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

Date of Decision : November 22, 2016

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MAT.A.(F.C)No.107/2015

HARJIT KAUR

.....Appellant

Represented by: Mr.Abhinav Bajaj, Advocate with
Appellant in person

versus

SURINDER SINGH

.....Respondent

Represented by: None

CORAM:

HON'BLE MR.JUSTICE PRADEEP NANDRAJOG

HON'BLE MR.JUSTICE YOGESH KHANNA

YOGESH KHANNA, J. (Oral)

1. Sometimes it become necessary to enquire from what motive a behaviour ensues. If the cause for the behaviour of a spouse is the result of breach of faith by the other spouse, and especially where the trust of fidelity is breached, it becomes the duty of the court to be more vigilant and appraise the evidence led at the trial with a hawk's eye. Sieving the evidence and then examining it under a microscope.

2. The appeal has reached for hearing today and none appears for the respondent. The reason is obvious. During the subsistence of the marriage he had an extra-marital relationship with one Ms.IK (name withheld). As a result of an illegal order passed by the learned Judge Family Court the appellant was denied the opportunity to bring on record evidence of

adultery. But as recorded in the order dated January 18, 2016 passed in the appeal, the respondent admitted that he had formally married Ms.IK after decree for divorce in his favour was passed and that on February 05, 2008, i.e. when the marriage was subsisting he had fathered a child Master MS (name withheld). It would be relevant to note that the petition seeking annulment of the marriage by grant of a decree for divorce was filed by the respondent on July 12, 2004 and was allowed in his favour vide order dated May 23, 2015. It is apparent that Master MS was born to Ms.IK when the proceedings for divorce were pending.

3. This appeal challenges the grant of decree of divorce under Section 13(1)(i)(a) of Hindu Marriage Act by the Family Court, 1955 Central District, Tis Hazari vide judgment and decree dated May 23, 2015. The parties were married on July 03, 1993 at Ludhiana, according to Hindu rites and ceremonies and a child Ms.Harpreet was born to them. The respondent in his petition for divorce alleged the behavior of the appellant to be cruel; quarrelsome; that she consumed sleeping pills on the first night; demanded share in his ancestral property. The appellant was brought to Delhi by the respondent to reside in a rented house at Fateh Nagar, Delhi and here also she misbehaved with his sisters in September, 1996 and in August, 1998 i.e. on the day of Raksha Bandhan.

4. The respondent herein further alleged to have purchased a house at Virender Nagar, Delhi in the year 1999 and shifted there. The respondent alleged that in October 2001 and in December, 2003 he was asked by the appellant to leave the house. The later incident was even witnessed by his neighbours. He was rather not allowed to enter in the house for about a month. In March 31, 2004, he alleges that the appellant abused and kicked

him out of the house in the presence of one Col. Gurdeep Singh and Mr.Gill and that lastly on April 03, 2004 she threw his articles from the balcony of the house and he then left his matrimonial home.

5. The appellant in her written statement denied the assertions of the respondent herein and alleged that she always acted as a devoted Hindu married women but was treated with cruelty by the respondent herein and his family members; that the respondent used to beat her almost daily; used to demand dowry etc. The appellant denied having taken any sleeping pills ever or having claimed any share in his ancestral property or ever asked him for a separate residential accommodation. She alleges to have been tortured on the birth of a female child; was never given a single penny for her personal expenses and was forced to abort her second child. She further alleges that the respondent was hell bound to get a divorce from her as he wanted to marry one Ms.IK, an employee in his office with whom he had an affair.

6. A bare perusal of the pleadings would show allegations and counter allegations, most of which are the part of the impugned judgment.

7. After recording the evidence, the Family Court granted the divorce to the respondent on the following facts, viz.; (a) grant of discharge of mother/sister of the respondent herein, in FIR bearing No.456/2004 under Section 498A/406 IPC PS Hari Nagar, Delhi and such order having attained finality, there being no appeal filed and that it caused tremendous cruelty to him; and (b) her demand for a partition of ancestral house or to live in separate accommodation and to deny sex to her husband was also viewed seriously against her by the learned Family court. It was held that the denial of sex to the husband/respondent in December 2003 as also in between

February 01, 2003 to April 01, 2004, on the false allegation that the respondent was having illicit relationship with Ms.IK. was nothing but cruelty, coupled with unproved allegations of alleged forced abortion, beatings etc.

8. A bare perusal of the pleadings and evidence would reveal that besides denying the allegations leveled against her in the petition for divorce, the appellant all along has been consistent in her allegation that the respondent was having an illicit relation with one Ms.IK.

9. Let us examine what the learned Family court has to say on this issue. The learned Court brushed aside this assertion of the appellant on the ground that it may be a subject matter of an independent complaint which the appellant has reportedly filed, but since she has failed to prove her assertions by examining any witnesses; viz., neighbours to prove that Ms.IK had actually resided with her husband at her matrimonial home at Fateh Nagar, for a period of one week in the year 1994-95 while she visited her parents in Punjab, her such false assertions caused cruelty to the respondent herein.

10. Now, though the Learned Family Court held that such allegations were not proved but we find that vide the impugned judgment the learned Judge brushed aside the effort of the appellant herein to bring on record those facts by moving an application dated December 11, 2013 under Section 17 of the Hindu Marriage Act, 1955 with a request to the Court to allow her to prove NCR Report No.879/2013 dated April 23, 2013 at PS Hari Nagar, Delhi registered on her complaint vide DD entry No.27B dated January 30, 2013 to SHO, PS-Hari Nagar. The appellant further alleged that police after investigation found the allegations against her husband and

Ms.IK as correct, but since the offence was non cognizable so only NCR report dated March 24, 2013, was registered. An application under Section 151 CPC dated December 19, 2012 filed on January 21, 2013 for summoning of the record from the school of Master MS was also dismissed on the ground that both were highly belated; and were moved after conclusion of the evidence and that the appellant could resort to an alternative efficacious remedy.

11. In our opinion the learned Judge, Family Court erred in denial of an opportunity to the appellant to prove her assertion qua the fact that the respondent herein was having extra marital relation with Ms.IK and that a child was born from their relationship. It would be necessary to highlight that when cross-examined on October 31, 2009, the respondent admitted that he was friendly with Ms.IK before his marriage and that the two were on visiting terms.

12. In her affidavit by way of evidence Ex.RW-1/1, the appellant deposed that the respondent wanted a divorce from her to enjoy the company of another divorcee, namely, Ms.IK, working in his office and that the respondent used to visit the house of Ms.IK and used to take her on his scooter or in his car to drop her to her office and that the respondent herein admitted to the appellant that he cannot live without Ms.IK and wished that the appellant herein should sign divorce papers of mutual consent and that on her refusal, he used to get angry and started quarrelling with her.

13. In her cross-examination, conducted on April 12, 2010 the appellant denied the suggestions that the respondent was having a brother and sister relationship with Ms.IK. She further deposed that she had seen the said lady riding on scooter with her husband, that the respondent on one or two other

occasions and that on one occasion in the year 1994, the presence of Ms.IK in her matrimonial home was even objected to by her relatives.

14. In the light of this evidence, the Family Judge ought to have given an opportunity to appellant to further substantiate her case, which unfortunately was not done. The testimony of the respondent as PW-1 that he visited house of Ms.IK on 10/20 times before his separation shows his inclination towards the said lady which, of course, was the main cause of dispute *inter se* the parties.

15. This gives credence that she never denied sex to the respondent and he did not come to her because of him being in relationship with Ms.IK.

16. Having an affair during the subsistence of marriage by either of the spouse amounts to cruelty to the other.

17. We also take note of an order dated 18.01.2016 passed in the present appeal, when the respondent herein appeared and admitted of having married with Ms.IK, though after the decree of divorce granted, but also stated that a child Master MS was born to him due to said relation on 05th February, 2008. Hence, this admission is in consonance with the defence taken by the appellant throughout that the respondent had an affair and a child is born to him. At least an order to summon the record from St. Marks Sr. Sec. School would have gone a long way to prove the hollowness of the claim of cruelty leveled by respondent herein.

18. Now where a respondent was involved in an extra marital affair, asking for a share in his property, just to secure the future of her neglected child, would not be causing cruelty upon the father. Moreso, the learned Family Judge gave unnecessary weightage to an order of discharge of the mother/sister of the respondent herein in FIR No.456/04 under sections 498-

A/406 IPC as such discharge simplicitor could not be treated as cruelty enough for grant of divorce in favour of respondent, as such relatives of the respondent may have been discharged being not squarely covered under those sections and not because the allegations leveled by appellant were false. The said FIR is still pending with two other cases one u/s 125 Cr.P.C. and another u/s 12 of Domestic Violence Act against the respondent.

19. Regretfully the aspects stated above were not properly appreciated by the learned Family Court. The totality of evidence rather establishes the mental cruelty upon the appellant rather than upon the respondent herein who is now stated to be blissfully married with Ms.IK, with whom he had a son during subsistence of marriage with the appellant herein.

20. The conduct of the appellant, even if correct as stated by the respondent has to be seen in the light of the fact that the respondent was in an open adulterous relationship with Ms.IK. He admitted said fact before this Court as recorded in the order dated January 18, 2016. The appellant would naturally be feeling insecure for herself and her daughter and thus even if she made a demand for an immovable property in her name, it would not be an act of cruelty but the helpless cry by a wife who was cheated to ensure that she and her daughter had a roof above their head. Her irrational behaviour, the intemperate language would be the result of the cruelty caused by the respondent. Her words spoken and deeds done cannot be attributed as conscious words and deeds intended to inflict mental torture on her husband. They would be a cry of anguish and acts of desperation.

21. The appeal is thus allowed.

22. The impugned judgment and decree dated May 23, 2015 is set aside. Petition seeking annulment of the marriage filed by the respondent is dismissed.

(YOGESH KHANNA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

NOVEMBER 22, 2016
VLD/neelam/mamta