any such written argument having been submitted. The so-called written argument bears date 15-4-1997. The record shows that the case was never posted on 15-4-1997 by the Trial Judge. In the circumstances though it may be that some note was kept on record subsequent to the oral arguments, it cannot be said such a point was urged before the Court. In any event the memo of appeal does not raise a ground anywhere that though such point was urged before the trial Court, the Court failed to decide it. Further the judgment of the learned Trial Judge does not show that he was called upon to decide this point. Whether a particular action or conduct of the other side amounts to "cruelty" or not is essentially a question of fact. We do not think that it would be proper at the appellate stage to permit the parties to raise such question of fact for the first time. We had therefore, even enquired from the learned advocates on both sides as to whether a remand of the case could be a solution. However, Sri Veerabhadraiah, the learned Counsel for the appellant specifically contended that he stands by his argument that such point can be raised even for the first time in the appeal and that mere non-proof of allegations in the written statement furnishes a good ground for claiming a decree in a case of present type. He therefore, requested the Court to decide the appeal on merits as the evidence stands. In the circumstances, we were left with no option but to decide the appeal on its merits.

22. As a result we are of the view that as laid down in Lalitha Kumari's case (supra) and Jayakrishna's case (supra) it is no doubt open for the petitioner in a petition for divorce on ground of "cruelty" to seek a decree of divorce on grounds arising out of charges levelled in the written statement by the respondent which amount to "cruelty". However, such a right to claim a decree of divorce does not

extend to cases where the respondent has merely failed to prove the charges. We hold that it is necessary to prove further that the charges levelled by the respondent apart from being unproved, are false, baseless, vexatious and malicious. The proof of falsity of such charges is a sine qua non for claiming a decree on ground of events alleged in the counter. How much proof and from what source, should come for proving falsity is a pure question of fact depending upon case to case. In our opinion in the instant case it has not been proved that the averments made in the counter by the respondent are false, malicious, baseless or vexatious. In the circumstances, we are of the view that the appeal is without any merit and deserve to be dismissed.

The appeal is accordingly dismissed.

No order as to costs.