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

+ **Date of Decision: 08.09.2015**

% **MAT.APP. 91/2009**

SUKH VARSHA BABBAR Appellant

Through: Ms. Sonia Mathur, Advocate with
appellant in person.

versus

PREM NATH BABBAR Respondent

Through: Mr. Augustine Chatterjee, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present appeal has been preferred to assail the judgment dated 31.01.2009 passed in HMA 214/07 by Additional District Judge (ADJ), Delhi, whereby the learned ADJ has passed a decree of judicial separation in favour of the respondent-husband and against the appellant-wife.

2. The respondent-husband had preferred a petition under Section 13(1)(ia) of the Hindu Marriage Act to seek dissolution of his marriage with the appellant-wife on the ground of cruelty. Instead of granting the divorce and dissolving the marriage, learned ADJ had moulded the relief and granted the decree of judicial separation. The parties were married in the year 1972. Out of the wedlock, three children were born, namely, two daughters, who were born in the year 1973, 1974, and one son was born in the year 1977. Unfortunately, the son passed away in an accident on 08.09.2002.

3. The relationship between the parties became strained in the year 1997. Since 2002, they started living separately in the same house on different floors. Respondent-husband occupied the first floor, whereas the appellant-wife along with her two daughters started living on the ground floor. Over the years, both the daughters have got married and are living in their matrimonial homes. The respondent-husband preferred the divorce petition in the year 2006. Several grounds alleging cruelty against the appellant-wife were raised in the petition. However, two grounds - which the trial court found to have been established, were the following:

- (a) Respondent-husband alleged that out of his personal income, the appellant-wife had advanced a loan of Rs. 2 lacs to one of her sisters behind his back, thus leading to his deprivation of the said money when it was required;
- (b) The appellant-wife and her daughter –RW2 had made allegations, to the effect that the respondent-husband had molested the daughter and had physically abused her, which was false and baseless and the said allegation had caused mental cruelty to him.

4. To establish the first ground aforesaid, the respondent appears to have filed the photocopy of the letter dated 04.11.1999 (Ex.PW1/B) claimed to have been sent by Shri Manohar Lal, brother-in-law of the respondent-husband (brother of the appellant) to Smt. Krishna Devi - the sister of the appellant and Shri Manohar Lal. In this communication, Manohar Lal records that Smt. Krishna Devi had taken a loan from the appellant, which has not been returned.

5. Pertinently, this document though filed by the respondent, was not led

in evidence by him in his examination-in-chief filed on affidavit. However, during his cross-examination, he volunteered to state that he has annexed the letter received by him through registered post, sent by his brother-in-law to support his case that a sum of Rs. 2 lacs have been advanced by the appellant-wife to her sister. When the said document was sought to be led in evidence as Ex.PW1/B, the appellant-wife had raised her objection as to the mode of proof. It was also suggested that this letter is forged and fabricated. The respondent admitted that he had not mentioned about his letter in his affidavit by way of evidence, but denied that the said letter was an after-thought. The respondent stated that the appellant used to visit her real sister to receive money, without informing the respondent-husband anything.

6. The learned ADJ relied upon Ex.PW1/B to hold that the said ground of cruelty aforesaid stood established. He observed that once the letter has been placed on record and exhibited without any objection as to its authenticity, it fell heavily on the appellant to prove otherwise. The fact that the appellant had not examined her brother to prove that the said letter was not written by him, and that it was a forged document, was taken against the appellant. The learned ADJ also held the circumstance, that the appellant did not examine her sister, goes against the appellant.

7. The approach of the learned ADJ on the aforesaid aspect is completely misplaced. Firstly, the respondent did not lead in evidence the said document marked Ex.PW1/B, which was filed by him, in his examination-in-chief. Secondly, he only produced a photocopy of the said letter. Thirdly, he claimed that he had received the said letter by registered

post from his brother-in-law. However, he did not produce the registered cover in which the said letter was purportedly received from his brother-in-law. Fourthly, and most importantly, he did not produce the author of the said letter to prove the writing of the said letter - that would have been the primary evidence to prove the said document. Fifthly, the said letter was not authored by the appellant wife, and its contents could not be held to have been proved against the appellant. It was essential for the respondent to independently prove the giving of loan by the appellant to her sister.

8. In his testimony, the respondent did not even state that he recognized the writing of his brother-in-law, and that the said letter has been written in the handwriting of his brother-in-law. Even otherwise, a perusal of Ex.PW1/B shows that the same has been written in *devnagari* script and at the end it appears to bear the name (Manohar Lal) but does not appear to contain his signatures. It is also pertinent to note that a perusal of Ex.PW1/B by itself does not lead to the conclusion that the appellant had advanced the loan, or that the respondent-husband was not aware of the factum of advancing of the alleged loan of Rs. 2 lacs by the appellant to her sister, or the said loan had been advanced secretly behind the respondent's back. It is also highly debatable whether such a conduct, even if indulged by the appellant-wife, would tantamount to cruelty. Thus, in my view, the said ground of cruelty has not been made out and to that extent, the impugned judgment cannot be sustained.

9. However, the position is quite different when one examines the second ground of cruelty alleged by the respondent-husband. The allegation made by the appellant-wife against the respondent-husband was that he had

molested and physically abused his grown-up daughter. The said allegation, if not established, would tantamount to a very serious false charge against the respondent-husband/father made by the appellant and her grownup daughter - of a father molesting and physically abusing his daughter. Such an allegation strikes at the very root of the relationship between, not only the father and his daughter, but also between the husband and the wife – particularly when the said allegation has been made by the appellant wife and the daughter RW2 has testified in support thereof. Such an allegation is completely destructive of the said relationships, as the insinuation is amongst the worst kind of character assassination that a husband/father can be subjected to. Such an allegation, if false, would lead to immense agony, anguish and pain to the husband/ father, which would have the effect of damaging the matrimonial fabric beyond repair.

10. In this regard, the appellant had produced RW2 –her daughter as her witness, who had filed her affidavit by way of her examination-in-chief as Ex.RW2/A. She stated that the respondent is guilty of various acts of cruelty against her as well as her mother. She, inter alia, stated that on some occasions, the respondent had physically abused and molested her and her sister while he was under the influence of liquor. She stated that she was molested by the respondent and he even removed all clothes worn by him, including his undergarments. She stated that on 01.10.2002, when she was leaving for her office in the morning, she was molested and physically abused by the respondent and that when the appellant intervened, both of them were given beatings for at least 10 minutes, and that she had to call the police to save herself. She stated that the respondent and the appellant were

booked under Sections 107/151 Cr.P.C. and later on, the mother i.e. the appellant was granted bail and the respondent-husband was sent to Tihar in jail custody.

11. In her cross-examination, RW2 stated that her educational qualification is M.Sc. (Mathematics). RW2 sought to explain the meaning of the expressions, 'physical abuse' and 'molestation' as understood by her, as meaning the giving of beatings and physical manhandling. She also stated during the course of her cross-examination that on 01.10.2002, the incident of 'molestation' and 'physically abuse' had taken place when she was on her way to work at about 8.00 p.m. as the duty was in the night shift.

12. The learned ADJ has found in favour of the respondent-husband and disbelieved the testimony of the appellant and RW2 on the said allegation. The learned ADJ observed that molestation and physically abuse are strongly suggestive of sexual abuse and reflected upon the character of the person against whom such words are used. In relation to the incident of 01.10.2002, the learned ADJ observed that on the one hand, RW2 had claimed that she was going to the office in the morning when the said incident of molestation and physical abuse had taken place at the hands of the respondent-father while, on the other hand, in her cross-examination she had, inter alia, stated:

“On 1.10.02, I was working with E-funds as a Team Member and the office of the same is in Gurgaon. On the said day, I was leaving for my office at around 8.00 p.m., it was my night shift duty. It is wrong to suggest that on 01.10.02, the cause of fight between petitioner and us was that we had forged a No Objection Certificate of petitioner for claiming dues of our deceased brother.”
(Emphasis supplied)

13. Thus, there was a serious contradiction in the testimony of RW2 with regard to the time of the incident. The appellant had not produced the case claimed to have been registered under Sections 107/151 Cr.P.C. post the incident of physical abuse and molestation, which allegedly took place on 01.10.2002.

14. RW2 sought to explain her understanding of the expressions, ‘molestation’ and ‘physical abuse’ by stating:

“The meaning of ‘physically abused’ as mentioned in my affidavit is that my father used to pounce on me and started giving beatings. The meaning of ‘molestation’ as mentioned in my affidavit is that physical manhandling of the petitioner with me. The meaning of the words in my affidavit that I was telling my father not to misbehave with us for the last ten years, starts from 1992. We are not residing together and are not in talking since the year 2002.”

15. The learned ADJ sought to give the benefit of doubt to RW2 about her understanding of the said expressions, by concluding that the allegations, in any event, did not relate to sexual abuse/sexual assault. However, in my view, the other allegations made by RW2 in her examination-in-chief, do not support the explanation sought to be furnished by her in her cross-examination with regard to her understanding of the expressions, ‘physical abuse’ and ‘molestation’. As noted above, the said witness had, inter alia, stated that the respondent had molested her inasmuch, as, he removed all his clothes including his undergarments. Thus, it cannot be said that RW2 was not aware of the meaning of the expressions, ‘molestation’ and ‘physical abuse’ as having sexual connotations, or that she understood the said expressions to mean only “physical beatings” and “manhandling”. She is

having a post-graduate qualification in Mathematics and being a mature person, would be aware of the true meaning of the said expressions. Thus, in my view, the findings returned by the learned ADJ with regard to the perpetration of cruelty by the appellant on the respondent, premised on the false allegation of molestation and physical abuse of RW2 is correct, and does not call for interference.

16. Reliance placed by the learned counsel for the appellant on ***Subhash Chander Sharma Vs. Anjali Sharma*** 174(2010) DLT 564, in my view, is of no avail. In this decision, this Court has taken note of the legal position that irretrievable breakdown of marriage is not a ground recognized as a ground for divorce under the Hindu Marriage Act. Reliance was placed in this regard on ***Neelam Kumar Vs. Dayarani II*** (2010) DMC 198 (SC). However, in the present case, firstly the learned ADJ has not passed a decree of divorce, and secondly, the relief of judicial separation granted to the respondent-husband is not premised on irretrievable break down of marriage. The same is premised on a finding of cruelty.

17. As discussed hereinabove, the ground of cruelty, though not made out in relation to the allegation of appellant advancing the loan of Rs. 2 lacs to her sister without the knowledge of the respondent, it is established in relation to a more serious charge of the respondent-husband physically abusing and molesting the grownup daughter RW2.

18. The learned ADJ has in his discretion granted judicial separation instead of a decree of divorce. The respondent-husband has not assailed the said judgment and decree by either filing a separate appeal, or by raising any cross-objections in the present appeal. Accordingly, I find no merit in this

appeal and dismiss the same leaving the parties to bear their respective costs.

19. The appeal stands disposed of.

VIPIN SANGHI, J

SEPTEMBER 08, 2015

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