

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: .2012

+ **FAO 233/2003**

Shri Rajeev Chadha Appellant.

Through: Mr.J.C.Mahindroo, Advocate.

Vs.

Ms.Shama Chadha Nee Shama Kapoor Respondent

Through: Mr.D.K.Malhotra and Mr.Rajesh
Malhotra, Advocates.

AND

MAT.APP.41/2008

Rajeev Chadha Appellant.

Through: Mr.J.C.Mahindroo, Advocate.

Vs.

Shama Kapoor Respondent

Through: Mr.D.K.Malhotra and Mr.Rajesh
Malhotra, Advocates.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J.

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1. These two appeals are filed under Section 28 of the Hindu Marriage Act, 1955. In FAO 233/2003, the appellant-husband has challenged the judgment and decree dated 05.03.2003 passed by the Court of the learned ADJ, Delhi in HMA No.453/02 whereby the petition filed by the appellant under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights was dismissed. In MAT.APP 41/2008 the challenge is to the judgment and decree dated 23.01.2008 passed by the Court of the ADJ in HMA No.331/06 whereby the petition filed by the respondent-wife under Section 13 (1) (ia) of the Hindu Marriage Act was decreed in favour of the respondent wife leading to the dissolution of marriage between the parties.

2. First I propose to deal with the appeal bearing Mat.App.41/2008 wherein the challenge has been made by the appellant to the decree of divorce passed by the learned trial court as the fate of other appeal filed by the appellant bearing FAO No.233/2003 would depend on the outcome of the decision in Mat.App.41/2008.

3. Brief facts of the case relevant for deciding the present appeals are that the appellant husband had invited matrimonial alliance through a newspaper advertisement seeking a working wife in response to which the bio data of the respondent wife was received and consequently the marriage between the parties was solemnized on 28.5.2001 in accordance with Hindu rites and ceremonies. The respondent wife besides citing other instances of neglect by the appellant claimed that the marriage between the parties was not consummated which caused her mental cruelty on account of which she filed a petition for divorce under Section 13(1)(ia) of the HMA. The grievance raised by the appellant husband on the other hand is that the respondent wife duped him by falsely projecting herself to be a working woman and due to which after marriage he refused to have any relationship with her till the time she produced the requisite certificates. Vide judgment and decree dated 23.1.2008 , the learned trial court passed a decree of divorce thereby dissolving the marriage

between the parties and feeling aggrieved with the same, the appellant has preferred the present appeal.

4. Mr.J.C.Mahindroo, learned counsel appearing for the appellant laid much stress on the fact that the appellant was fully justified in not maintaining physical relations with the respondent as she did not disclose the correct facts in her bio-data. Counsel also argued that the respondent had exposed herself on account of her blatant and repeated refusal to furnish the educational certificates and she had thus hatched a conspiracy in collusion with her brothers and sister-in-law and ultimately left the matrimonial home on 01.07.2001. Counsel also argued that the respondent had lodged a complaint before the Crime Against Women Cell leveling false allegations of non-return of dowry articles including the articles which did not constitute her istridhan. Counsel also argued that the divorce petition filed by the respondent is a counter blast to the petition of restitution of conjugal rights filed by the appellant prior to the filing of the divorce petition. While denying all the allegations of cruelty

leveled by the respondent in her divorce petition, the counsel for the appellant categorically took a stand that the marriage was duly consummated and the appellant had only desired that his wife should furnish all the requisite certificates so as to enable him to look for her employment, as he wanted that they should not have any child till they were financially sound. The counsel for the appellant also gave explanation that at Shimla the parties could not have any physical relations on account of the presence of the children of brother and sister of the respondent in the same room and also when they were travelling in the first class compartment where four persons were occupying the coupe. Counsel also argued that the appellant had also produced the medical certificate before the CAW Cell to prove his potency, but the same was ignored by the learned trial court. The counsel submitted that the learned trial court while passing the impugned judgment has ignored the provisions of Section 23 of the Hindu Marriage Act and has let the respondent take advantage of her own wrongs and at the same time ignored the positive evidence

led by the appellant giving complete justification for refusal on his part to have physical relationship with his wife.

5. Counsel for the respondent, on the other hand, supported the decree of divorce passed by the learned trial court. Counsel argued that the respondent-wife was treated by the appellant-husband with cruelty both physically and mentally, as he failed to discharge his matrimonial obligations to consummate the marriage. Counsel for the respondent contended that in fact the appellant had humiliated and insulted the respondent by repeatedly refusing to have sex with her on false and flimsy grounds. Counsel further argued that the appellant-husband in fact has admitted in his pleadings that he had retracted his relationship with the respondent till she produced the requisite certificates of her educational qualification and of employment. Counsel also argued that the stand of the appellant stating that the marriage was consummated in the very first hour after arrival of the 'Doli' cannot be accepted, as the brother of the respondent had accompanied the doli and was present in the

matrimonial home throughout after arrival of the doli. Counsel for the respondent also argued that the appellant deliberately did not produce the report of his medical examination which led the learned trial court to observe that the appellant withheld the first available evidence from the court by not disclosing the result of his medical examination. Counsel also submitted that the appellant himself admitted in his evidence that he came to know about the respondent leaving her job a week prior to the marriage. The contention of counsel for the respondent was that after having known the said fact of non-employment of the respondent-wife, the appellant had proceeded ahead with the marriage, but then immediately after the marriage made it a big issue, to break the matrimony on the alleged ground of non-supply of educational certificates by the respondent. Counsel further submitted that the respondent did not make any misrepresentation in her bio-data as on the relevant date she was in employment with Infotech Institute and she had also appeared for her final year examination of MCA from IGNOU

which she later qualified and the said MCA certificate was duly proved on record by the respondent as Ex.PW-R2. Counsel for the respondent thus submitted that the conduct of appellant-husband towards the respondent wife was utterly cruel; both physically and mentally, as he denied a normal sexual life to his wife without any justifiable reasons.

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

7. Through a matrimonial advertisement, the appellant sought alliance with a working woman and in response to the said offer, the father of the respondent furnished the details of the educational qualifications of the respondent, her personality and other broad features with a categorical stand that the respondent was working with Infotech Institute and she had appeared for final MCA (3 years) course from IGNOU. The said bio-data is the root cause of the marital discord between the parties as the main defence taken by the appellant in his written statement was that the respondent misrepresented the facts in her bio-data

by falsely stating that she was working with Infotech Institute and also that she possessed the qualification of BP.Ed and is a final year student of MCA from IGNOU. The appellant in his defence as well as in his evidence has candidly admitted that he had refused to have any physical relationship with the respondent till she produced the requisite certificates to prove her educational qualifications as disclosed by her in the bio-data in response to the matrimonial advertisement. The appellant-husband has also taken a stand that he wanted a working wife so as to supplement his income and proper living for his family, but since the respondent did not come forward to furnish the said certificates to prove her educational qualifications, therefore, looking into the dubious conduct of the respondent, the appellant clearly told her that he would not have any relationship with her, if the facts disclosed by her in the bio-data turned out to be false.

8. The respondent-wife, on the other hand, has leveled numerous allegations against the appellant ranging from bringing insufficient dowry to her utter neglect by the family,

non-return of her istridhan, depriving the respondent to contribute in the household chores, the appellant-husband not entering the bed room before 11:30 p.m and mostly remaining with his mother, refusal of the appellant to alter the two suits given by his mother to the respondent, respondent getting scolded with abuses by the appellant on her refusal to eat stale 'kari' etc., but the main ground taken by the respondent for claiming a decree of divorce was 'non-consummation' of the marriage and deliberate avoidance of the appellant to have physical relationship with her.

9. To support her case, the respondent-wife examined herself as PW-1 and adduced the evidence of her father Shri M.L.Kapoor as PW-2, her brother Dr.Mahesh Kapoor as PW-3, her second brother Shri Suresh Kapur as PW-4. In defence, the appellant examined himself as RW-1 and led the evidence of his father Shri Abnash Chander Chadha as RW-2, his mother Smt.Raj Rani Chadha as RW-3, Ms.Ruchika Joshi, LDC from the Office of District Legal Service Authority as RW-4, H.Ct.Naresh Kumar from the Office of Crime Against Women

Cell as RW-5, his maternal uncle Shri Vimal Kumar Verma as RW-6, his brother-in-law Shri Vinod Chadha as RW-7 and his sister Ms.Neelam Kapoor as RW-8.

10. The learned trial court, after evaluating the pleadings of the parties and the evidence adduced by them in support of their respective stands, concluded that the respondent-wife was able to prove that the appellant did not consummate the marriage purposely and did not behave like a newly married man. The learned trial court also held that though the appellant-husband took a stand that the marriage was consummated, but this fact could not be proved on record by him because no specific suggestion was given by him to the respondent in this regard and secondly it was admitted by him by way of pleadings and evidence that he had taken a decision to refuse to have any kind of relationship with his wife on the ground that she should first prove her bio-data and show her certificates so that he can make efforts to generate some employment for her to supplement his income. Taking note of such attitude and conduct of the appellant, the

learned trial court found that it was clear that the appellant was not interested in establishing marital relations with the respondent and he was more interested to have earnings of his wife. The trial court also observed that such a conduct and behaviour of the appellant-husband has no justification and instead of building the relationship with his wife, he demolished the same without any sufficient reasons. The trial court also did not find any valid justification given by the appellant in taking the stand that there was no opportunity for him at Shimla to have sexual relationship with his wife as the children of brother and sister of the respondent were staying in the same room and thus such a plea taken by the appellant would have no meaning in view of his admission taking a categorical stand of not to have any physical relation with his wife till she does not show her educational and employment certificates.

12. Non consummation of marriage was the sore point of the respondent wife due to which she filed a petition for divorce whereas the appellants' cause of heartburn was the

alleged misrepresentation in the bio data of the respondent wife and thereafter shrouding the certificates of the qualifications in mystery. In any event of the matter, the substantial question to be decided by this court is that whether the conduct of the appellant amounted to cruelty entitling the respondent for a decree of divorce. Cruelty as a ground for divorce as envisaged in section 13(1)(ia) of the Hindu Marriage Act has not been defined in the Act and rightly so as it is not capable of any precise definition. The Apex Court has thus through judicial pronouncements given a broad interpretation to the said term and the court entertaining the petition for divorce on the said ground has to determine that whether the conduct complained of is "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be expected to live with the other spouse. It should be much more than ordinary wear and tear of married life and it must be of the type so as to satisfy the conscience of the Court that the relationship between the parties has 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. In the facts of the case at hand, it has to be determined whether the conduct of the appellant spouse was touching a pitch of severity which would entitle the respondent for a decree of divorce.

13. The conduct complained of by the respondent wife was the refusal of the appellant husband to have sexual intercourse with her. It is to be borne in mind that a normal and healthy sexual relationship is the one of the basic ingredients of a happy and harmonious marriage. The importance of sex in married life was emphasized by the Apex Court in the celebrated judgment of ***Dastane vs. Dastane*** ***AIR1975SC1534*** wherein it was observed that sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. One of the landmark judgments in this regard is of the Hon'ble Division Bench of this court in the case of ***Mrs.Rita Nijhawan Vs. Mr.Bal Kishan Nijhawan***

AIR1973Delhi200 wherein it was held that marriage without sex is an anathema and denial of sexual activity in marriage has extremely unfavourable influence on woman's mind and body and leads to depression and frustration and there is nothing more fatal to marriage than disappointment in sexual intercourse. It would be worthwhile to reproduce the relevant paras of the said judgment herein:

"21. Thus the law is well settled that if either of the parties to a marriage being a healthy physical capacity refuses to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual weakness of the respondent disabling him from having a sexual union with the appellant or it is because of any willful refusal by the respondent; any willful refusal by the respondent; this is because in either case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty. Prior to Gollin's case 1963 2 All Er 966 the Courts in England had been taking the view that unless cruelty was aimed at by either of the parties the same would not amount to cruelty. But that is no longer a correct view and therefore, subsequently the Courts have proceeded on the basis that it is not necessary to prove the culpability of the respondent in order to hold him guilty of cruelty. What has to be found in each case is whether the act is such which the complainant partner should not be asked to endure. The Court of appeal in Sheldon v. Sheldon 1966 2 All Er 257 granted a decree to the wife on the finding that the husband's persistent refusal of sexual intercourse over a long period without excuse, caused a grave injury to the wife's health and amounted to cruelty on his part. Lord Denning observing that:

'the categories of cruelty are not closed. The persistent refusal of sexual intercourse is not excluded.'

22. In the present case the marriage took place in 1954. Barring the pregnancy in 1958 which according to the appellant was the result of part improvement, right from the day of marriage till 1964, there

has never been any normal sexual life and the respondent has failed to give sexual satisfaction. The marriage has really been reduced to a shadow and a shell and the frustration. In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and, therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse."

(emphasis supplied)

The above observations of this court have been cited with approval by the Apex Court in a number of judgments and in the case of ***Vinita Saxena vs. Pankaj Pandit*** ***AIR2006SC1662*** where after referring to the above observations of this court, it was held as under:

"22. The legal concept of cruelty which is not defined by statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all question of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complains accusations or taunts. It may be mental such as indifference and frigidity towards wife, denial of a company to her, hatred and abhorrence for wife or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be

called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure."

It would also be apt here to refer to the judgment of this court in the case of ***Shankuntla Kumari vs. Om Prakash Ghai*** ***AIR1983Delhi53*** wherein it was held that if sexual intercourse is not possible, due to ill health on the part of one of the spouse, it may not amount to cruelty, depending on the facts and circumstances of the case, but willful denial of sexual relationship by a spouse, would amount to cruelty, especially when the parties are newly married.

14. In ***Samar Ghosh vs. Jaya Ghosh (2007)4SCC511***, the Hon'ble Supreme Court gave a treatise on the subject of cruelty, examining the amplitude of cruelty in different countries and gauging their judicial trends, the Court also laid down broad parameters which may be relevant in

dealing with the case of mental cruelty and the illustrative instances that may constitute mental cruelty as narrated in the said judgment are reproduced as under:

74. 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) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(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, discomode 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) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and

emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(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) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(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) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(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."

Hence, it would be evident from above that willful denial of sexual intercourse constitutes mental cruelty.

15. Adverting to the facts of the present case in the background of abovestated legal principles, it would be seen that the parties had stayed together only for a very short

period after their marriage from 26.5.2001 till 29.6.2001/1.7.2001 although the appellant took a stand that the marriage was consummated on the very first day on the arrival of the doli and through this stand he sought to demolish the version of the respondent pleading non-consummation of marriage between the parties. The version of the appellant that the marriage was consummated on the very first day, even if believed to be correct would not come to his rescue and be a viable justification for his future conduct when he admittedly did not make any effort to have physical relationship with the respondent despite having various opportunities and on the contrary avoided the respondent wife. The parties had gone to Shimla together and that was the opportune time when both the parties could come close to each other by establishing a bond by physical relationship. It is thus a clear cut case of deliberate avoidance by the appellant to maintain distance from his wife by not establishing any kind of physical relationship. The appellant in his written statement and in the evidence has not denied the

fact that he had refused to establish any physical relationship with the respondent till she produces the requisite certificates of her employment and of her educational qualification. Thus, the conduct of the appellant is certainly atrocious and cruel towards the respondent as to put such an unreasonable condition, i.e., first production of the requisite certificates of qualification and then to establish a physical relationship.

17. So far the argument of the counsel for the appellant that as per the provisions of section 23 of the Act, the respondent wife is not entitled to relief is concerned; this court does not find merit in the said contention of the counsel for the appellant. The appellant husband has claimed that by granting a decree of divorce to the respondent wife the trial court has allowed her to take advantage of her own wrongs which is barred by section 23(1)(a) of the Act. Section 23 in the facts of the present case would not bail out the appellant as the conduct of the respondent does not come within the meaning of “wrong” as occurring in section 23(1)(a) of the HM Act as the wrong should be misconduct of such a nature

that would justify the denial of relief. The respondent wife had left her job one week prior to the marriage and this was admittedly, within the knowledge of the appellant. The appellant husband did not wait for the respondent wife to settle down in the matrimonial home and started asking for the certificates soon after the marriage and within a matter of two days refused to have sexual intercourse with her. This court does not find that the conduct of the respondent wife was anything that would compel the appellant husband to take such a harsh and insensitive decision and denying relief to the respondent wife on this ground would perpetuate the wrong committed by the appellant husband.

18. In India, finding a suitable match through newspaper is a means to the popular arranged marriage phenomena and various factors such as caste, religion, physical appearance, professional qualifications, family background, etc serve as parameters for selecting a match. For some, it may be paramount that their spouse is homely and takes care of their family while there may be some for

whom it is a decisive factor whether the girl is a working woman or not. In today's era of technological bliss, where there are websites and brokers dedicated to the task of finding the perfect match, it is not extraordinary to seek a spouse having a particular quality or pursuing a particular hobby, what to talk of a particular profession. Hence, this court cannot find fault with the demand of the appellant husband where he sought a working wife and for that reason he even categorically specified it in the matrimonial advertisement as well. However, having said that, this court at the same time cannot persuade itself to believe that a newly married person would refuse to establish physical relationship with his wife on the ground that she is unable to produce her employment and educational certificates within a day of getting married. This Court is not suggesting that a person should not have any preference while looking for a life partner as it helps in cementing the relationship but to put a pre-condition for discharging one of the most vital matrimonial obligations is baffling and unfathomable to say

the least. The appellant ideally should have waited for the respondent to settle down and then take up the topic of employment with her. It is also most unfortunate that cases like the present one, the parties do not try to resolve the matter and seek the help of marriage counselors and the situation then reaches the point of no return.

19. George Washington once said that *"I always considered marriage as one of the most important events of ones life, a foundation of happiness or misery"*, and rightly so as it is in one's own hands what to make of a bond that joins two souls for a lifetime; a journey of togetherness or a miserable and agonizing voyage. The inane pre condition put forth by the appellant husband in the present case unfortunately has given matrimony a hue of being a barter system rather than a pious, sacred union of two bodies and souls. A newly wedded wife who is full of anticipation, desire, dreams and aspiration for a starting a new phase of her life must have been shattered and crestfallen by such bizarre behaviour of the appellant husband. Undeniably, with the ever

increasing cost of living, to lead a comfortable and respectable life, one looks for a working spouse and to this extent this Court does not find any fault with the expectation of the appellant. It is inexplicable however that in the facts of the present case, the appellant gave so much importance to the employment of his wife that he put a precondition for production of the testimonials of employment first and then to consummate the marriage. What is more distressing is the irony that the parties who did not even live together for even a week have spent the better part of their youth; one trying to dissolve a marriage on one hand and the other trying to save a marriage which in true sense never was.

20. In the light of the above discussion, this Court does not find any illegality, infirmity or perversity in the impugned judgment/decreed dated 23.1.2008 passed by the learned trial court and the same is accordingly upheld. So far the other appeal filed by the appellant i.e. FAO No. 233/2003 challenging the judgment and decree dated 5.3.2003 passed by the learned trial court whereby the petition filed by the

appellant under Section 9 of the Hindu Marriage Act was dismissed is concerned, the same will not sustain as the appellant cannot claim restitution of the marital ties as he himself is guilty of causing cruelty. The judgment and decree dated 5.3.2003 passed by the Court is also accordingly upheld.

March , 2012

KAILASH GAMBHIR, J