

**HIGH COURT OF MADHYA PRADESH BENCH AT  
GWALIOR**

**BEFORE**

**HON'BLE SHRI JUSTICE ANAND PATHAK**

**&**

**HON'BLE SHRI JUSTICE ROOPESH CHANDRA VARSHNEY**

**FIRST APPEAL NO.1142/2023**



**VS.**



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**Appearances:-**

Shri Yash Sharma – Advocate for the appellant/ wife.  
None for the respondent/husband though served .

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**JUDGMENT**

**(Delivered on 13<sup>th</sup> the Day of November 2024)**

With consent heard finally.

1. The instant first appeal under Section 28 of the Hindu Marriage Act, 1955 hereinafter referred as HMA has been filed by the appellant/ wife against the judgment and decree dated 04-03-2023 passed by Principal Judge, Family Court Vidisha (M.P.) in HMA Case No.136/2019 whereby although the Court has found cruelty against the appellant/ wife but did not pass the decree of divorce instead decree of judicial separation has been passed.
2. Facts of the case in short are that appellant and respondent got

married on 11-12-2000 with Hindu Rites and Ritual at Haridwar. Out of their wedlock, they are blessed with two children; one daughter namely [REDACTED] and one son namely [REDACTED]. It is alleged by the appellant/ wife against the respondent/ husband that from the next day of marriage respondent/ husband started touching the appellant mentally as well as physically for small things but appellant has not raised any voice against the same because she was a responsible house wife and was under the hope that by the passage of time, things would be sorted out but the same never happened.

3. In the year 2002, appellant started working in VLCC in Aurangabad, but respondent did not like the same and used to force her to take day off but due to nature of job appellant refused, on which respondent started beating her and threatened her to leave the job else she has to face consequences. When appellant did not listen to him then respondent beaten her so badly that she had to leave the job immediately thereafter.

4. Thereafter, they went to live in Gaziabad where also appellant underwent physical and mental cruelty. In the year 2003 when appellant got pregnant, one day respondent invited his friends for dinner but appellant requested him to bring the food from outside then respondent in the rage of anger pushed her due to which she suffered abortion and had to undergo DNC procedure at Bhopal. The attitude/ behaviour of the respondent remained the same.

5. On 17<sup>th</sup> November, 2005, appellant gave birth to a baby girl [REDACTED]. During the period of pregnancy, respondent neither took care of her nor supported her in any activity, rather continuously tormented her during that period also knowing fully well about the medical condition of the appellant. Earlier also, due to such behaviour of the respondent; she suffered abortion.

6. In the year 2006 and 2007, respondent on petty issues like not making food of his choice used to beat the appellant badly and make taunts upon her regularly. Appellant again got pregnant and gave birth to a boy on 06-10-2008 [REDACTED]. In the year 2013-14, they shifted from Puna to Delhi. There also respondent used to harass the appellant. In the year 2017, appellant started doing job in a school called [REDACTED]. Respondent again threatened her to leave the job immediately because he was not happy with her job therefore, under pressure, she left the job. Behaviour of respondent remained violent and cruel with the appellant and children in the whole period.

7. On 22-05-2019, respondent sent appellant and children to her maternal home Vidisha and told them not to come back in his house. Since then appellant with her children is living in her maternal home at Vidisha. Being upset by ill-treatment of the respondent with her and children, appellant filed an application under section 13(1)(i)(i-a) of the HMA seeking divorce on the ground of cruelty.

8. The Family Court however, found cruelty against the appellant

but looking to the fact that parties have led married life for almost 19 years happily, passed the decree of judicial separation. Against the said decree, appellant/wife is before this Court.

**9.** It is the submission of learned counsel for the appellant that she got married in the year 2000 and from the very next day of marriage, she faced harassment mentally as well as physically at the hands of respondent/ husband. Respondent used to touch her on petty things and used to pass objectionable comments on her existence. In the initial years, appellant used to tolerate all the things under the hope and trust that by the time, things would be sorted out, but things were never changed for her, instead, range and intensity of physical and mental cruelty increased with the passage of time.

**10.** It is further submitted that respondent was a foodie person and on not getting the food on time and good food, he used to beat the appellant. Sometimes, when they are alone and sometime even in front of guests/ others also. Out of marriage, they were blessed with two children one girl namely [REDACTED] and one boy namely [REDACTED]. After giving birth to children she thought that behaviour of respondent would improve but same never happened but the respondent started harassing her in front of their children. He used to harass the children also. Several times, appellant try to discuss and sort out the things but to no avail.

**11.** On small issues, respondent used to get extremely violent/

angry and used to start fighting with her and beat her. Appellant/wife lived with respondent/ husband for almost 19 years in the marriage but during the said period, behaviour of her husband did not change and remained same as on the first day of marriage. In whole 19 years, he used to ill treat the appellant.

**12.** It is further submitted that appellant is an educated lady and wants to be financially independent and pursue her career. She got the opportunity to work and make her career twice, once at VLCC, Aurangabad and another at School but due to stubborn behaviour of the respondent, on both the occasions she had to leave the job. Therefore, appellant had sacrificed her dreams and career to save her marriage, but respondent did not understand the feelings and had never behaved as an understanding husband. He never hesitated in causing harassment to with appellant in front of her children and others. Appellant suffered the ill treatment/ harassment at the hands of respondent for almost 19 years and thereafter, she decided to part with respondent for the future welfare of her children and giving them a good and happy life.

**13.** The family Court appreciated the record and though found the case of cruelty proved but did not pass the decree of divorce. Instead, passed the decree of judicial separation which is contrary to the record. While passing the decree, the family Court opined that both the parties lived in the marriage for almost 18 years happily,

however, some cruelty happened in that period but looking to the long period of 18 years of their survival in the marriage, decree of judicial separation has been passed by the Family Court.

**14.** None is present for the respondent/ husband to advance arguments. On 12.5.2023 registered AD notice was issued but respondent did not turn up. Again on 25.7.2024 fresh RAD notice was issued, that too on both of his addresses at Haridwar and Delhi, still he did not choose to appear. It appears that he is avoiding service of notice. Therefore court proceeded to hear arguments on behalf of appellant.

**15.** Heard the counsel for appellant and perused the record /documents.

**16.** This is a case where appellant is before this Court against the decree of judicial separation. From perusal of the facts of the case, it appears that appellant got married in the year 2000 and from the very next day of marriage she faced mental trauma as well as physical cruelty at the hands of respondent.

**17.** From the evidence available on record, it appears that respondent was in habit of touching the appellant for everything. The fact of physical as well as mental cruelty was very much proved before the Family Court and the finding in that regard has been given by the Court in para 184, but the Family Court swayed away by the fact that since the couple resides for 19 years therefore, passed

the decreed of judicial separation. Once the relationship between the two reached of irretrievable breakdown, marked with desertion, more than 5 years, then compelling the couple to live together will not serve much purpose by giving decree of judicial separation. Survival of marriage for 19 years does not mean that all things were good between the couple and the relationship would have continued till the end.

**18.** Judicial separation is provided in Section 10 of the Hindu Marriage Act, 1955 which reads as under:-

*“Judicial separation.—1[(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.]*

*(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.”*

**19.** Section 13 of the HM Act provide decree of divorce. Section 13 is reproduced as under:

*“(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--*

*(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or*

*(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or*

*(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]*

*(ii) has ceased to be a Hindu by conversion to another religion; or*

*(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.*

*Explanation.-In this clause,*

*(a) the expression mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;*

*(b) the expression psychopathic disorder means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]*

*(v) has been suffering from venereal disease in a communicable form; or*

*(vi) has renounced the world by entering any religious order;*



*(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;*

*Explanation.-In this sub-section, the expression desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.*

*(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground*

*(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 8[one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or*

*(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 8[one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.*

*(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,-*

*(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:*

*Provided that in either case the other wife is alive at the time of the presentation of the petition;  
or*

*(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or [bestiality; or]*

*(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;*

*(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.”*

*Explanation.-This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]*

**20.** The concept of Judicial Separation rests upon the consent and circumstances of the couple and hope of survival of their relation while the divorce is the decree which is based upon the allegations and counter allegations of the parties in *lis*. Judicial separation is a mechanism whereby a couple is given some cooling period to think over their decision of separation from each other while it is no longer obligatory. Divorce is a decree purely based upon the merits of the case. Several grounds are provided for decree of divorce to a couple

and if wife opts for divorce, then some additional grounds are also provided under the statutes itself. In the decree of judicial separation, right of inheritance is duly available to the couple while in the decree of divorce no such right of inheritance is available as after passing the decree of divorce, all the relations between the couple stands eclipsed.

21. Perusal of the aforesaid provision clearly indicates that the decree of judicial separation can be passed only if either party agreed to. The Court cannot bound the parties to cohabit with each other without their will or any application/ petition filed in that behalf. In the present case, appellant filed application under Section 13(i-a) of the Hindu Marriage Act seeking divorce on the ground of cruelty and she neither want judicial separation nor she prayed so in any of her averments made before the Family Court. She wanted divorce throughout.

22. The Hon'ble Apex Court in the case of **Dr. N.G. Dastane Vs. Mrs. S. Dastane (1975) 2 SCC 326** has held that:

*“32.....The Court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures.”*

23. The aforesaid decision was referred to with approval in **AIR 2002**

SC 2582 (Praveen Mehta Vs. Inderjit Mehta), (2007) 4 SCC 511 {Samar Ghosh Vs. Jaya Ghosh}, (2010) 4 SCC 339 {Manisha Tyagi Vs. Deepak Kumar}, (2012) 7 SCC 288 {Vishwanath Agrawal Vs. Sarla Vishwanath Agrawal}, (2013) 2 SCC 114 {U. Sree Vs. U. Srinivas}. In all these cases, the judgment rendered in the case of **Dr. N.G. Dastane (supra)** is relied upon. In the case of **Samar Ghosh (supra)**, the Supreme Court has enumerated the illustrative instances of human behaviour which may be relevant for dealing with the cases of mental cruelty:

*“No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.*

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

*(ii) \*\* \*\* \**

*(iii) \*\* \*\* \**

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

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

*(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of*

*the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.*

(vii) \*\* \*\* \*

(viii) \*\* \*\* \*

(ix) \*\* \*\* \*

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

(xi) \*\* \*\* \*

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

(xiii) \*\* \*\* \*

*(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.”*

**24.** This Court also in the case of **Yamini Dubey Vs. Suraj Bajaj in F.A.No.584/2022** has dealt with the issue in relation to judicial separation in detail.

**25.** From the evidence available on record, it appears that appellant mentioned various instances of cruelty towards her. The Family

Court in its finding itself explained that appellant is subjected to mental as well as physical cruelty thus, the appellant has successfully proved her case, still on possibility of reunion, passed the order for judicial separation. Therefore, approach of Court below was erroneous.

**26.** In the conspectus of facts and circumstances of the case, this Court is of the considered view that the Family Court erred in passing the decree of judicial separation. Hence, the instant appeal is allowed. The judgment dated 04-03-2023 and decree of judicial separation passed by the Family Court in HMA No.136/2019 is hereby set aside. The application under Section 13(i-a) of the Hindu Marriage Act filed on behalf of the appellant/wife stands allowed. Resultantly, appellant is found entitled to get decree of divorce.

**27.** Office is directed to draw decree of divorce accordingly.

**28.** Appeal stands allowed and *disposed of*.

**(ANAND PATHAK)**  
**JUDGE**

**(ROOPESH CHANDRA VARSHNEY)**  
**JUDGE**

Anil\*