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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **MAT.APP.(F.C.) 207/2019 & CM APPL. 34536/2019**
JITENDRA KUMAR SHARMA Appellant
Through: Mr. Kunal Nath, Mr. Sahil, Advocates

versus

VARSHA RAWAT Respondent
Through: None.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

ORDER

% **15.10.2019**

1. This appeal has been filed by the appellant/husband against the judgment and decree dated 26.02.2019, passed by the Family Court, East District, Karkardooma Court, Delhi, whereby it has dismissed the petition filed by the appellant/husband under Section 13(1)(ia)(b) of the Hindu Marriage Act, 1955 ('the Act', for short), seeking divorce from the respondent/wife on grounds of cruelty and desertion.
2. The facts as are relevant for the disposal of the present appeal are that the appellant/husband and the respondent/wife were married at Agra, UP on 28.11.2006, as per Hindu rites and customs. They do not have any child. While moving the petition for divorce, the appellant/husband pleaded that he and the respondent/wife had lived together at Agra, UP for two years, during which period, she had harassed and humiliated him and misbehaved and disrespected his family. He also claimed that she was negligent in the discharge of her matrimonial obligations. She also suffered from Pyorrhoea,

much to the discomfort of the appellant/husband due to the foul smell coming from her mouth. He further alleged that the respondent/wife used to blackmail him emotionally to pressure him to reside separately from his parents and in order to get her illegal demands fulfilled. According to the appellant/husband, he had put up with these cruel acts and misbehaviour for two years in the hope that she would improve.

3. The appellant/husband further stated that in March, 2008, he joined employment at NOIDA and after six months of joining there, he had brought the respondent/wife to a rented accommodation at NOIDA but when he was transferred to Kanpur, the respondent/wife created a scene by claiming that she was suffering acute pain in the chest but at the hospital, it was revealed that nothing was wrong with her. In the process, he ended up spending Rs.18,000/-. The appellant/husband also alleged that the respondent/wife had tried to commit suicide by attempting to hang herself, by putting a bunch of keys in her mouth, by overdosing herself with sleeping pills and by attempting to burn herself. On all occasions, he had managed to rescue her with timely intervention.

4. The appellant/husband claimed that he had done his best to keep the respondent/wife happy but her conduct did not improve and she continued to misbehave and treat him with cruelty. It is also stated that since April, 2010, they have had no physical relationship, though at the time of filing of the petition for divorce, the parties were living together at J-69, Second Floor, Pandav Nagar, Delhi. Thus, the appellant/husband claimed that his wife had deserted him and he was entitled to a decree of divorce, both on the ground of cruelty as well as on the ground of desertion.

5. Needless to state, the respondent/wife denied all these allegations and

countered them by alleging that the appellant/husband and his family members had treated her with cruelty on account of inadequate dowry. It was further stated that the appellant/husband always adopted a hostile attitude towards her since the inception of the marriage and this was on account of his affair with another lady, 'P', whose own matrimonial life was jeopardised on account of such conduct of the appellant/husband. She stated that though the appellant/husband was earning more than Rs.45,000/- per month, he had neglected her totally, while at the same time, he had transferred money into the account of the said lady, 'P'. It was submitted that the appellant/husband had himself sought transfers from Agra to NOIDA and then to Kanpur and thereafter to Delhi and was unwilling to take her alongwith him. She denied having ever attempted to commit suicide. Thus, it was submitted that the appellant/husband was setting up a false case to obtain a divorce.

6. The Family Court considered these pleas and the evidence that was brought on record by the parties who had entered the witness box to prove their respective stands. The Family Court also took into consideration the events that occurred after the filing of the case namely, institution of three cases by the respondent/wife; (i) a criminal complaint case under Sections 498A/323/324/313/504/506 IPC read with Section 200 Cr.P.C., (ii) a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 and (iii) a petition seeking maintenance under Section 125 Cr.P.C.

7. On the basis of the material brought on the record, the Family Court concluded that the appellant/husband had failed to prove that the respondent/wife had treated him with cruelty and that there was any

desertion, as neither the fact of separation nor the *animus deserendi* were proved. Accordingly, the petition for divorce was dismissed.

8. According to the learned counsel for the appellant/husband, the Family Court ought to have considered the fact that there was no cross-examination of the appellant in respect of the averments made in the affidavit and therefore, there was a deemed admission of the said allegations. No other proof was therefore called for to establish cruelty. Further, it has been argued that to determine cruelty, conduct had to be seen not as a single isolated incident as the cumulative effect of the conduct ought to have been considered. Learned counsel contended that when the respondent/wife had failed to prove adultery or second marriage, that itself was sufficient to prove that she was cruel to him. The subsequent litigations had also resulted in cruelty since in all those cases, the courts had declined any relief to the respondent/wife.

9. No doubt, the law is that cruelty cannot be ascertained on the basis of a uniform standard, mental cruelty being a state of mind and if there is consistent conduct which renders the life of a spouse miserable, that would be treated as cruelty. However, it is equally trite that the fact that the appellant/husband was being subjected to such treatment, had to be proved by him. The onus is not on the respondent to disprove the said allegations. Further, there are two essential conditions that were required to be established by the appellant/husband to obtain divorce on the ground of desertion, mainly, the factum of separation and the intention to bring cohabitation permanently to an end. The deserted spouse has also to establish that there was an absence of consent from his/her side and that he/she had not given any reasonable cause to the other spouse to leave the

matrimonial home.

10. The appellant/husband was therefore, required to prove through positive evidence with reference to specific acts that he had been treated with cruelty. However, learned counsel has sought to argue that the averments made by the appellant/husband had not been challenged in the cross-examination and hence stood proved. But a perusal of the evidence on record would show that the reverse is also true, as none of the assertions of the appellant/husband made in the petition were put to the respondent/wife during her cross-examination, despite the fact that she had disputed that she had ill-treated the parents of the appellant/husband or had emotionally blackmailed him or had attempted to commit suicide on several occasions through different modes.

11. The Family Court observed that even if it was accepted that the respondent/wife had quarrelled with the appellant/husband whenever he was transferred, it was only a natural response of a wife being left alone by the husband and this would have to be treated as normal wear and tear of matrimonial life. This conclusion drawn by the Family Court cannot be faulted.

12. In the absence of any specific instances of misbehaviour and insult to the appellant/husband and his parents, in the absence of cogent proof that the respondent/wife had attempted to commit suicide and medical evidence of the possibility that the respondent/wife suffered from Pyorrhoea, there was no material on the basis of which the Family Court could have concluded that the appellant/husband had been subjected to cruelty by the respondent/wife. It cannot be overlooked that the parties had stayed together at Agra, at NOIDA and at Pandav Nagar, Delhi but, the appellant/husband

examined only one neighbour, Sh. Praveen Nayak as PW2. In his testimony, this witness only confirms that the parties were residing together at J-69, Second Floor, Pandav Nagar, Delhi, in the year 2012-2013, but he did not testify to any misbehaviour on the part of the respondent/wife. Thus, examination of this witness does not help the appellant/husband in proving cruelty of a nature that would entitle him to a divorce from the respondent/wife.

13. The last aspect is regarding the abortions. While the learned counsel for the appellant/husband argued that the respondent/wife had not been able to give specific answers as to when her pregnancies were aborted by the appellant/husband and, therefore, she had made false allegations, it has to be noted that the appellant/husband does not dispute the fact that the respondent/wife had suffered two abortions, though in her cross-examination, a suggestion was given to her that she had never conceived from the appellant/husband. The Family Court, therefore, rightly concluded that the abortions may have been natural and therefore, nothing turned on them.

14. Regarding the subsequent litigations between the parties, the Family Court rightly concluded that all of them have been filed by the respondent/wife after the appellant/husband had moved for divorce. Merely because the respondent/wife sought maintenance and residence, is no reason to conclude that she had inflicted cruelty upon the appellant/husband, who was already pursuing his claim for divorce. In any case, the Family Court has observed that the case under the Domestic Violence Act was dismissed on the observation that the respondent/wife was already residing in the matrimonial home at Agra and no further orders were called for and further,

the maintenance plea was rejected, as an interim maintenance had been fixed in the divorce petition. The petition under Section 125 Cr.P.C. was dismissed in default. The criminal complaint filed under Section 200 Cr.P.C. on the plea that the appellant/husband had committed various offences under the IPC, was dismissed on the ground that vague and non-specific averments had been made therein. It was not as if, the appellant/husband had been acquitted after a full trial, as he was not even summoned by the learned Magistrate in that case. The dismissal of all these cases can by no stretch be interpreted as cruelty on the appellant/husband entitling him to a divorce.

15. In respect of the ground of desertion taken by the appellant/husband, the Family Court rightly found that the respondent/wife had not wilfully withdrawn from the company of the appellant/husband as he has also admitted that at the time of filing of the petition, they were both residing at Pandav Nagar, Delhi. According to the respondent/wife, it is after the written statement came on the record that she was left by the appellant/husband at Agra, in the matrimonial home. The allegation of the appellant/husband that the respondent/wife had forcibly occupied the first floor of the said house at Agra, has not been established. On the other hand, the respondent/wife has brought on record enough evidence to show that the appellant/husband was having some relationship with the lady, 'P' as the litigation between the lady, 'P' and her husband was brought on record by the respondent/wife including a complaint (Ex.RW1/E). She withstood the cross-examination on behalf of the appellant/husband in this regard. A man who is not true to his wife, would certainly give her cause to withdraw from his company and it is relevant to note, that if at all the respondent/wife had shifted to her matrimonial home at Agra, it was because the

appellant/husband had given her cause to do so. He has no explanation to offer as to why he had transferred money to the said lady, 'P', after his marriage with the respondent/wife. The Family Court, therefore, rightly concluded that the appellant/husband could not take advantage of his own wrong.

16. Another significant fact is the medical record of the respondent/wife. The parties had admittedly tried to settle their disputes vide Settlement dated 02.03.2014 (Ex.RW1/D) whereunder the divorce petition was to be withdrawn. However, the appellant/husband did not withdraw the divorce petition and also did not resume his residence with the respondent/wife. The medical certificate (Ex.RW1/C) is subsequent to this settlement and is dated 03.04.2014 and the Family Court has recorded in the impugned judgment that the following injuries were found on the person of the respondent/wife. The MLC reads as below : -

“MLVC DH Agra: B/B her brother Pintu Rawat.

03.04.2014 8:30 PM examined Smt. Varsha Sharma aged about 30 years W/o Jitendra Kumar Sharma D/o Om Pratap Rawat r/o 15/163 C/2, M.P. Pura Tajganj, PS Tajganj, Agra.

- 1. Reddish contusion 2x2 cm left side back of chest upper part.*
- 2. Traumatic swelling 3x2 cm left side head.*
- 3. Incised wound 3.0x0.5 cm in deep over left side (illegible) clotted blood present margins regular.*
- 4. Reddish contused Traumatic swelling 3x2 cm front of left knee.*
- 5. C/o pain both side chest.*
- 6. C/o pain left hand.*

Injuries simple in nature. Injury no.3 caused by sharp edged object. Rest by hand and blunt object. Duration about half day old.”

17. The respondent/wife has claimed that the appellant/husband used to beat her mercilessly. This MLC corroborates the said claim of the respondent/wife. The injuries recorded in the MLC appear to be grave. Besides traumatic swelling 3x2 cm on the left side of the head and traumatic swelling 3x2 cm front of left knee, caused with a blunt object, there was an incise wound 3.0x0.5 cm deep with clotted blood, which could have been caused only by a sharp edged object. Other injuries were also found to have been caused by hand. This reflects the conduct of the appellant/husband and shows that it is he who did not wish to live peacefully with his wife and was bent upon creating such an environment that would force her to leave and subsequently, raise a bogey of desertion. There is no proof of voluntary separation by the respondent/wife and nor is there any proof that her shifting to Agra was with the intention to sever all relationship with the appellant/husband.

18. Thus the appellant/husband has neither established his entitlement for divorce on the ground of cruelty, nor has he established a case for divorce on the ground of desertion. The judgment of the learned Family Court is therefore unimpeachable and is upheld.

19. The appeal is dismissed *in limine* being meritless alongwith the pending application.

(ASHA MENON)
JUDGE

(HIMA KOHLI)
JUDGE

OCTOBER 15, 2019/MK/s