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

Reserved on: 26.07.2016

Decided on: 21.09.2016

+ MAT.APP. 45/2011

MINI APPA KANDA SWAMI @ MANI Appellant

Through: Ms. Shailja Balasaria, Advocate.
versus

M INDRA Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MS. JUSTICE DEEPA SHARMA (JUDGMENT)

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1. This appeal has been preferred by the appellant husband against the order of the Family Court, Rohini, Delhi, dated 12.08.2010 whereby his petition for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act (hereafter "the Act") was dismissed.

2. Briefly, the facts are that the parties got married according to Hindu rites and customs at JJ Colony, Delhi on 06.09.2003 and through the wedlock one male child was born on 01.07.2004.

3. The petition for divorce was filed by the appellant on the ground of cruelty, alleging that the respondent wife was pressurizing him to setup a separate home as she did not want to live in a joint family. The appellant

worked as a labourer and it is his contention that owing to limited financial means it was not possible for him to set up a separate independent household. It is further contended that despite several attempts to explain the difficulty of setting up a separate household, the respondent refused to cooperate and kept pressurizing the appellant. It is argued that the respondent became overbearing and abusive and also started misbehaving, not only with the appellant but also with his family members. The respondent would get aggressive and on several occasions had even beaten him. She also refused to do the household chores and threatened to implicate him and his family members in false criminal cases. Thereafter, on 21.11.2003, her parents visited her and instead of advising her to mend her ways, supported her. The respondent continued her atrocities against the appellant and his family and on 21.01.2004, left the matrimonial home without giving any reasons. It is argued by the appellant that he and his family members made several efforts for reconciliation and even went to the respondent's parental home on 10.02.2004 and 04.03.2004 to bring her back so that she could rejoin the company of the appellant. However, all such attempts failed. In fact, it is alleged, that instead of sorting the differences, the respondent and her

family threatened to implicate the appellant as well as his family members in dowry demand cases. The appellant received a notice from CAW Cell (Crime Against Women Cell) on 30.03.2005. A false complaint with Mahila Ayog (Delhi Commission of Women) was also filed by the wife. The appellant submits that he returned all the dowry articles to the respondent on 25.04.2005. It is submitted that he did not condone the wife's cruelty in any manner and that their marriage reached a point of no return with there being no likelihood of a patch up or sorting of differences. Under such circumstances there could be no re-union of the parties.

4. The respondent, who appeared in person in the proceedings, had filed her written statement which controverted all the appellant's contentions and had urged that it was he who had treated her with cruelty. She contends that the appellant had raised a demand of ₹ 1 lakh as well as a motor cycle and when she could not make good of these demands, she was turned out of the matrimonial home; she made efforts for reconciliation, but to no avail. It is also contended that she was sent back to her parental home when she was in family-way and all the delivery expenses were borne by her parents.

5. In the replication, the appellant had alleged that it was he who had borne the delivery as well as post-delivery expenses and denied any allegation that he had demanded any money or a motor cycle or even that he had treated her with cruelty.

6. The Family Court heard the arguments and framed three issues:-

“a. Whether after the solemnization of marriage, the respondent has treated 'the petitioner with cruelty'? OPP

b. Whether the respondent has deserted the petitioner , for a continuous period of not less than 2 years immediately before presentation of this petition? OPP

c. Whether the petitioner is entitled for a decree of divorce on the ground as prayed for? OPP

7. Parties led their evidence. While the appellant had examined himself and his mother and one neighbour, the respondent had examined herself and her father. After considering all the evidence on record, the Family Court found that the husband had failed to discharge the burden placed upon him and had failed to prove that the respondent had committed cruelty of such nature which warranted a decree of divorce. It was also observed that the husband had failed to prove that his wife had deserted him for a continuous period of two years and dismissed the petition.

8. The impugned order is challenged by the appellant before this Court on the grounds that the learned Judge has failed to take note of the un rebutted statements of his witnesses and that there was no reason to disbelieve their testimonies. Learned counsel for the respondent, Ms. Shailja Balasaria submits that on a reading of the impugned order, there appears to be an inconsistency in the observations made by the learned trial Judge in para 22. Counsel urges that the judgment is based solely on presumptions and suffers from infirmity and illegality and is liable to be set aside.

9. It is further contended that the appellant is possessed of limited financial means and in the circumstances could not have afforded a separate independent household. The respondents demanded a separate residence and committed acts of misbehavior which resulted in cruelty; by passing the impugned order, the Family Court has erred in holding that the demand of the respondent for a separate home was justified. It is further argued that the Family Court wrongly relied upon a settlement reached between the parties before the CAW Cell although no such settlement was proved on record by the respondent.

10. The question for consideration is whether the conduct of the respondent/wife in the circumstance of the case, amounted to cruelty, to entitle the husband to divorce. Cruelty could be physical or mental or both. While it is easy to discern physical cruelty, mental cruelty has to be assessed from the overall behavior of spouses as well as other incidental factors. There is no doubt that in a matrimonial setup, a couple, which decides to live together, invariably has different attitudes and opinions, likes and dislikes, and more often than not spouses behave differently when faced with the same situations. While disputes and arguments are normal in a marriage, in order to constitute cruelty, the conduct of the spouse should be something more serious than the ordinary “wear and tear” of a marital life.

11. While considering whether a particular conduct constitutes cruelty or not, the social status of parties, cultural background, physical and mental conditions, customs and traditions etc. have to be considered. Mental cruelty can be assessed from the continuous unprovoked conduct of a spouse which causes embarrassment, humiliation, and anguish so as to render the other spouse’s life miserable and unendurable. This conduct should be of such gravity that the wronged party cannot be reasonably

asked to put up with such conduct and continue to live with the other party.

12. The Supreme Court in the case of **A. Jayachandra v. Aneel Kaur** reported in (2005) 2 SCC 22, has observed as under:-

“It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of such type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of”

13. It is in the backdrop, of the behavior of parties, that the court has to discern if the conduct complained is cruelty. There is no dispute as to the fact that the appellant was working as a labourer. He was living in a house built on a plot measuring 25 sq. yards, consisting of two rooms, along with his parents, three brothers and three sisters. While the appellant in his evidence deposed he had a room on the ground floor and one room on the first floor, his mother in her deposition claimed that there were two rooms on the ground floor and one room on the first floor. Even if the latter account were taken to be true, it leads to a scenario where, three rooms

accommodate eight adults. With the respondent joining her matrimonial home and after the birth of their child, the number of members living in that house further increased.

It was in the background of these facts that the learned trial Judge held:-

“The petitioner has claimed that the respondent wanted to stay in a separate accommodation. She definitely requires/required one bedroom for herself and the petitioner. Such a demand from the newlywed cannot be considered as unwarranted or undesirable. If the respondent at all wanted to stay in a separate accommodation that could be only because she did not or could not have the required privacy in the matrimonial home in such a large family. I am, therefore, of the considered view that her expectation/demand was not unreasonable.”

14. Privacy is a fundamental human right. Oxford dictionary defines privacy as *“a state in which one is not observed or disturbed by the other people.”* So when a woman enters into matrimony, it is the duty of the family members of her matrimonial home to provide her with some privacy. There is no evidential backing by the appellant or his family members showing that they had provided requisite privacy to the respondent. The Family Court was therefore correct in holding that such demand was not unreasonable and as such did not constitute cruelty.

Besides this allegation, the appellant has not brought on record any proof to substantiate the allegation that the behavior of the respondent caused mental cruelty. The allegation that she was abusing the appellant and his family members are vague and there are no specific instances cited.

15. The Family Court has further noticed on the basis of evidences on record that the petitioner had taken a rented accommodation and stayed there with the respondent, but later on abandoned her.

The Family Court relying on the evidences on record held:-

“The record, further, reveals that the respondent had lodged a complaint with CAW Cell and there, the parties arrived at a compromise. The Respondent has claimed that as per the settlement, it was agreed that the parties shall stay in a separate independent accommodation. The Petitioner has, however, stated that no such settlement was arrived at. The Petitioner has taken the stand contradictory to his own testimony in the court. He has testified in his cross-examination that all the dowry articles of the Respondent as per the list Ex. PW1/RI were returned to the Respondent. He denied the suggestion that any rented accommodation was taken by them in E-Block Shakurpur. He, also, denied that rent of the said accommodation was Rs. 1200/- per month or that father of the Respondent was/has been paying the rent. He, however, admitted voluntarily that all the dowry articles of the Respondent are lying in that rented accommodation. He, further, denied the suggestion that the articles are not lying in the house of real Bua (sister of father of the Respondent). If the Petitioner and the respondent had not taken any rented accommodation in pursuance of the settlement arrived at in CAW Cell, the Petitioner could not have known that the dowry articles are lying in that rented

accommodation. The Respondent has, therefore, rightly claimed and testified in the court that the Petitioner stayed with her in a separate rented accommodation for 2-3 days in the year 2005 i.e. after the settlement arrived at in CAW Cell. The dowry articles were returned to the Respondent on 25.04.2005 and thereafter, the parties stayed in a rented accommodation for 2-3 days.”

16. The evidence clearly disproves the appellant’s contention that the respondent left her matrimonial home and never returned. Rather, the record shows that the appellant had set up the matrimonial home in a rented accommodation, which he left and did not return to thereby abandoning the respondent. In his cross-examination, the appellant has also admitted that at the time of marriage the respondent had brought dowry with her. His testimony is extracted as under:-

“At the time of my marriage respondent brought one bed, some utensils, one refrigerator, one washing machine and one almirah. We have returned all the articles of the respondent which belongs to her as per the list mentioned Ex. PW1/R1.”

17. Interestingly, in the cross-examination of the respondent/wife a suggestion was given which was accepted by the respondent, thereby fortifying her stand that the appellant had demanded ₹ 1 lakh and one motorcycle from her and on her failure to arrange the same, he abandoned her. The suggestion which was accepted as correct by the respondent is “It

is correct that petitioner demanded Rs. One Lac and one motor cycle from me. This demand was raised in the presence of my in-laws.”

18. A person is not allowed to take advantage of his own wrong. The appellant has failed to prove his allegation of cruelty. Not just this, he had also demanded dowry and it is he who abandoned the respondent. Under the circumstances, there is no infirmity in the order of the learned trial judge inasmuch as the appellant is not entitled to a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. Furthermore, Section 23(1)(a) of the Act makes it abundantly clear that a decree can be granted when the Court is satisfied that the petitioner is in no way taking advantage of his wrong. Such is not the case here, as it is the appellant who abandoned the company of his wife.

19. Lastly, it is urged by learned counsel for the appellant that the parties have been living separately for the last 12 years and the marriage has virtually lost its meaning for them as they have reached a point of no return. She avers that there is no life in the marriage bond and that it should be dissolved for this reason. She has relied on para 26 of the Judgement in *K. Srinivas Rao vs D.A. Deepa, 2013 (2) SCALE 735*, reproduced as under:-

“We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.”

20. We have given thoughtful consideration to this argument of the learned counsel. While there is no dispute to the fact that the parties have not been living together for almost 12 years, yet a decree of divorce cannot be passed on this ground alone as has been observed by the Supreme Court in the *Rao* case (supra):-

“Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act.”

21. No doubt in *Naveen Kohli vs. Neelu Kohli* (2006) 4 SCC 558, the Supreme Court made a recommendation to the Union of India to amend the Hindu Marriage Act to incorporate irretrievable breakdown of marriage as a ground for divorce, yet till date this ground of divorce has

not been added to the Act. Also in ***Vishnu Dutt Sharma v. Manju Sharma***

(2009) 6 SCC 379, the Supreme Court held as under:-

“On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.

Learned Counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned Counsel for the appellant.”

22. The Supreme Court in ***Anil Kumar Jain vs. Maya Jain 2009 (12)***

SCALE 115 clearly defined the jurisdiction of the High Court while considering the ground of irretrievable breakdown of marriage as a ground for granting divorce. The court has stated as under:

17.This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution.

23. This Court thus lacks jurisdiction to dissolve a marriage on the doctrine of “*irretrievable breakdown*”.

24. The findings of the Family Court that the respondent had no intention to desert the appellant cannot be faulted with especially when evidence shows that it was the appellant who had left her and the child in the rented accommodation where he stayed with them only for 2-3 days.

25. The order of the family court does not warrant any interference. The appeal has no merit and is dismissed.

**DEEPA SHARMA
(JUDGE)**

**S. RAVINDRA BHAT
(JUDGE)**

SEPTEMBER 21, 2016

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