

\$~R-1B

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

Judgment reserved on: **07.07.2015**
% Judgment delivered on: **07.01.2016**

+ **MAT. APP. 54/2009**

AS Appellant

Through: Ms. Kamlesh Jain, Advocate

versus

SNS Respondent

Through: Mr. R.G. Srivastava, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The present appeal under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred as 'HMA') assails the judgment & decree dated 20.03.2009 passed in HMA 741/06 by Additional District Judge (ADJ), Delhi, whereby the learned ADJ allowed the petition preferred by the respondent-husband under Section 13(1)(ia) and (ib) of the HMA, granting a decree of dissolution of marriage in his favour and against the appellant-wife.

2. The parties were married on 17.06.1984 at Varanasi, U.P. No issue

was born out of the wedlock. The respondent alleged that the appellant treated him with cruelty, and deserted him on 12.09.1999. She had denied sexual relations on one pretext or the other after 13.06.1997. It was further alleged that the appellant suffered from psychological and physical deformities, and used to pick quarrels with the respondent. She created ugly scenes several times in the presence of family members and friends of the respondent. She was suffering from tubercular endometritis and blockage of both fallopian tubes. Further, when the respondent returned on 02.10.1999 from his training in Manchester, he found his house locked. He came to know that the appellant had left the house on 12.09.1999 and deserted him.

3. In the written statement filed by the appellant-wife, she denied all the allegations. She stated that the marriage was solemnized on 03.06.1985, and not on 17.06.1984. She stated that she never denied sexual relations to the respondent. She also denied that she suffered from tubercular endometritis and blockage of both fallopian tubes. She claimed that it was the respondent who gave her contraceptive pills to avoid pregnancy till after 2-3 years of marriage. This had affected her fertility. She also stated that it was the respondent, who had forced the appellant to leave her matrimonial home, as he had extra-marital relations with one SJ.

4. After the relevant issues were framed, both the parties led their evidence in support of their cases. The Trial Court on assessing the evidence on record, passed the decree of dissolution of marriage, both under Section 13 (1)(ia) and (ib) of HMA.

5. The Trial Court came to the conclusion that the respondent-husband

had successfully established the cruelty caused to him by the appellant, on account of his being deprived sex. Moreover, the appellant had made serious allegations impinging on the character of the respondent, which remained unsubstantiated. The same also caused mental cruelty to the respondent. The Court also came to the conclusion that the appellant deserted the respondent on 12.09.1999. Consequently, the marriage was dissolved between the parties. Hence, the present appeal.

6. Learned counsel for the appellant submits that the appellant did not desert the company of the respondent. She never left the matrimonial home willingly or with the intention to desert the company of the respondent. In fact, she was forced to leave her matrimonial home by the nephew of the respondent while he was away in the UK on 12.09.1999. In such circumstances, it cannot be said that the appellant deserted the respondent. The appellant in her cross-examination stated as follows:

“Vol. I was forced to leave the matrimonial home as nephew of the petitioner first asked me to leave before petitioner comes back but when I did not listen to him, he locked the door from inside and I had no option but to go elsewhere.”

7. On the aspect of cruelty, the appellant submits that the appellant had never denied sexual relations to the respondent. On the other hand, it was the respondent who denied sexual relations to the appellant. He did not want children and gave contraceptive pills to the appellant to prevent her from conceiving. This further resulted in health problems to the appellant. In her cross examination, she deposed as follows:

“It is incorrect to suggest that I was reluctant to have sexual

relations with the petitioner after the marriage. According to me, the physical relations between husband and wife are important and I was giving due importance to the same.”

8. The appellant submits that the respondent had cheated her. He is a corrupt officer, and has obtained various awards by adopting corrupt means. It is further submitted that the respondent is a known womanizer among his colleagues and in the society. Learned counsel for the appellant further submits that it was the respondent who never respected the matrimonial relationship. He insulted her in front of his relatives and friends.

9. Reliance is placed on ***Shyam Sunder Kohli v. Sushma Kohli @ Satya Devi***, 2005 (1) JCC 136, wherein it was held that it is only in extreme circumstances that the Court may use its power of dissolving a marriage, where the wife is still ready to go back. Reliance is also placed on ***Jitender Singh (Sh.) v. Smt. Yashwanti***, 2008 IX AD (Delhi) 527, wherein it was held that if no independent evidence is brought on record, and the incidents are denied by the other party in the pleadings, a solitary incident cannot be a ground of cruelty in the absence of any other evidence. He further submits that the allegation of cruelty in the present case is nothing but normal wear and tear in a marital relationship.

10. On the other hand, learned counsel for the respondent submits that the appellant had constantly changed her stand. In the pleading, it was stated by her that the respondent had thrown her out of the matrimonial home. However, in her cross-examination, she stated that respondent's nephew threw her out of the matrimonial home. It was not her case in the written statement that the nephew of respondent had thrown her out of the

matrimonial house. Paragraph 20 of the written statement reads as follows:

*“The contents of para 20 of the petition are wrong and denied except to the extent that the respondent is living separately from the day **the petitioner has thrown/forced the respondent to leave her matrimonial home.**”*

(emphasis supplied)

11. The respondent further submits that the allegations of cheating, corruption and womanizing have remained unsubstantiated. Even the allegation of the respondent having an extra-marital affair with one SJ was not proved. In the written statement, the appellant stated that the respondent had relationships with several women, but in her cross-examination, she only states that he was having an affair with SJ.

12. Learned counsel for the respondent has placed reliance on the following judgments:

- i. *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675;
- ii. *Praveen Mehta v. Inderjit Mehta*, AIR 2002 SC 2582;
- iii. *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511;
- iv. *Kamini Gupta v. Mukesh Kumar*, AIR 1985 Delhi 221,
- v. *Shashi Bala v. Rajiv Arora*, 188 (2012) DLT 1, and;
- vi. *Vineeta Saxena v. Pankaj Pandit*, (2006) 3 SCC 778

13. I have carefully considered the submissions of learned counsels for the parties and perused the record laid in the case, including the impugned judgment.

14. The appellant in her cross-examination stated as follows:

“I came to know that petitioner came back from Manchester on 2.10.99. I left the matrimonial home on 12.9.99. I went to Vasant Kunj flat to reside. Vol. I was forced to leave the matrimonial home as nephew of the petitioner first asked me to leave before petitioner comes back but when I did not listen to him, he locked the door from inside and I had no option but to go elsewhere.”

(emphasis supplied)

15. In her written statement, the appellant, *inter alia*, stated that:

“3. The respondent was forced to leave the matrimonial home due to the misconduct and misbehavior of the petitioner.

x x x x x x x x x x

12. It is the petitioner who has misbehaved with the respondent not spared her in Manchester also. Due to the ill behavior of the petitioner the respondent forced to leave her matrimonial home.

x x x x x x x x x x

20. the respondent is living separately from the day the petitioner has thrown/forced the respondent to leave her matrimonial home. It is the petitioner who is having extra martial relations with SJ and due to this reason he forced the respondent to leave her matrimonial life.”

(emphasis supplied)

16. Thus, there is a clear contradiction in the stand of the appellant as taken in her written statement and as narrated in her testimony. The fact that the appellant left the matrimonial home on 12.9.99 is undisputed, since she deposed to that effect in her cross-examination. The appellant claimed that

she left the matrimonial home due to the illicit relations of the respondent with SJ. However, no evidence had been brought on record to suggest that the respondent had any relations with any SJ. No independent witness has been examined by the appellant, who had witnessed the relationship between the respondent and SJ.

17. The appellant in her cross-examination stated that the respondent was involved in a serious affair with one SJ from the year 1996. She further stated that SJ had visited the house twice, however, she personally did not see her. She also gave details of the work place and residential address of SJ. She further deposed that:

“Once I saw the petitioner coming out of the flat of SJ. I was having knowledge that petitioner used to stay at the flat of SJ several times. Besides SJ, I have no knowledge about any other involvement of petitioner with any other female. I do not know exactly whether SJ was working in the office of the petitioner. It is correct that besides the incidents mentioned by me above and in my affidavit, I myself did not see the petitioner and SJ together.”

I contacted the husband of Ms SJ on telephone. The number I could get through my relative.”

18. The self serving testimony of the appellant regarding the alleged involvement of the respondent with SJ is of no avail, when the respondent has denied the allegations. Mere averments of the appellant cannot be believed in absence of any cogent evidence to this effect. Similarly, the allegations of respondent’s misbehavior remained unsubstantiated. The defence of constructive desertion by the respondent/ husband is unsubstantiated in the facts of the present case. In *Rayden on Divorce*, 7th

Edn., the expression ‘constructive desertion’ is explained at p. 155 thus:

“Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife, and the case of man who compels his wife by his conduct, with the same intention, to leave him. This is the doctrine of constructive desertion.”

In **Ashok Kumar v. Shabnam**, AIR 1989 Del. 121, this Court observed:

“80. if one side by his words and conduct compels the other side to leave the matrimonial home or stay away therefrom; the former would be guilty of desertion though it is latter who is seemingly separated from the other.”

19. For such a defence to be available, the appellant-wife should have led cogent evidence to establish that the respondent-husband created such circumstances, that it was not possible for the appellant-wife to reside in the matrimonial home. She has failed to lead any cogent evidence to that effect.

20. In **P. Indira Devi v. Kumaran**, AIR 1982 Ker. 78, the Kerala High Court took the similar view as that of the Supreme Court in **Bipin Chander Jaisinghbhai Shah v. Prabhawati**, [1956] 1 SCR 838 and observed that:

“3. Desertion, in its essence, is the separation of one spouse from the other with intention on the part of the deserting spouse of bringing cohabitation permanently to an end - vide Herod v. Herod ((1938) 3 All ER 722 at p. 731); Hopes v. Hopes ((1948) 2 All ER 920 at p.925). Further such separation must be without the consent of the other spouse. The mere physical

*act of departure of one spouse does not necessarily make that spouse the deserting party. **Desertion is not withdrawal from a place but from a state of things**, – Pardy v. Pardy ((1939) 3 All ER 779 at p.782). What law seeks to enforce is the recognition and discharge of the common obligations of the married life and it is therefore said that mere withdrawal from the place should not be taken as desertion. It must be the withdrawal from a state of things. The state of things may, be termed for short the home – Lane v Lane ((1952) 1 All ER 223). Therefore, **a Court must look for the existence of two elements to find desertion: first, the factum of physical separation and second, the animus deserendi, that is the intention to bring cohabitation permanently to an end.** These two elements must be present on the part of the deserting spouse and there must be absence of consent as well as absence of conduct reasonably causing the deserting spouse to form his intention to bring cohabitation to an end. **Desertion commences from the time the factum of separation and the animus deserendi coincide in point of time.** This may be simultaneous or may be at different points of time.”*

(emphasis supplied)

21. In **Bipin Chander Jaisinghbhai Shah** (supra) and **P. Indira Devi** (supra), the Courts have held that two essential conditions must exist for desertion. Firstly, the factum of physical separation and secondly, the *animus deserendi*. It is evident from the record that no such circumstances existed that compelled the appellant to leave her matrimonial home without the consent of the respondent. The intention of the appellant to leave the company of the respondent is also clearly established. She left the matrimonial home on 12.09.1999 – when the respondent was not even in India, and did not return to the matrimonial home even after he returned on 02.10.1999. She never returned to the matrimonial home even by the time the petition was filed by the respondent on 03.01.2005. If her testimony is

to be believed – that the nephew of the respondent threw her out of her matrimonial home, nothing prevented her from returning to her matrimonial home after the respondent returned from Manchester on 02.10.1999. The contradictions in statements of the appellant create a serious doubt, and her defence cannot be believed. Therefore, the desertion had continued for over two years when the petition was preferred by the respondent.

22. On the aspect of cruelty, a perusal of the record reveals that the respondent could not establish the denial of sexual relationship by the appellant. The learned ADJ, while returning his finding on the said aspect in favour of the respondent/husband, in my view, was unduly swayed by what the appellant had recorded in her personal diary. A perusal of the same shows that she has nowhere recorded in her diary that she is averse to having sex with the respondent/husband, or that she does not permit him to have sex with her. The content of the said diary reflects upon the depressed state of mind of the author, who is self critical and finds fault with herself for her incompatible relationship with her spouse. It does not contain anything to say - with any definitiveness, that the appellant/author of the diary refused sexual relationship with the respondent. Similarly, the letters written by the respondent/husband merely suggests that he longed for the appellant/wife while she was away. No allegation is contained in the said letters of the respondent/husband, that the appellant has been denying sex to the respondent. No doubt, it is difficult to find direct evidence – one way or another on such an aspect, which is very personal between the husband and the wife. However, that by itself would not mean that the court would jump to the conclusion that the allegation of the respondent/husband of his being

denied sex stands established, merely because the appellant has recorded in her diary that the respondent/husband had received disappointment at the hands of the appellant/wife in several fields. At the highest, what could be said is that on account of her frame of mind, the appellant did not actively participate in the sexual activity, and did not enjoy the same. This could not be taken to mean that she has denied or repelled the moves of the respondent/husband to have sexual intercourse with her. The admission of the appellant that it was the respondent who always used to initiate for sex, and that she used to surrender to his wishes also does not mean that the respondent was denied sex by the appellant. Similarly, her admission that the parties had sex only three or four times during the period between June 1997 to September 1998 also does not lead to the said inference. The observations made by the learned ADJ that the appellant “*corroborated the version of the petitioner that sex and love are not made for her*” is not borne out from the record. A perusal of her diary (Ex. PW-1/9) shows that it does not contain any statement to the said effect. Consequently, to the aforesaid extent, the finding returned in the impugned judgment is set aside.

23. The learned ADJ has held that the appellant treated the respondent with cruelty also on account of the fact that the appellant had made scandalous allegations against the respondent, which she had failed to prove. The making of baseless and untrue allegations which led to character assassination of the respondent itself tantamounts to cruelty. In this regard, the learned ADJ has placed reliance on *Kamini Gupta* (supra). It is well settled that cruelty under Section 13(1)(ia) of the HMA is not limited to physical cruelty but also includes mental cruelty. In *Vineeta Saxena*

(supra), the Court has held that mental cruelty would cause even more serious injury than the physical harm can, and the same can create, in the mind of the injured person such apprehension as is contemplated by Section 13(1)(ia). In *Naveen Kohli* (supra), the Supreme Court observed that cruelty is a course of conduct of one which is adversely affecting the other. It may be mental or physical. It may be intentional or unintentional. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment in the mind of the spouse. The test is to determine whether it cause reasonable apprehension that it would be harmful and injurious to live with the other – ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may be cases where the conduct complained is bad enough and *per se* unlawful and illegal. In such cases, the impact or the injurious effect on the other spouse may not be enquired into or considered, and cruelty would be established if the conduct itself is proved or admitted. Similarly, in *Praveen Mehta* (supra) and *Samar Ghosh* (supra), the Supreme Court observed mental cruelty under Section 13(1)(ia) 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. It should be of such nature that the parties cannot reasonably be expected to live together.

24. In *Kamini Gupta* (supra), the Supreme Court has observed that reckless allegations amount to mental cruelty under Section 13(1)(ia) of the HMA. In the present case, the appellant has unhesitantly, consciously and knowingly made serious allegations against the respondent, which adversely

reflect on his character and morality. He is alleged to be a corrupt officer and a womanizer. It is alleged that he had an illicit relationship with one SJ. None of these allegations had been established by the appellant by leading any cogent evidence. It is one thing for a spouse to speak harshly to the other in the course of an argument and in the heat of moment. Harsh words and utterances so spoken are bound to cause pain and anguish and also result in anger and a grouse being experienced by the other spouse. However, such wear and tear in a matrimonial relationship is normally healed, and the parties move on in life. But, it assumes a difference when serious allegations are made by one spouse against the other – not in the heat of the moment, but in a premeditated and planned manner in legal proceedings.

25. In the present case, the appellant has made these allegations in her defence/written statement. She had better known to the consequence of making these allegations and not establishing the same when she made them. Her failure to lead any evidence on these allegations clearly shows that they were made recklessly. The making of these allegations by the appellant in her written statement undoubtedly would have caused immense pain and suffering to the respondent/husband, as the allegations impinge on his character and morality. To be called a womanizer and corrupt by his own spouse, would have caused such pain and suffering to the respondent as would lead him to entertain the apprehension that it would not be conducive to his physical and mental well being to live with the appellant/wife.

26. Consequently, I am of the view that the learned ADJ rightly concluded that the appellant treated the respondent with cruelty entitling him to seek dissolution of marriage under Section 13(1)(ia).

27. Learned counsel for the appellant relied on *Shyam Sunder Kohli* (supra) and *Jitender Singh* (supra). The judgment in *Shyam Sunder Kohli* (supra) cannot be applied to the facts of the present case. In the said case, the Trial Court and First Appellate Court had given concurrent findings that no cruelty or desertion was established. The evidence in the said case rather indicated that the respondent-wife was forced out of the matrimonial home. The Court further observed that a party who is at fault and has not allowed the marriage to work, cannot claim that the marriage should be dissolved. In the present case, the facts are to the contrary, as already discussed above. The observation in *Jitender Singh* (supra), cannot be applied in this case. In the said case, this Court while citing various judgments discussed the meaning of ‘cruelty’ in light of the facts of the said case. The Court observed that the appellant-husband had failed to give any independent and supporting evidence as no one from his family, including his maternal uncle, had come to depose in his favour. It was held that a solitary incident cannot be a ground of cruelty. Therefore, cruelty was not established for the lack of evidence. In the present case, there is sufficient evidence on record to corroborate the statements of the respondent. On the aspect of irretrievable breakdown of marriage, the Court in the said case held that the ground of irretrievable breakdown of marriage cannot be invoked when one of the spouses is genuinely interested to live with the other, forgiving and forgetting existing bitterness. That is neither a ground available for obtaining divorce under the HMA, nor is a ground taken by the respondent to seek dissolution of marriage in the present case. The said decision is, therefore, of no avail to the appellant.

28. In the light of the aforesaid discussion, while setting aside the finding returned by the learned ADJ on the aspect of cruelty on account of denial of sexual relationship by the appellant to the respondent, the impugned judgment and decree is affirmed and the present appeal stands dismissed, leaving the parties to bear their respective costs.

VIPIN SANGHI, J

JANUARY 07, 2016