

IN THE HIGH COURT OF DELHI AT NEW DELHI

MAT APP No. 26/2009

Judgment delivered on: 12.11.2010

Shri Ajay Kumar Gaur Appellant

Through: Mr.Ashutosh Kumar, Adv.

Versus

Smt. Monika Sharma Respondent

Through: Mr. Achin Aren, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR,

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

KAILASH GAMBHIR, J. Oral:

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1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955, the appellant seeks to challenge the judgment and order dated 27.11.2008 passed by the Court of the learned ADJ, Delhi, whereby the divorce

petition filed by the appellant under Section 13(1) (ia) & (ib) of the Hindu Marriage Act was dismissed.

2. Brief facts of the case relevant for deciding the present appeal are that the appellant and respondent got married on 23.1.2003 in Delhi according to Hindu rites and ceremonies and a female child was born out of the said wedlock on 17.5.2004. it is the case of the appellant that the respondent was suspicious about him having extra marital relations and that caused cruelty to him. He filed for divorce under section 13(1) (ia) & (ib) of the Hindu Marriage Act, 1955 which vide judgment dated 27.11.2008 was dismissed. Feeling aggrieved with the same the appellant has filed the present appeal.

3. Mr. Ashutosh Kumar, counsel for the petitioner states that the appellant has successfully proved the cruel behaviour of the respondent but still the learned trial court, ignoring the facts on record, dismissed the divorce petition. Counsel further submits that the respondent, however, in her written statement has admitted the fact that she had developed an impression of extra marital affair of the

appellant with one Ms. Indu Kakkar and with the said admission on the part of the respondent, the learned trial court ought to have accepted the version of the appellant. Counsel further submitted that the appellant was terminated from his service due to the said allegation of extra marital relationship which caused serious and indelible mental agony to the appellant due to which he could not devote time to his office work which ultimately led to his termination from the service. Counsel further submits that the respondent used abusive language besides not taking any interest in household work and on many occasions she misbehaved and insulted the appellant even in the presence of his friends. Counsel further submits that the respondent deserted the appellant in the first week of August 2004 without any lawful reason and the respondent did not return to the matrimonial home thereafter, and therefore the respondent by her refusal to join back the company of the appellant brought the cohabitation permanently to an end.

4. Refuting the submissions of the counsel for the appellant, Mr. Aren, counsel for the respondent submits that the fault squarely lies on the appellant who himself had created such an impression in the mind of the respondent but still the respondent never uttered a single word attributing any impression of extra marital relationship of the appellant. Counsel further submits that the appellant failed to establish the ground of cruelty and desertion and therefore, no fault can be found in the findings given by the learned trial court on issue nos. 1 and 5.

5. I have heard learned counsel for the parties at considerable length and have gone through the records.

6. The marriage between the parties was solemnized at Delhi on 23.1.2003 according to Hindu rites and rituals. A female child was born out of the said wedlock on 17.5.2004. The main reason given by the appellant which caused mental cruelty to him is that his relationship with the respondent got severed when she developed an impression of extra marital relationship of the appellant with some lady. The appellant has also stated that he tried his level

best to clarify things but the respondent could never dispel such an impression. The respondent in her written statement, on the other hand, has not denied this fact that she had an impression of the appellant having an extra marital relationship but she has taken a stand that not even a single word was uttered by her against such relationship. The appellant in his cross-examination has admitted that one lady with the name of Indu Kakkar was one of his friends. He has also admitted that the said lady was unmarried and with whom he had developed friendship while working in a company namely, Indo Asia Tours Pvt. Ltd. in the year 2000. He also admitted that when he celebrated his birthday he had invited the said lady Indu Kakkar but did not invite his wife or even his daughter. There can be no doubt that simply having friendship with a female or male would not lead to such a conclusion that one is having an extra marital relationship but at the same time after the marriage if any of the spouse indulges into any such act or acts which can lead to an inference of extra marital relationship then it is for the said spouse to make

an effort to dispel such an impression. No explanation has come forth from the side of the appellant as to why he did not even invite his own daughter, what to talk of his own wife, on his own birthday but gave preference to the said lady Indu Kakkar. It is not the case of the appellant that the respondent had levelled any allegation of any sort of existence of an extra marital affair. The case of the appellant is that the respondent had developed such kind of impression.

7. Marriage is an institution where bitter sweet instances happen every now and then. It is a delicate relationship which is to be nurtured with effort and love from both the parties. Normal wear and tear of married life cannot be magnified to claim dissolution of marriage on the ground of cruelty. The conduct of the spouse has to be such that it becomes intolerable for them to live with each other. The term cruelty however has not been defined in the Hindu Marriage Act, 1955 and rightly so as it is not possible to put the concept in precise definition. Cruelty can be both physical and mental cruelty. It would be pertinent to refer to

the judicial pronouncements of the Apex Court where mental cruelty as a ground for divorce has been discussed. In the case of ***A. Jayachandra vs. Aneel Kaur AIR 2005 SC 534*** it was held as under:

"12. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section [10](#) of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

13. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels

between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."

In the case at hand the conduct of the respondent has not been demonstrated to be so grave and weighty so to have caused mental pain and suffering to the appellant beyond tolerance. It would be pertinent to refer to the judgment of the Apex Court in the case of ***Samar Ghosh vs. Jaya Ghosh (2007)4 SCC 511*** where the Apex Court enumerated certain instances which could constitute cruelty and held that:

"72. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

73. Human mind is extremely complex and human behavior is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behavior in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental

cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration."

Applying the aforesaid to the facts of the case at hand it would be evident that the appellant has not proved on record any such instance which could cause any kind of mental suffering that could threaten the marital life of the appellant. The appellant in his petition has nowhere stated any specific detail as to when any abusive language or any allegation was made by the respondent attributing the extra marital relationship of the appellant with the said lady. Hence, the appellant has miserably failed to prove on record any act on the part of the respondent which could cause mental cruelty to him.

8. The learned trial court has in the impugned judgment clearly observed that it was the own conduct of the appellant which prompted the respondent to draw an inference of his extra marital affair. The court also observed that it is beyond comprehension as to why the appellant did

not leave the company of Ms. Indu Kakkar when his married life was at stake. It cannot be lost sight of the fact that the respondent had an *impression* of the appellant having extra marital affair with a lady named Indu Kakkar. The said impression of the respondent was not totally unfounded as he gave preference to his female friend over his own wife and daughter. This conduct of the appellant therefore had created such circumstances that it gave an impression to the respondent of his having an extra marital relationship. Even otherwise, if the respondent had developed such a feeling then it was the responsibility of the appellant to make concerted efforts to dispel the same for the smooth sail of the matrimony.

10. In the light of the above, this court does not find any illegality or perversity in the said findings arrived at by the learned trial court on issue no.1.

11. The other ground for claiming dissolution of marriage by the appellant is desertion. It is a settled legal position that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the

other without that other's consent, and without reasonable cause. For the offence of desertion so far as deserting spouse is concerned, two essential conditions must be there (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The onus to prove the ground of desertion was on the appellant which he has failed to discharge. The appellant has failed to prove even the exact date when the respondent had deserted him or any specific efforts made by the appellant to bring back the respondent to the matrimonial home. The appellant has also failed to prove the *animus deserendi* on the part of the respondent which is vital to prove the ground of desertion. Hence on issue No.2 as well, the findings of the learned trial court are also upheld.

13. In the light of the foregoing, this court does not find any merit in the present appeal and the same is hereby dismissed.

November 12, 2010
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KAILASH GAMBHIR, J