

4

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on : 10.10.2013

+ MAT. APP. (FC) NO.3/2013 & cm 7056/2013 (maintenance),
CM 7057/2013(delay)

PUSHPA RAJAI Appellant
Through : Mr.Jai Bansal, Advocate.

Versus

JAI PRAKASH LALWANI Respondent
Through : Nemo

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

% MR. JUSTICE NAJMI WAZIRI

1. This is a matrimonial appeal arising out of judgement and order of the Family Court dated 11th February, 2013 in HMA No. 686/2010 ("**impugned order**") whereby the marriage between the parties was dissolved on grounds of cruelty. The divorce petition filed under Section 13 (1) (a) of the Hindu Marriage Act, 1956 by the respondent/husband had alleged a number of acts of cruelty, *inter alia*, of (a) the appellant/wife being

quarrelsome and non cooperative towards him and his family members; (b) her confiding that the marriage was against her wishes and not to a person of her choice; (c) her inability to respect him and his family members; (d) constant pressurising by her for living separately; (e) her visiting her maternal home frequently, where she stayed for months together and her quarrelling whenever the issue was raised by the respondent/husband; (f) her being inhospitable to guests; (g) her rude and indiscreet conduct towards his friends, and to relatives and neighbours; (h) denial of conjugal relationship; (i) constant threats to commit suicide and implicate him and his family members in criminal cases in case her demands were not met; (j) frequent visits by the elder sister of the appellant/wife who interfered in their day-to-day life; (k) compelling the respondent/husband to leave his job in Muscat and moving to Ahmedabad where he had extreme difficulty in finding a job; (l) forcing him to hand over his entire salary to her, etc. The husband had contended that despite his according her due care and affection and ensuring proper medical care during her

pregnancy, she was adamantly quarrelsome and left the matrimonial home alongwith her child on 4th November, 2011. He had further contended that she repeatedly complained to the police, alleging harassment by and concocting false cases against the respondent/husband and his family members. On 14th February, 2002, she received her entire jewellery/*stridhan* pursuant to a case she had filed in Bhavnagar (Gujarat) under Section 114 IPC and sections 3 and 7 of the Dowry Prohibition Act. In another proceedings under Section 125 of Cr.P.C., she was awarded maintenance of Rs. 1,000/- per month for herself and Rs. 600/- per month for the minor daughter.

2. It further appears that the respondent/husband started living in Rohini from 15th August, 2002 after he got a new job; the appellant/wife was still residing at her maternal home. On 19th January, 2005, the respondent/husband and his mother visited the appellant/wife at her maternal home and sought to bring her back, but she refused to join them. This effort was repeated by the respondent/husband on 3rd September, 2005, and after much persuasion, she did join him, but did not adjust with him. The

respondent/husband had contended that she continued to be cruel to him and yet again left the matrimonial home on 23rd September, 2005, alongwith the minor daughter. He had also contended that while leaving she threatened him for his life.

3. A divorce petition was filed on 13th September, 2007 by the respondent/husband. However, the parties compromised their differences before the learned ADJ-1, Rohini, and started living in a rented accommodation in Sector 5 in Rohini from 27th July, 2009, where the respondent/husband's other family members also resided. However, even thereafter, according to the respondent/husband, the appellant/wife refused to have any conjugal relationship (sexual relations) with him and continued to be haughty, quarrelsome and aggressive, while contemporaneously threatening to commit suicide by lighting a gas cylinder or pouring petrol on and setting fire to herself. It had also been contended that she even alleged existence of an illicit relationship of the respondent/husband with his sister-in-law (*bhabhi*) and with his niece. In view of the last allegation, the respondent/husband's brother shifted to another house on 8th

8

July, 2010 too, so as to escape from the atrocities and uncouth behaviour of the appellant/wife, and also to safeguard his own family peace and dignity.

4. Before the Family Court, the appellant/wife had denied the allegations levelled against her. She contended that contrary to the petition, it was actually the respondent/husband who inflicted cruelties upon her and her minor daughter. She had contended that (a) the respondent/husband and his family made unwarranted demands for a car and a flat in Delhi; (b) the respondent/husband assaulted her after a month of marriage; (c) she was starved of food and tortured for bringing inadequate dowry; (d) her health deteriorated and she was prevented from even talking with her family members over the telephone; (e) the respondent/husband had returned from Muscat only upon his parents' wishes so that he could be with him in their old age; (f) that he was disrespectful towards her and showed no affection towards their daughter, who was born on 2nd April, 1999; (g) that she was assaulted on 4th January, 2001 and thrown out of the matrimonial house without any money. That

6
however, with the passage of time and the intervention of family elders, she returned to live with the respondent/husband. This, she underlines, occurred in particular because of the settlement before the ADJ-1, Rohini, recorded subsequently in his order of 22nd August, 2009. She had argued that the settlement agreement signified that the parties had forgiven and forgotten all the differences / cruelties between themselves, so that they could start their marital life afresh. She had denied the non existence of conjugal relationship between them. However, she claimed that she was humiliated and had to refrain from sexual relationship with him because the demand from the husband in this regard was unnatural.

5. The Family Court considered the evidence led by the parties and framed the following two issues:

1. *Whether after solemnization of marriage, the Respondent had treated the petitioner with cruelty?*
OPP
2. *Whether the petitioner is entitled to the decree of divorce*

6. After having considered the evidence led by the parties and their arguments, the Family Court found *inter alia* as under:

"35. The parties come from lower middle or middle class section of our traditional society in Gujarat and shifted to Delhi in the later part of their marital life. The petitioner did not have sufficient income and for that reason, he must have shared the two-room accommodation with his brother's family. He has claimed and established on record that the Respondent did not let him have physical/sexual relations with her. The suggestion put to him by the ld counsel for the Respondent that he took a smaller accommodation as he did not want to discharge his martial (sic: marital) obligations towards her – implying thereby that he himself did not want to have physical/sexual relations with her as often as she would have wished / clearly establishes that the parties did not have normal sexual life. [L]d. Counsel for the Respondent put another suggestion to the petitioner that he had forced the Respondent to have unnatural sex. He denied the suggestion though he had initially admitted to have unnatural sexual relations with her. He went on to clarify that he did force her to have unnatural sex only when she refused to have sex with him.

36. The suggestion put by ld. counsel for the Respondent regarding the nature of sexual relationship between them and the clarification of the same by the petitioner, are very important. It becomes evident that the Respondent at times, if not always, did refuse to have sexual relations with him. [Considering the class to which the parties belong, it would appear normal for him to coerce for natural or unnatural sex and on some occasions, he might have to use some force, also. However, it is not the case of the Respondent that the petitioner always forced her to have unnatural sex with

21

him. The fact that the Id. Counsel for the Respondent did not even put a bare suggestion to the petitioner that they had normal physical relations – regularly and continuously, itself shows that the physical relating (sic: relation) between the two were not normal. The petitioner would therefore have felt deprived of marital bliss and due to that reason, he may not have remained very affectionate to her.

38. [T]he petitioner has established on record that the Respondent had levelled allegations of his having physical relations with he (sic: the) bhabhi (sister-in-law) as well as his niece. The Respondent, in her cross-examination, [t]estified that the petitioner used to sleep in her jethani's (sister-in-law's) used to feed her daughter. The Respondent has asserted that the petitioner had physical relation with his bhabhi. This, however, appears quite improvable by any stretch of imagination. Admittedly, the brother of the Petitioner was living in the same accommodation and he would have never permitted the petitioner to sleep in his bedroom. There could be no possibility of the petitioner having physical / sexual relations with his brother's wife – since his brother was staying in the same house. It, thus, becomes crystal clear that the Respondent had levelled false allegations against the petitioner.

[...]

39. The term “mental cruelty” has been defined in the Black's Law Dictionary (8th Edition, 2004) as under:

40. “Mental Cruelty As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers

12

the life, physical health, or mental health of the other spouse."

In V Bhagat Vs. D. Bhagat, reported in II (1993) DMC 568 (SC), Hon'ble the Apex Court has observed as under: -

"Mental Cruelty in Section 13(1) (i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such as 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. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner."

[...]

42. ...The Respondent has testified that the petitioner used to sleep in her jethani's (sister-in-laws) room. The Respondent even went to the extent of alleging that the petitioner had illicit/physical relations with his own niece. It is evident that false and absurd allegations have been levelled by the Respondent. No mother and /or father would have let the petitioner have physical relations with their daughter in their own house. Further, it has come over the record that the Respondent even threatened the petitioner that she would not let the marriage proposal of his widow niece materialize by levelling allegations that he had illicit relations with her. Such allegations clearly reveal the mind-set of the Respondent. She appears to be a dead

13

destructive person. She has not only created nuisance in the matrimonial home by levelling such false allegations but also, caused severe stress and strain to the petitioner. The brother of the petitioner left the said rented accommodation with his wife and daughter only because of the conduct / behaviour of the Respondent. This would have definitely affected the mind of the petitioner and he would have found it difficult to stay with the Respondent in such circumstances. And this explains as to why the petitioner left the Respondent and her minor daughter. When I consider the versions of the petitioner and the Respondent in the light of their day to-day behaviour towards each other as well as their family members, I find the version of the petitioner much more probable than that of the Respondent. In fact, the version of the Respondent does not appeal to senses and rather, appears to be quite absurd.

43. The petitioner has brought over the record that the Respondent was non-cooperative towards him and his family members, right from the beginning of their married life. In fact, she had told him just after a month of the marriage that he was not a person of her choice and she was force[d] to marry him. She pressurized him to get separated from his parents and other family members. She forced him to leave the job at Muscat and return to India. He had to take-up a new job at a lower salary. She threatened him to commit suicide by pouring petrol over herself or by lighting the gas cylinder etc. Ld. Counsel for the Respondent failed to put any suggestion to rebut the testimony of the petition regarding the relationship between the parties from the inception of the marriage till 23.09.2009. The

said testimony, therefore, is deemed to have been admitted.

44. Ld. Counsel for the Respondent has contended that the petitioner had condoned the conduct/behaviour of the Respondent before 28.09.2009 and therefore[, any acts of cruelty (deemed admissions) are of no help to him. I am, however, not in conformity with the Ld. Counsel for the Respondent.

45. The term 'condonation' (sic: condonation) means forgiveness of the matrimonial offence and the restoration of the offending spouse to the same position as he or she occupied before the offence was committed. To constitute [condonation], there must be two things – (i) forgiveness and (ii) restoration the evidence of [condonation] exists and is shown by the fact that the spouses lead a normal sexual life (despite Respondent's alleged acts of cruelty). (Reliance placed on *Narain Ganesh Dastane vs. Suchitra* – AIR 1975 SC 1534).

46. It has come over the record that the respondent did not mend her behaviour towards the petitioner and his family members even after 28.09.2009. She continued to ill treat him. She threatened him of implication in false criminal /dowry cases. She threatened to commit suicide. She threatened to kill him and his family members also. In view of her aforesaid conduct and behaviour, the acts of omission and commission on her part before 28.09.2009, get revived. The petitioner therefore, cannot be said to have condoned her acts and deeds before 28.09.2009. It has come over the record that there have been no physical relations between the petitioner and the Respondent during the

75
last 8/9 years of their stay together. Ld. Counsel for the Respondent failed to rebut the same by putting any suggestion. It therefore stands established that the petitioner and the Respondent did not have normal sexual life after 28.09.2009 also. I, accordingly, reject the contention of Ld. Counsel for the respondent and hold that the petitioner had not condoned the conduct (sic: conduct) /behaviour of the Respondent towards him before 28.09.2009.

47. Considering the social and economic background of the parties, it becomes evident that the petitioner would have found it difficult to stay in the company/society of the Respondent. He would have to remain in constant fear to his own life as well as that of his brother, bhabhi and niece as well. She would have found it difficult to have a peaceful (sic: peaceful) sleep at night. Since the Respondent has threatened to implicate him and his family members in false criminal case. The fear of the petitioner cannot be said to be unfounded. Since the Respondent has earlier got a case under section 498a/326/506 II IPC read with Section 114 IPC and Section 3 & 7 of the Dowry Prohibitions Act registered at Lady Police Station District Bhavnagar (Gujarat) on 15.1.2002 against the (sic) him and his family members. Further, the respondent had continued to create scenes in the matrimonial home and here. She brought down the Petitioner in the eyes of his neighbours and others. He would have, definitely, suffered grave mental agony due to the acts of omission and commission on part of the Respondent 1. I therefore, hold that the Respondent has treated the Petitioner with cruelty after solemnization of the

marriage. The issue is, accordingly, decided against the Respondent and in favour of the Petitioner.

(Emphasis supplied)

7. Before this Court, learned counsel for the appellant/wife argues that the Family Court had erred in dissolving the marriage on the ground of cruelty as no cruelty existed after the parties had resolved to and resumed their marital cohabitation on 27th July, 2009 after recording of the settlement agreement, any allegation of cruelty prior to that date would be deemed to be nonexistent and obliterated in view of the fact that the respondent/husband himself had agreed to disregard all such alleged prior incidents as may be. He had deposed before the ADJ-I, Rohini as under:-

"Statement of Sh. Jai Prakash Lalwani S/o. Late Sh. Harkishan Dass, Age 38 years, R/o. C-9/144, First Floor, Janta Flats, Sector-5, Rohini, Delhi – 110 085. Petitioner in person, on S.A.

I have settled all my disputes with the respondent amicably out of court and now we both have been residing together since 27.07.2009. We both assured each other to lead a happy and pleasant matrimonial life. We both have assured each other to make maximum efforts in that respect. I do not want to pursue the present petition. Same may be disposed off as compromised. I am making the statement voluntarily under no force, coercion, threat or any kind of pressure from any corner.

17

Sd/-

R O & A C

(Pitamber Dutt)

ADJ-1/North-West/HMA

Rohini, Delhi/22.08.2009

Statement of Mrs. Pushpa Rajai, W/O. Sh. Jai Prakash Lalwani D/o. Sh. Mohan Dass, Age 36 years, R/o. C-9/144, first floor, Janta Flats, Sector-5, Rohini, Delhi-110 085. Respondent in person on SA.

I have settled all my disputes with the petitioner amicably out of the court and now we both are residing together since 27.07.2009. We both have assured each to lead a happy and pleasant matrimonial life. We both have assured each other to make maximum efforts in that respect. A criminal case under Section 498-A/406 IPC and complaint u/s. 125 Cr. P.C. have been pending before the court of Bhav Nagar, Gujarat. I shall cooperate with the petitioner to get the aforesaid proceeding quashed. I am making the statement voluntarily under no force, coercion, threat or any kind of pressure from any corner.

Sd/-

R.O. & A.C.

(Pitamber Dutt)

ADJ-1/North-West/HMA

Rohini, Delhi/22.08.2009"

8. The settlement order recorded as under:-

18
"22.08.2009

Present : Counsel for the petitioner with petitioner in person.

Respondent in person.

An application for seeking permission to withdraw the present petition has been filed by the petitioner.

Ld. Counsel for the petitioner on instructions states that both the parties have settled all their disputes and claims amicably and both of them have been residing together since 27.07.2009. Ld. Counsel for the petitioner on instructions submits that the present petition may be disposed off as compromised.

Statement of the petitioner as well as respondent has been recorded separately.

Both of them have categorically stated that they have settled all their claims and disputes amicably and now both of them have been living together since 27.07.2009. Both the parties have assured each other to lead a happy matrimonial life and to make maximum efforts in that regard. The petitioner has further stated that she will cooperate with the respondent in quashing the proceeding of criminal case u/s. 498A/406 IPC as well as 125 Cr. P.C. pending in the court of Bhav Nagar, Gujarat. Both the parties prayed that the present proceedings may be disposed off as compromised. In the facts and circumstances, I am of the considered view that both the petitioner and respondent have settled their disputes amicably out of their own free will without there being any pressure from any corner and both of them already started residing together in their matrimonial home.

In view of the above and statement of both the parties, present petition filed by the petitioner is

79

disposed off as compromised. File be consigned to record room after due compliance.

Sd/-
(PITAMBER DUTT)
ADJ-/North-West/HMA
Rohini, Delhi/22.08.09"

9. Thus learned counsel argued that the impugned judgement was without any basis having for dissolved the marriage on the ground of cruelty since all such acts of cruelty, whatever they may be, had been condoned by the husband and obliterated.

10. This court has considered the material on record and submissions of the counsel for the appellant. This Court is conscious that the settlement order recorded before the ADJ-1, Rohini was to facilitate the withdrawal of the divorce proceedings that had been filed by the husband in 2007.

However, since the parties had started residing together since 27.7.2009, the parties deemed it prudent and logical to end the haunt of the pending divorce petition. Evidently the withdrawal was premised on the hope that there would be a conjugal relationship between the parties thereafter. However, there was

no such resumption let alone complete conjugal relationship. The parties merely cohabited. The Family Court, in the impugned order, concluded that there was no conjugal relationship between the parties for almost 8 to 9 years as the appellant/wife was living away from the respondent/husband at her matrimonial home in Gujarat or otherwise shunned physical relationship with him. The promise of marital cohabitation was reneged by the wife as she continued to refrain from physical intimacy with the husband. Till the pronouncement of the impugned judgement in 2013, the physical distance between the parties had remained the same. Physical intimacy between a married couple is an essential aspect of marriage and consistent refusal of physical intimacy strikes at the very root of the marital relationship.

11. A full bench of the Supreme Court in the seminal *Samar Ghosh v Jaya Ghosh*, (2007) 4 SCC 511 had, after a detailed examination of the various authorities on the issue of what may amount to mental cruelty, as one of the instances of behaviour amounting to mental cruelty, held:

101. 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:

[...]

(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.

[...]

(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.

The above *dicta*, in the opinion of this court, applies to the present matter on all fours.

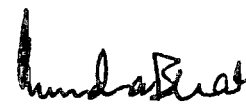
12. Even assuming that the previous instances of cruelty had been obliterated in view of the settlement between the parties, the allegation of the respondent/husband having an illicit relationship with his sister-in-law and niece itself constitutes cruelty. The appellant/wife did not rebut this during her cross-examination. This manifestation of cruelty was inflicted upon the respondent/husband after the settlement agreement

(condonation), and it continued till the impugned judgement was pronounced. The appellant did not condone this cruelty, which had also led to disruption of the family life of his relatives (brother's family had shifted out to save themselves from further insults and unwarranted ignominy). The Family Court, therefore, rightly returned the finding that the appellant/wife did not deny this allegation of cruelty. In view of the aforesaid discussion, this court is of the opinion that the impugned judgement of the Family Court is based upon sound evidence and the conclusions arrived at are just. The decision to dissolve the marriage on the ground of cruelty calls for no interference.

12. Consequently, the appeal has to fail and is accordingly dismissed.



NAJMI WAZIRI, J
(JUDGE)



S. RAVINDRA BHAT, J
(JUDGE)

OCTOBER 10, 2013