

\$~4

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

%

Date of Decision: September 29, 2016

+

MAT.APP.(F.C.) 74/2016

RAJEEV KUMAR

..... Appellant

Represented by: Mr.Pradeep Chaudhary, Adv.

versus

VIDYA DEVI

..... Respondent

Represented by: None

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (Oral)

1. On May 17, 2016 notice was issued in the appeal to the respondent/wife returnable for August 11, 2016. The Process Server reported that since nobody in the house received the notice service was effected by affixation. On August 11, 2016 fresh notice returnable for today was issued by ordinary process and registered A.D. post noting that since there was no order to effect service by affixation, the report pertaining to the order dated May 17, 2016 had to be ignored.

2. Summons sent by ordinary process had been returned by Process Server with the report that father of the respondent/wife refused to receive the notice and therefore, it was affixed. Report from the postal authorities is that the addressee refused to receive the notice.

3. Impugned order shows that after being served the respondent/wife entered appearance but failed to appear thereafter and was proceeded against ex-parte on December 11, 2013, which order was set aside on August 08, 2014 on an application filed by the respondent/wife. Written statement filed was taken on record. The respondent/wife stopped appearing thereafter and was proceeded ex-parte on December 10, 2015. The impugned order albeit dismissing petition for divorce filed by the appellant, is an ex-parte decision.

4. Today in view of the report of the Process Server and the postal authorities we treat the respondent/wife as served and since none appearing for the respondent/wife we proceed against her ex-parte.
5. Learned counsel for the appellants/husband has been heard.
6. The appellants/husband is aggrieved by the judgment and decree dated March 01, 2016 whereby the divorce petition filed by him against the respondent/wife has been dismissed by learned Judge, Family Court mainly on the ground that the instances of cruelty pleaded and proved by him do not satisfy the standard of cruelty as per requirements of Section 13(1)(ia) of the Hindu Marriage Act, 1955.
7. The brief facts are that the appellants/husband is the only son of his parents and is employed as peon in Employees State Insurance Corporation of India having his posting at ESI Hospital, Basai Darapur, Delhi. The marriage between the parties was solemnised on November 26, 2001 at Sonapat, Haryana which is the native place of his wife. The marriage was consummated and the parties were blessed with two sons who were aged about 10 years and 9 years respectively at the time of filing of the petition in the year 2013.
8. The appellants/husband has pleaded various instances of mental cruelty being caused to him and his entire family by the respondent/wife which are mainly on the issues of not attending the household work and asking the other family members to do their own work whether in respect of cleaning the house, washing the clothes or working in the kitchen. When the conduct of the respondent/wife became unbearable, the parents of the appellants/husband asked them to have separate accommodation in another portion of the same house. However, common area used by the appellants/husband, his wife and by his parents was not cleaned by his wife when his parents had gone for 'Char Dham Yatra'. Since this was not appreciated by his parents, his wife was questioned to which she replied in derogatory and rude tone that the person in whose name the property stands would get the same cleaned. The appellants/husband had to take a rented

accommodation to avoid confrontation between his wife and parents. Despite that the respondent/wife failed to improve her conduct and was not even preparing the food for him and the children or getting the children ready for the school which was a routine affair. She was also not meeting or respecting the close family guests visiting them thereby causing annoyance to him as well his family and the guests. Even the religious ceremonies 'Puja Paath' were not attended to by her. The situation became unbearable when two of her relatives working with Delhi Police started interfering in their family affairs and also threatening the appellant/husband and his family to be implicated in some criminal case. The appellant/husband had to make a complaint against the two police officials/relatives of his wife to their department. There were several issues between the parties about the gifts being taken by the wife from her matrimonial home to her paternal home and vice versa.

9. In para 22 of the plaint the husband has pleaded as under:

'22. That apart from above all she has not permitted the petitioner to have bodily relations with the respondent for the last four and half years, though, both were living under the same roof. Whenever, during this cited period, the petitioner to make body relations, the respondent uttered derogatory abusive language (gaaliyan) and pushed him aside.'

10. Divorce petition was contested by the respondent/wife wherein she denied all the averments made in the divorce petition against her and pleaded that she was subjected to cruelty. In response to para 22 of the petition she has pleaded as under:

'22. That, the contents of para No.22 of the petition are wrong, incorrect, false, fabricated and hence specifically denied. It is submitted that the petitioner had on his own volition turned out the respondent from her matrimonial home and has now levied false allegations against her in the present petition under reply.'

11. During ex-parte evidence the appellant has examined himself as PW-1 and his father as PW-2. Both of them have filed their affidavit by way of

evidence. Though two more affidavits of Daya Kishan (PW-3) and Pran Kumar (PW4) have been filed, but they were not examined.

12. The learned Judge, Family Court on considering the testimony of the appellant and his father, observed that the appellant/husband has failed to prove the cruelty being committed by his wife, prayer for divorce was declined.

13. The learned Judge, Family Court has reproduced the entire affidavit by way of evidence of the appellant/husband in the impugned judgment. The divorce petition has been dismissed on two grounds:-

(i) The case was filed on May 18, 2013 whereas act of cruelty relates to the period 2011-2012 and in the year 2012, upto November, attempts were made to patch up the difference by arranging a separate accommodation and in the year 2013 March the respondent/wife tried to force her entry into the house of her father-in-law. The learned Judge, Family Court has considered the same as an act of condoning the cruelty.

(ii) The acts of cruelty pleaded and proved were not satisfying the criteria laid down by the Supreme Court in AIR 2005 SC 534 A.Jayachandra vs. Aneel Kaur.

14. The learned Judge Family Court failed to take note of the following facts:-

(i) The appellant/husband had sent a complaint dated October 12, 2011 Ex.PW1.B to the Commissioner of Police complaining about he and his family being intimidated by Rajeev Kumar and Reena – both member of Delhi Police Force and are husband & wife. In this complaint made against Rajeev Kumar at that time was posted at PS Kalyan Puri and his wife Reena was posted PS Subzi Mandi, specific complaints have been made against them as to how they had been visiting his house and threatening him and his family members and also instigating his wife not to serve her family. PW-2 Sh.Bale Ram Kashyap – father of the appellant/husband in his affidavit Ex.PW2/1 had also narrated the various acts of the respondent/wife in her day to day behaviour with her in-laws which have been insulting,

humiliating and causing mental cruelty to them to the extent that their son had to shift to a rented accommodation. He has also narrated about the visits by Rajeev Kumar and Reena – relatives of her daughter-in-law who had been visiting and threatening them.

(ii) Merely by making efforts to sort out the difference by arranging a separate accommodation for the reason that the relationship between his parents and wife had reached a stage where it was just impossible to live in the same house did not have the effect of condonation of the act of cruelty.

(iii) In the petition in para 22, as reproduced above, he specifically pleaded that for a period of four-and-a-half years despite living under one roof, the parties did not cohabit because of the resistance put by the respondent/wife.

15. Arranging a separate accommodation was only an attempt to save the marriage.

16. It is settled legal position that denial of sex to a spouse itself amounts to causing mental cruelty. In the decision reported as AIR 1973 Delhi 200 Rita Nijhawan vs. Balakishan Nijhawan it was held as under:-

‘Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body. the result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain. develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse.’

17. In another decision reported as AIR 2015 SCC 285 Vidhya Viswanathan vs. Kartik Balakrishnan the Supreme Court has held as under:

‘12. Undoubtedly, not allowing a spouse for a long time, to have sexual intercourse by his or her partner, without sufficient reason, itself amounts mental cruelty to such spouse.’

18. When the case of the appellant/husband is examined in the above

settled legal position, we find that the averments made by him in para 22 of the petition to the effect that the respondent/wife did not permit him to have bodily relations for a period of four-and-a-half years despite living under the same roof, have not been specifically denied by the respondent/wife in the written statement. At the stage of evidence, she abandoned the proceedings. The testimony of the appellant/husband in this regard has remained unchallenged.

19. In view the forgoing discussion, we are of the considered view that the appellant/husband has fully established that he was subjected to mental cruelty by the respondent/wife by denying sex to him for a long period despite living under the same roof without any justification and though she was not suffering from any physical disability. The appeal being well founded deserves to be allowed.

20. Accordingly, the appeal is allowed. We grant a decree of divorce in favour of the appellant/husband on the ground of cruelty by dissolving his marriage with the respondent/wife that had been solemnised on November 26, 2001.

21. LCR be sent back alongwith copy of this order.

PRATIBHA RANI
(JUDGE)

PRADEEP NANDRAJOG
(JUDGE)

SEPTEMBER 29, 2016
'hkaur'