

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 27.07.2012**

% **FAO No.315/2012**

SMT. SUPERNA ROY Appellant
Through: Mr. M.M. Kalra with Mr. Kunal Kalra,
Advocates

versus

SHRI GANESH ROY Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (Oral)

C.M.12631/2012

Allowed, subject to all just exceptions.

FAO 315/2012 & C.M. No.12630/2012 (for stay) **and C.M. No.12632/2012** (for leading additional evidence.

1. The appellant assails the judgment dated 08.05.2012 passed by Shri Kamlesh Kumar, Addl. Principal Judge, Family Courts, Rohini, New Delhi in a petition preferred by the respondent under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') to seek dissolution of marriage with the appellant herein.

2. The undisputed facts are that the parties were married on 24.02.1999 according to Hindu rites and ceremonies at Village & Post

Office Purnal, District Howrah, West Bengal. They were blessed with a son, named, Arnav Roy on 02.12.1999. The chief allegation of the respondent in support of his case of cruelty against the appellant, as pleaded in the petition, was that the appellant deprived the respondent of marital bliss, i.e. of conjugal relationship between the parties. The respondent alleged that the appellant did not allow him to have physical relationship with her after the birth of their son despite his persuasions and best efforts. According to him the appellant did not bother about his wishes, desires and sentiments. Various other allegations with regard to her behaviour and conduct qua the respondent and his family members were also made.

3. The respondent retired from the Indian Air Force in the year 2002 and joined the Delhi Technological University in the year 2005 as a Junior Mechanic and started living in the campus accommodation. Though the parties lived under the same roof, they did not live as husband and wife as the appellant refused to cohabit with the respondent. Denial of any physical relationship caused mental agony, torture and humiliation to the respondent which, as aforesaid, constituted the primary ground to allege cruelty against the appellant. The respondent also alleged that the appellant started leaving the matrimonial home without his permission and against his wishes since October, 2006. She started living at her parental house for considerable long periods. She would even take away the minor child

with her without bothering about his academic or educational loss. She did not take care of the day-to-day needs of the child, including his food, dresses, uniform and cleanliness etc. The respondent had to prepare his own food in these circumstances.

4. It was also the respondent's case that on 24.02.2009, the wedding anniversary of the parties, the respondent made efforts to endear the appellant by greeting her in the morning and requesting her to go with him for dinner outside, but she flatly refused by stating that there was no reason for celebrating the occasion as there had been no physical relationship between them. Even that caused agony, torture and humiliation to the respondent. The respondent also stated that he had not condoned these acts of cruelty committed by the appellant.

5. In her written statement, the appellant denied the averments made by the respondent as a bunch of lies. She claimed that she was made a dowry victim in her matrimonial home, though her parents had spent huge amount of money at the time of her marriage and given her jewellery, costly clothes, furniture and other allied items and cash etc. She also alleged that all her dowry articles/stridhan had been illegally/unlawfully retained by the respondent and his parents. She claimed that the respondent and his family members beat her on several occasions for not bringing sufficient dowry items in marriage. In

para 12 of her written statement, the appellant also alleged that the respondent was having an illicit relationship with another woman and that he wanted to get rid of the appellant to marry the said woman.

6. It appears that the respondent stood his ground during his cross examination and clearly deposed to the effect that he had had no physical relation with the appellant just after the birth of his son. On the other hand, during the cross examination of the appellant, she, inter alia, stated:

"My son sleeps with his father (petitioner). I also sleep in the same bedroom where my son with the petitioner sleep but since the bed is of small size, I sleep on the floor in the same room. It is wrong to suggest that I do not sleep on the floor in the same room. It is wrong to suggest that I sleep on the bed in a separate room."

7. The appellant also stated during the cross examination that she feels relaxed only after the respondent goes to sleep. Keeping in view the respective cases set up by the parties and the evidence led by them, the learned Additional Principal Judge, Family Courts, Rohini, New Delhi, by the impugned judgment held that the appellant had treated the respondent with cruelty by denying him love and sex.

8. The submission of learned counsel for the appellant is that the appellant is a homely lady who comes from a rural background. It is his submission that for this reason, the appellant felt hesitant in making full and complete disclosures in her written statement and in

her deposition before the Court. He further submits, by referring to the application moved under Order 41 Rule 27, that the appellant had become pregnant and her pregnancy was terminated in the year 2009 under the supervision of Dr. Sajana Jain at Shoam hospital. According to the appellant if the appellant is permitted to lead additional evidence, it could be conclusively established that the parties maintained conjugal relationship and the primary ground to allege cruelty against the appellant would disappear.

9. Having heard learned counsel for the appellant, perused the pleadings of the parties, their respective cross examinations and the impugned judgment, we are of the view that the impugned judgment correctly marshals the evidence led by the parties and that the conclusion drawn by the learned Additional Principal Judge, with regard to the respondent being treated with cruelty by the appellant, is correct. Pertinently neither in the written statement nor in her cross examination, the appellant even once clearly and categorically states that she has been maintaining physical relationship with the respondent, or that she has not denied the respondent the right to maintain such relations. She repeatedly refers to her duties as a wife but refers to the same in relation to other chores such as preparing and giving food and taking care of the minor child. From her cross examination, some of which has been referred to above, it is clear that the respondent was denied the right to maintain physical relationship

with the appellant. Pertinently, there was hardly any cross examination of the respondent on the said aspect. From the cross examination of the respondent it appears that only a suggestion was given that all the allegations made by him against the appellant were false. It also appears that the endeavour of the appellant was to establish that the respondent used to beat up the appellant after consuming liquor regularly. However, even in that regard the appellant could not establish the allegation as is clear from her cross examination. She could not show if she had ever complained about such conduct of the respondent to anyone, including the superiors of the respondent, who was earlier working with the Air Force and thereafter working with Delhi Technological University.

10. The learned Additional Principal Judge has believed the testimony of the respondent, and in our view, rightly so, as the same remained unassailed and unchallenged on all material points. The cross examination conducted by the appellant of the respondent was wholly deficient as she had even failed to confront the respondent with the suggestion that he had not been deprived of a conjugal relationship by her, or that there had been physical relations between the parties even after the birth of their son. The learned Additional Principal Judge takes note of the various decisions which deal with the aspect of cruelty in the relationship of husband and wife, including

V.Bhagat vs. D. Bhagat, II (1993) DMC 568 (SC) and A. Jaychandra vs. Aneel Kaur, (2005) 2 SCC 22.

11. It has been held that mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put-up with such conduct and continue to live with the other party. If the conclusion reached is that the petitioner spouse cannot be reasonably expected to live with the other spouse, and the differences are something more serious than “ordinary wear and tear of married life”, the Court may be justified in granting divorce on the ground of cruelty.

12. In **Rita Nijhawan Vs. Balkishan Nijhawan**, reported as AIR 1973 Delhi 200, this Court observed:-

“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 intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any wilful refusal by the respondent, it 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.

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.”

13. In the light of the aforesaid evidence and judicial pronouncements, the learned Additional Principal Judge concludes and, in our view rightly so, that the deprivation of physical relationship between the parties, tantamounted to cruelty qua the respondent. We may note that the learned Additional Principal Judge has also examined the manner in which the specific averments made in the petition had been dealt with by the appellant. Her written statement discloses that there was no specific denial of the averments made by the respondent with regard to his being denied the right to maintain physical relationship with the appellant.

14. So far as the appellant's application under Order 41 Rule 27 read with Section 151 C.P.C is concerned, we find no justification in allowing the same at this stage. The appellant had lead evidence only in respect of the case set up by her in her written statement. It has not even been pleaded by her in her written statement that she was maintaining physical relationship with the respondent, much less, that she had conceived through him and that the pregnancy was terminated in the year 2009. To us it appears that the appellant is only seeking to drag the matter and to somehow keep the respondent bound in the relationship of marriage with her. Even along with the application, no document has been filed which would show that she had undergone abortion in the year 2009 - to show her alleged

pregnancy arising out of her relationship with the respondent. The appellant cannot lead evidence *de hors* her pleadings.

15. The said application, in any event, would not come to the aid of the appellant, as the appellant has no defence to the additional and independent finding of the learned Additional Principal Judge that the appellant made a categorical allegation against the respondent as his maintaining extra marital relationship with another woman. However, in her testimony she did not substantiate this allegation and even during the cross examination of the respondent, it was not brought out that he was maintaining any such relationship with another woman. The appellant did not even give the name of any other woman with whom, according to her, the respondent was maintaining an illicit relationship. In fact a false allegation in this regard itself constitutes cruelty which leads the parties to a situation in which they cannot live together without agony, deprivation and distress. Such character assassination by the appellant of her husband, the respondent, in open Court constitutes cruelty. (See AIR 2000 Himachal Pradesh 73-**Minakshi Mehta Vs. Major Atul Mehta** and **Smt. Vimla Ladkani Vs. Dr. Chandra Prakash Ladkani**, AIR 1996 Madhya Pradesh 86). The Supreme Court in **Vijaykumar Ramchandra Bhate Vs. Neela Vijaykumar Bhate**, (2003) 6 SCC 334, in respect of similar allegations of the wife maintaining extra marital relationship observed:-

"To satisfy the requirement of clause (i-a) of sub-section (1) of Section 13 of the Act, it is not as though the cruel treatment for any particular duration or period has been statutorily stipulated to be necessary. As to what constitutes the required mental cruelty for purposes of the said provision, in our view, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct, but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the courts perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer. A conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot so lightly be ignored or brushed aside, to be of no consequence merely because it came to be removed from the record only. The allegations levelled and the incidents enumerated in the case on hand, apart from they being per se cruel in nature, on their own also constitute an admission of the fact that for quite some time past the husband had been persistently indulging in them, unrelented and unmindful of its impact. That the husband in this case has treated the wife with intense cruelty is a fact, which became a fait accompli the day they were made in the written statement. They continued on record at any rate till 5-10-1988 and the indelible impact and scar it initially should have created, cannot be said to have got ipso facto dissolved, with the amendments ordered. Therefore, no exception could be taken to the courts below placing reliance on the said conduct of the appellant, in this regard, to record a finding against him. In the aforesaid case, the husband, who had made such wild allegations had in fact sought to amend the written statement but withdrew the same. In spite of that, the Supreme Court held that such allegations once made even if withdrawn would tantamount to cruelty if they are false."

16. Learned counsel for the appellant had sought to place reliance on the decision of the Madras High Court in ***S. Saikumari Vs. P. Mohanasundaram***, 1 (1995) DMC 520. The said decision has absolutely no relevance in the facts of the present case as discussed hereinabove. The appeal and the applications are accordingly dismissed.

VIPIN SANGHI, J

SANJAY KISHAN KAUL, J.

July 27, 2012
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