

20

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

% Judgment Reserved on: October 27, 2016
Judgment Delivered on: November 03, 2016

+ **MAT.APP.(F.C.) 15/2014**

KANTA

..... Appellant

Represented by: Mr.Pankul Nagpal, Adv.

versus

MITHLESH KUMAR JHA

..... Respondent

Represented by: Ms.Anu Narula, Advocate with
Mr.R.K.Thakur, Mr.B.Mishra,
Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. This appeal is directed against the judgment and decree dated January 04, 2014 passed by learned Judge Family Court whereby the respondent/husband's petition under Section 13(1)(ia) & (ib) of Hindu Marriage Act, 1955 seeking dissolution of the marriage has been allowed.
2. The appellant/wife got married to respondent/husband on April 28, 2003 at Begusarai in Bihar according to Hindu rites and customs. After the solemnization of marriage they started residing at Delhi where the respondent/husband was carrying on his business. As per the husband when the respondent/husband asked her choice for honeymoon destination she not only broke her bangles but also removed her ring and cried. The marriage was consummated only for about 8 months of their marriage. Husband claims that since inception the matrimonial life of the parties was passing through turbulence. They started residing separately w.e.f. April 30, 2006.
3. Before becoming adversary to each other in HMA Petition No.76/09,

MAT.APP. (F.C.) 15/2014

Page 1 of 11

the parties who are well educated did spare a thought for an amicable solution to their matrimonial issues. This is evident from HMA Petition No.714/2007 (Ex. PW-1/C) filed by the parties on December 17, 2007 seeking dissolution of their marriage by mutual consent. Memo of parties of the petition under Section 13-B(1) recorded the address of the respondent/husband as 70, Manjil Apartment, Sector-9, Dwarka and that of the wife as RZ G-21, Devkunj, Raj Nagar, Palam, New Delhi. The fact that parties were residing in Delhi but at different address is an indication of the fact that there was no cohabitation. At the stage of second motion, despite receiving ₹4 lakhs in the account of her firm and seeking waiver of statutory period, she did not appear to make statement before the Family Court at the stage of second motion. The legal consequence was dismissal of the petition HMA No.714/2007 under Section 13-B(1) of Hindu Marriage Act.

4. Since the parties failed to reconcile their differences and continued living separately the husband preferred HMA No.76/2009 for dissolution of their marriage on the ground envisaged under Section 13(1)(ia) & (ib) of Hindu Marriage Act, 1955.

5. The divorce petition was contested by the appellant/wife claiming herself to be a victim on account of her harassment by her husband and in-laws for non-fulfilment of dowry demand. The reason for non appearance at the stage of second motion pleaded by her was that at that time the husband was required to give her ₹40 lakhs and one house whereas he had given only ₹4 lakhs in the account of her firm.

6. After considering the testimony of the parties who have examined themselves to prove their respective pleas, the learned Judge Family Court allowed the petition inter-alia for the following reasons:-

(i) The wife conceived in October, 2004 i.e. after about 1½ years of

marriage but took a unilateral decision to go for abortion.

(ii) The husband fulfilled the desire of his wife by purchasing a flat but she even did not sit with him for puja performed for 'Greh Pravesh' ceremony. Rather in front of guests while abusing her husband said that she was not his wife.

(iii) In February, 2005 on her return from Bangalore to Delhi, she was pregnant. The husband suspected that he was not the biological father of the child. He wanted the DNA test to be conducted. Again the wife without the knowledge of the husband had gone for abortion.

(iv) In November, 2005 when the parents of the husband were at their place, the wife refused to join them for dinner and even told her mother-in-law that the respondent/husband was impotent and he had ruined her life.

(v) Despite the husband paying ₹ 4 lakhs through cheque at the stage of second motion in addition to the payment of ₹5 lakhs made at the stage of first motion, she preferred not to appear before the Court for making the statement which resulted in dismissal of the petition on April 01, 2009. The parties were living separately since April 30, 2006 and there had been no cohabitation since then. Despite that on September 03, 2008 the wife visited Dr.Lal Path Lab. at Dwarka for pregnancy test and tested positive.

(vi) While they were living together at Dwarka in a flat on 6th floor the wife used to threaten to commit suicide by jumping from the 6th floor. Via the allegations were made against the husband that he had developed relationship with Sangeeta, sister of his wife which remained unsubstantiated.

(vii) The parties had been living separately since April 30, 2006 and there had been no cohabitation since then. The harassment on account of the dowry demand was not proved by wife. The animus deserendi being

established, the ground of desertion was also held to be proved.

7. Learned counsel for the appellant/wife has questioned the legality of the impugned judgement on facts and on law both. In the written submissions learned counsel for the appellant while penning the profile of the wife, described her as highly qualified simple lady from a small town Begusarai in Bihar. She is MBA/PGDM M.Sc. B.Sc. She is a business woman carrying on the business of Project Management and Execution Company and is well settled in the city life. While admitting the factum of the marriage between the parties on April 28, 2003 in Bihar. It has been contended that she was harassed on account of non-fulfilment of dowry demand. After the marriage she was not even brought to Delhi. When ultimately she came to Delhi in November, 2003 and tried to settle in family life with her husband she was physically assaulted. When she got pregnant in October, 2003, her husband suspected her character alleging that he was not biological father of the child. The physical and mental stress suffered by her resulted into miscarriage. It has been further contended that in February, 2005 she again conceived. On her return from Bangalore, her husband asked her to get DNA test done for which she refused and got the child aborted without the consent or information to the respondent/husband. Learned counsel for the appellant contended that the wife was made Director of one of the Company by her husband. She was taken to the Court on the pretext of signing certain documents in order to get her out of the said company as various cheques have been issued and that her liability be discharged. Trusting him, she appeared and made statement at the stage of first motion. She did not appear at the stage of second motion despite she being offered ₹40 lakhs as settlement amount by her husband to get rid of her but later on backed out. The appellant/wife has contended that she was

24

made sole proprietor of firm M/s Aripa Decor only on papers with no control on the business as the affairs were managed by her husband only. Her husband became more interested in her sister Sangeeta who was brought by him to Delhi and got admitted in interior designing course. She was also harassed on objecting to their intimacy. The appellant was shifted to a different accommodation on the pretext that the flat wherein they were residing was to be renovated. Learned counsel for the appellant/wife has submitted that the parties lived together till September 20, 2010. She tested positive for pregnancy in September, 2008 at Dr. Lal Path's Lab as she was living with her husband and discharging all her matrimonial obligations. She had to undergo abortion in 2008 also as her husband was casting aspersion on her character. She has even attended 'Janeu Sanskaar' of the nephew of her husband and still willing to live with him.

8. While assailing the finding of learned Judge Family Court on the issue of cruelty and desertion it has been argued that the appellant/wife was harassed and tortured physically as well mentally on non-fulfilment of dowry demand. The fact that the husband was living in adultery with the younger sister of the wife, which amounted to cruelty to the wife, has not been properly appreciated by the learned Judge Family Court. Learned counsel for the appellant/wife submitted that since no witness has been examined to prove cruelty or any humiliation being caused by the wife in presence of his parents/relations, the impugned order is liable to be set aside.

9. On perusal of trial Court record we notice that the contentions raised on behalf of the appellant are not in consonance with her pleas in the written statement as well her testimony as RW-1. The appellant in her cross-examination has admitted the following facts:

(i) Her father-in-law and mother-in-law are well educated. They were

25

professors in LNMU, Darbhanga.

- (ii) At the time of her marriage she was a graduate. After the marriage her father-in-law got her admitted for post graduation in MA (Sociology).
- (iii) The relations between the parties were cordial till the year 2005.
- (iv) Her younger sister Sangeeta was brought and got admitted in an interior designing course in Delhi.
- (v) The firm Aripa Decor was having a current account with Axis Bank at Palam of which she was the sole proprietor and authorised to sign all the cheques for the firm and also withdraw the money.
- (vi) She conceived thrice and each time the pregnancy was got terminated without the knowledge and consent of the husband.
- (vii) The petition and the proceedings under Section 13-B(1) of the Hindu Marriage Act, 1955 have been signed by her. She also appeared before the Family Court for making statement at the stage of first motion as well at the stage of filing an application under Section 151 CPC for waiver of statutory period. She also appeared before the Court at the stage of second motion for seeking more time to further negotiate the terms of settlement between the parties.
- (viii) She had filed the criminal complaints only after the husband sought dissolution of marriage on the ground of cruelty and desertion.
- (ix) No MOU to pay her ₹40 lacs and a house was prepared while applying for divorce by mutual consent.
- (x) No complaint against the husband was ever made for alleged adulterous relationship with her younger sister Sangeeta.
- (xi) Sangeeta continued staying with her in Delhi till 2009 i.e. even after the parties got separated on April 30, 2006.
- (xii) She had gone to Dr.Lal Path Lab, Dwarka for pregnancy test on

26

September 03, 2008 which tested positive.

10. To appreciate the submissions made by the appellant/wife before this Court, we have carefully re-appreciated the entire evidence. It is an admitted fact that the marriage was solemnized in the year 2003. The first motion seeking dissolution of marriage by mutual consent was filed on December 17, 2007 which was registered as HMA No.714/2007.

11. LCR of the first motion petition (HMA Petition No.714/2007) and second motion petition (HMA Petition No.251/2008) are also enclosed with LCR of HMA Petition No.76/2009 wherein the impugned judgment and decree has been passed which we have perused.

12. While filing the first motion, the parties categorically pleaded in para 6 of the petition that they have been living separately since April 30, 2006. The petition was supported with the affidavit of the parties annexing their ID proofs. Rent agreement in respect of a separate accommodation taken by the appellant/wife on rent w.e.f. June 01, 2007 was also filed along with this petition. Statement of the parties was recorded by the learned ADJ on January 23, 2008. At the stage of first motion, statement of the appellant/wife before the Court is a detailed statement wherein she stated about the settlement of all matrimonial disputes even qua maintenance – past, present and future, istridhan and alimony etc. with her husband. She specifically stated that her consent to file this petition ex. PW1/C was voluntarily given by her free from any pressure, force or coercion from any corner. The concluding lines of her statement at the stage of first motion read as under:

“I have made my statement voluntarily out of my free will and after due contemplation and understanding its implications without any pressure, force or coercion from any corner.”

13. The proceedings dated January 23, 2008 in HMA No.714/2007

recorded by the Court reads as under:

"HMA NO.714/2007

23.01.2008

*Present: Both the petitioners in person.
Ms.Disha Arora, counsel for the petitioner no.1.
Ms.Rekha Mishra, counsel for the petitioner no.2.*

Efforts for reconciliation have failed at this stage. Petitioners are adamant to go for first motion. Let their statement be recorded.

In view of the statement recorded of the petitioners on separate sheets who have duly been identified by their counsel, the petition U/s 13(B)(1) of HMA is accepted vide separate order announced of even date. No orders as to cost. File be consigned to Record Room.

Sd/

*Additional District Judge
Tis Hazari, Delhi"*

14. The second motion petition bearing HMA Petition No.251/2008 was filed on May 14, 2008. The application under Section 151 CPC seeking waiver of statutory period duly signed by both the parties and by their respective counsel was allowed vide order dated May 20, 2008. The matter was listed for recording the statement of the petitioners on May 30, 2008. Both the parties appeared before the Court with their counsel on that date. It was for the first time that petitioner no.2, the wife who is appellant before us, requested the Court that she wanted to reconsider the terms of settlement. Thereafter she preferred not to appear and apprise the learned ADJ about the development, if any. This resulted in dismissal of the petition no.251/2008 on April 01, 2009.

15. The judicial record pertaining to first motion and second motion No.HMA No.714/2007 & HMA No.251/2008 falsify the contention raised

28

on behalf of the appellant/wife that she was taken to the Court by her husband on the false pretext that to get her out of the said Company she had to appear before the Court. Admittedly the appellant/wife is well qualified independently running her business in Delhi. The Court proceedings record the efforts by learned ADJ during reconciliation proceedings. Her request for adjournment to reconsider the terms of settlement clearly establishes that she knew the nature of relief claimed in the above petitions.

16. Without entering into the controversy about the orally agreed terms of the settlement, failure to disclose the description of the property agreed to be transferred in her name as a condition for grant of divorce by mutual consent, her request to the Court to have a relook at the terms of the settlement without disclosing any of the above fact at that stage, is suggestive of the fact that there was no agreement to pay her ₹40 lakhs alongwith a house by the husband. Thus, the reason given by her for non-appearance at the stage of second motion is an afterthought.

17. The appellant/wife has alleged intimate relation between her younger sister and her husband. They have been residing separately since 2006 whereas her sister resided with her for 3-4 years even thereafter in her separate accommodation. She would not have kept her sister along with her had it been a case of her husband being in illicit relationship with her younger sister. She has failed to examine any witness to prove these allegations. Her admission that she filed the criminal cases against her husband and in-laws only after the divorce case was filed by her husband i.e. almost about five years of their marriage gives rise to an inference that she wanted her husband and in-laws to accede to her subsequent demand. She was married in a well educated family and her in-laws got her admitted for post-graduation to enhance her qualification, her husband established her as

a business women making her the sole proprietor, her sister was brought to Delhi and got admitted in a course in interior designing course proves otherwise.

18. In the written submissions it is not disputed by the appellant/wife that thrice she had gone for abortion without the knowledge or consent of her husband. Whether the first abortion was voluntary or involuntary, could have been established by filing the medical record or examining the doctor about the cause for such miscarriage/abortion. The appellant/wife preferred not to bring on record her prescriptions even for the year 2008 when the parties had already initiated litigation. The factum of the parties being living separately since April 30, 2006 duly admitted by her at the stage of filing first motion petition and second motion petition as well while making statement before the Court at the stage of first motion petition. A presumption arises to the correctness of the facts as recorded in the judicial order and negated the possibility of the husband being the biological father of the child when she tested positive on September 03, 2008.

19. In the instant case, to seek divorce the husband had proved the following facts:-

- (i) The wife threatened to commit suicide by jumping from the sixth floor.
- (ii) She filed false criminal complaints alleging harassment on account of non-fulfilment of dowry demand against husband and in-laws.
- (iii) Making false allegations against the husband of he being in adulterous relationship with her younger sister Sangeeta.
- (iv) Repeatedly going for abortion without the consent and knowledge of the husband.

(v) Though the parties had been living separately w.e.f. April 30, 2006 and had not cohabited, she tested positive for pregnancy in September, 2008 and this time also she had gone for abortion.

(vi) To sustain the plea of desertion by the husband he had not only proved that the wife was living separately but also that there is animus deserendi on the spouse and that he has not wilfully conducted himself in a way which would furnish a reasonable ground for the wife to stay away from the matrimonial home.

20. The concept of mental cruelty as illustrated by the Supreme Court in (2007) 4 SCC 511 Samar Ghosh Vs. Jaya Ghosh and AIR 2013 SC 2176 K.Srinivas Rao vs. D.A.Deepa apply to the present case with equal force. Thus, while concurring with the finding of learned Judge, Family Court, we dismiss the instant appeal.

21. No costs.

22. TCR be sent back along with the copy of this order.


PRATIBHA RANI
(JUDGE)


PRADEEP NANDRAJOG
(JUDGE)

NOVEMBER 03, 2016

'pg'