

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

Judgment Reserved on: August 23, 2016

% *Judgment Delivered on: August 31, 2016*

+ **MAT.APP.(F.C.) 137/2015**

SUDESH Appellant
Represented by: Ms.Gargee Dixit, Advocate
with Appellant in person.
versus

SURESH SOLANKI Respondent
Represented by: Mr.Tara Chand Gupta, Adv.
with Respondent in person.

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Represented by: Ms.Gargee Dixit, Advocate
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SURESH SOLANKI Respondent
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CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. By this common order we intend to dispose of the two matrimonial appeals filed by the appellant/wife challenging the order dismissing HMA Petition No.154/2012 filed by her under Section 9 of the Hindu Marriage Act, 1955 and granting the decree of dissolution of marriage in Counter Claim bearing HMA No.232/2013 filed by the respondent/husband

alongwith the written statement to HMA Petition No.154/2012.

2. The undisputed case of the parties is that they got married on April 20, 1994 as per the Hindu rites and customs. The marriage was consummated and a female child was born to the parties on February 17, 1999. At that time the appellant/wife was at her parental home.

3. There is some dispute on the issue as to whether the respondent/husband and his family visited her parental home to see the child or not. While the appellant/wife claims that none came to see the child as they were not happy on birth of a female child, the respondent/husband claims that he along with his family members went to see the child but they were humiliated and insulted. However, it is not disputed that after the birth of the child the appellant/wife returned/brought back to her matrimonial home in Palam village along with their child.

4. The appellant/wife stayed at the matrimonial home somewhere in the year 1999 till she along with her cousin returned to her paternal home with her daughter. Her grievance is that thereafter her husband never cared to enquire about their welfare or made any effort to bring them back. The reason behind is claimed to be the illicit relationship between her husband and her 'Jethani' namely Smt.Diwan.

5. In the year 2012, she filed a petition under Section 9 of the Hindu Marriage Act, 1955 praying for restitution of conjugal rights. Her husband filed a counter-claim for dissolution of marriage on the ground prescribed under Section 13(1)(ia) and 13(1)(ib) (cruelty and desertion) of the Hindu Marriage Act, 1955.

6. Learned Judge, Family Court vide the impugned judgment dismissed the petition of the appellant/wife. The counter-claim filed by the respondent/husband was allowed by dissolving their marriage by a decree of

divorce on the ground of mental cruelty mainly for the following reasons:

- (i) There are material contradictions in the testimony of the prosecution witnesses namely PW-1 the appellant/wife, PW-2 her father Balbir Singh and PW-3 Kuldeep Singh Chikara her cousin, as to when and to whom she disclosed about the illicit relationship between her husband and his 'Bhabhi'.
- (ii) There was no allegation of illicit relationship between respondent/husband and his 'Bhabhi' when the appellant/wife lodged her first complaint at PS Dwarka on September 27, 2006 wherein the allegations against the husband were only for harassment on account of non-fulfilment of dowry demand.
- (iii) The version of the appellant/wife (PW-1) that she herself left the matrimonial home for her delivery at her parent's house, disproves her case that she was forcibly turned out of the matrimonial home by her husband and other family members.
- (iv) The appellant/wife has stated that she had been residing at Karol Bagh at the house of Sanjay Gupta from 2007 to 2011. PW-2 father of the appellant/wife in his cross-examination has that she had taken a premises on rent even prior to 1998 in Uttam Nagar.
- (v) Her testimony about meeting the dowry demand by her father by giving ₹2 lakhs was not even supported by PW-2 her father Balbir Singh.
- (vi) There was no material to prove her case for seeking restitution of conjugal rights which was dismissed.
- (vii) Taking into consideration all allegations of illicit relationship between her husband and his 'Bhabhi' with no material to support the same, the respondent/husband succeeded in making out a case of causing mental cruelty. Thus, counter-claim was allowed.

7. Assailing the order of the Family Court, Ms.Gargee Dixit, learned counsel for the appellant/wife submitted that right from the day of her marriage, her husband ignored her and continued to have illicit relationship with his 'Bhabhi'. It was not mere suspicion of the appellant/wife as one day she chased him and found him in compromising position with his 'Bhabhi'. Thereafter her husband and other family members sent her to her paternal home. Learned counsel for the appellant/wife has contended that her husband and in-laws never wanted her to give birth to a male child so that the inheritance rights of two sons of his 'Jeth' are not adversely affected. The appellant/wife was also harassed for giving birth to a female child. Neither her husband nor his family visited her parental house despite being intimated about the birth of a daughter. Learned counsel for the appellant justified her conduct of leaving the matrimonial home with her cousin submitting that she was not able to bear the cruel treatment meted out to her by her husband and in-laws for objecting to his illicit relationship with his 'Bhabhi'. The conduct of her 'Jeth' was objectionable as instead of checking them he asked her to sleep with him. She left the matrimonial home along with her cousin in the year 1999. Thereafter she was never brought back to the matrimonial home. It has been contended that it was a case of desertion and cruelty committed by the husband. Despite that wrong doer has been given benefit of his own wrong by dissolving the marriage. The appellant/wife wanted the matrimonial ties to be re-united and for that purpose she filed a petition for restitution of conjugal rights which has been dismissed.

8. Opposing the two appeals, Mr.Tara Chand Gupta, Advocate appearing on behalf of the respondent/husband submitted that it was not a case of harassment on account of dowry demand. There was no issue over

birth to a female child. Learned counsel for the respondent/husband submitted that the appellant/wife defamed her husband and his entire family in the village bringing disrepute to them. This compelled the respondent/husband to leave his village and shift to Jaipur where he is residing for last many years.

9. It is admitted case of the appellant/wife that she had been residing separately since the year 1999 when she left the matrimonial home with her cousin.

10. Till September 27, 2006 the appellant/wife did not file any complaint against her husband or in-laws about she being harassed on account of bringing insufficient dowry or for giving birth to a daughter or her husband living in adultery.

11. For the first time she filed a complaint before the SHO, Sector-23, Dwarka giving the caption of being harassed on account of dowry demand. In the said complaint while mentioning the fact of being married to Suresh on April 20, 1994 and birth of a daughter after two years of the marriage, she has levelled the following allegations:

- (i) She was taunted by her husband Suresh, 'Jeth'Ramesh and 'Jethani' Smt.Diwan for giving birth to a daughter.
- (ii) She was asked to bring ₹5 lakhs from her father which was spent by her in-laws on the marriage or she and her daughter would not be allowed to stay in the house.
- (iii) She was harassed by all of them to the extent that one day she was forced to consume 'phenyl' and was removed to hospital in unconscious state by her neighbours. Her father was informed telephonically.
- (iv) She had been facing this humiliation for the past eight years.
- (v) She informed her father about the demand of ₹5 lakhs but he was

unable to meet this entire demand. He gave ₹2 lakhs to her which she handed over to her husband, 'Jeth' and 'Jethani' in instalments and now they are asking for more which she cannot bring.

(vi) She has been turned out of the house after giving beating to her. For the last many years she has been residing with her father and bringing up her daughter for which his parents are bearing the expenses.

(vii) Her husband has not come to take her back on instruction of her 'Jeth' and 'Jethani' who do not want her to live in the matrimonial home.

(viii) Once or twice her relations and brother accompanied her to the matrimonial home to drop her there but all of them were abused and pushed out of the house.

(ix) She sought justice for her and punishment to the dowry greedy in-laws as well save and secure the life of her daughter.

12. The appellant/wife has nowhere disclosed the action taken on above complaint but it can be inferred from the record that no FIR was registered on the basis of the above complaint. Since for disposal of these two appeals the limited purpose for which this complaint is relevant, is absence of allegation of illicit relationship between her husband and 'Jethani'.

13. In the complaint filed in the year 2009 under Section 12 of Protection of Women from Domestic Violence, 2005, for the first time allegations were made in para 2(i) about unsocial rather cruel behaviour of the husband, which reads as under:

'2(i) That the behavior of respondent No.1 towards the applicant/wife was unfriendly, unsocial rather cruel since the very night of their honey-moon night. It is the applicant/wife who has been tolerating such un-social behavior of the respondent No.1 for the sake of the honour of her marital life and for the future prospects of their minor daughter (Miss Dipanshi).'

14. In para 2(j) of the complaint, she pleaded as under:

'2(j) That when the applicant/wife came to know about the continuous illicit relationships of her husband (respondent No. 1) with her sister-in-law (Bhabhi) namely Smt.Diwan before the marriage of the applicant/wife and found that it was the sole root cause of his such abnormal behaviour towards the applicant/wife, she tackled the situation carefully and cautiously to save the honour of her marital relations, but instead of mending his behavior, he became violent towards the applicant/wife. Seeing no other options, she used to go to her parents for the sake of the honour and prestige of her in-laws (Sasural) hoping meanwhile he will mend his behavior but of no avail.'

15. In the petition under Section 125, Cr.P.C. seeking maintenance for herself and her daughter filed in the year 2010, she repeated the allegation about the illicit relations between her husband and 'Bhabhi'.

16. Thus from the record it is clear that despite the parties living separately since the year 1998/1999 when for the first time on September 27, 2006 the appellant/wife lodged a complaint at PS Dwarka, no allegation was made by her against her husband for living in adultery with his 'Bhabhi'. The entire complaint is focused on dowry demand and pressurizing her to bring ₹5 lacs from her parents spent by in-laws on their marriage out of which she allegedly paid ₹2 lacs in instalment to her husband and in-laws. The fact that no FIR under Section 498-A/406 IPC was registered on the basis of complaint dated September 27, 2006, we may infer that such allegations were not substantiated during investigation in the said complaint.

17. The respondent has been accused of living in adultery for the first time in the year 2009 in petition under Domestic Violence Act filed in the year 2009 despite the fact that at that time the parties have been living separately for the past eleven years (she finally left matrimonial home in the year 1999). The evidence led by the appellant/wife in the petition under

Section 9 of Hindu Marriage Act, 1955 and in her defence to the counter claim seeking dissolution of marriage on account of mental cruelty, no material could come on record to prove the said accusations even on probabilities.

18. The appellant/wife in her affidavit Ex.PW1/A in this regard has stated the following facts:

(i) After her marriage she was not brought to the matrimonial home for about a period of five months. After intervention of the mediator she was taken to her matrimonial home.

(ii) After 8-10 days her 'Jethani' asked her husband to sleep upstairs which was complied by him which created suspicion in her mind.

(iii) Para 11 of the affidavit is to the following effect:-

"11. That I state that being suspicious about the conduct of the respondent and that of sister-in-law Mrs.Diwan, I wanted to know the real truth. I further state that consequently one day I followed the respondent on the upstairs to follow him and to my surprise it was discovered that Smt.Diwan and the respondent were found in compromising position in the mid night."

(iv) In para 24 of her affidavit giving the family chart she has tried to explain that since both sons of 'Jethani' are inheriting the property left by her father-in-law Late Sh.Nand Ram Solanki, her 'Jethani' namely Smt.Deewan and her husband are doing these unsocial and illegal activities against her to prevent her from giving birth to a male child.

(v) She reported the incident of seeing her husband and 'Jethani' in compromising position to her 'Jeth' Ramesh who did not object to their relationship and asked for a sexual favour from her and to live life in cross adultery.

(vi) She was threatened not to disclose these facts to anyone in the neighbourhood or to her family.

(vii) She continued tolerating her husband living in adultery hoping for good sense to prevail upon him without disclosing to her parents or relatives to save the honour of both the families.

(viii) In 1998 when she was pregnant, she left the matrimonial home and went to her parents' house where she gave birth to a daughter on February 17, 1999. Despite being informed neither her husband or family came to see the child and then she returned matrimonial home alongwith her cousin brother. They were not welcomed rather she was insulted and humiliated and her husband continued living in adultery.

(ix) Panchayat was called at her parental village in Dhigal (Haryana) 2-3 times and her family also visited the house of her husband for reconciliation but their efforts failed.

(x) Her cousin brother and uncle brought her back to village Dhigal in the year 1999. Since then her husband had never taken any initiative either for reunion or for the custody of the minor child.

19. In her cross examination dated February 12, 2014 she stated that the illicit relationship between her husband and his 'Bhabhi' was disclosed by her to her mother after about 2½ years and her mother informed her father. She admitted that in the complaint Ex.PW1/R1 to the SHO, PS Dwarka she made the allegation of being harassed and taunted on account of dowry and that no action was taken on her complaint. She has also admitted that in the petition under Section 125 CrPC she deposed that she was staying with the family of Sanjay Gupta at Karol Bagh during the period 2007 to 2011. She has also admitted that her daughter is living at her parental house whereas she is residing at Uttam Nagar at her Bua's house (father's sister house) and that her father is looking after her daughter, her daughter visits her during holidays. During her cross examination conducted on July 31, 2014 she

admitted that in the complaint Ex.PW1/R1 written by her in Hindi she has not made any allegation of her husband having illicit relationship with his 'Bhabhi'.

20. PW-2 Balbir Singh – father of appellant/wife in his affidavit deposed to the following effect on the vital points relevant for this appeal:-

(i) Just after two months of the marriage, his daughter informed him about illicit relationship between her husband and 'Bhabhi'. On hearing this, he visited her matrimonial home and took up the issue but they started abusing his daughter. He assured her daughter that things will become normal soon.

(ii) For four years after the marriage, his daughter continued visiting her parents' house intermittently and during that period her husband continued living in adultery.

(iii) He alongwith his close relatives and Panchayat of village Dhigal (Haryana) visited the matrimonial home of his daughter to resolve the dispute.

(iv) The matter could not be settled and his daughter was physically turned out from the matrimonial home.

(v) Her husband did not like the birth of female child and despite being intimated, he did not take them back till date.

(vi) In his cross examination, he has stated that her daughter had taken a house on rent before 1998 in Uttam Nagar.

21. PW-3 Sh.Kuldeep Singh Chikara – cousin of the appellant/wife with whom she finally left the matrimonial home in the year 1999 has stated that after 3-4 weeks of the marriage he came to know about something wrong in the family of the appellant/wife on account of illicit relationship of her husband and 'Bhabhi' and his indifferent attitude towards his wife which

fact was disclosed by her (appellant) to him (PW-3). Efforts of reconciliation though made with the intervention of Panchayat 3-4 times but with no success. Respondent/husband never came to see his daughter and attitude of his entire family towards Panchayat was rude.

22. There are two identically worded affidavits of Kuldeep Singh Chikara on record: one attested on August 27, 2015 and another attested on July 31, 2014 which is Ex.PW3/A. PW-3 was cross examined on January 13, 2015 wherein he stated that Panchayat meetings were held about ten times and last Panchayat was held at PS Dwarka, however, he claimed that he did not know if the appellant/wife had filed a complaint in the year 2006 with PS Dwarka. He also stated that appellant/wife is residing with her Mausi at Nawada near Uttam Nagar, Delhi and it just takes three minutes to reach that house from his house. He denied the appellant/wife living in a rented accommodation. He was denied having any knowledge as to where the daughter of appellant/wife was born and who is taking care of her despite averments to this effect having been made by him in his affidavit Ex.PW3/A. He also did not know whether the appellant/wife had left the matrimonial home in 1998. He was also not aware if she had resided at the house of Sanjay Gupta at Karol Bagh for about 3-4 years.

23. On re-appreciation of the testimony of the appellant's own witness including herself, the following conclusions can be drawn:

- (i) She left the matrimonial home in the year 1999.
- (ii) After leaving the matrimonial home in the year 1999, she started residing in Uttam Nagar, Delhi leaving her infant daughter at her parents' place. Till date the mother and daughter are residing separately as appellant/wife is in Delhi and her daughter is with her maternal grandfather where she is living and staying since her birth.

(iii) PW-2 Balbir Singh – father of appellant/wife did not speak about any dowry demand of ₹5 lacs or partially meeting the dowry demand by arranging ₹2 lacs.

(iv) Different versions appearing on record as to when she informed her parents or cousin about her husband having illicit relations with his *Bhabhi*’.

(a) As per PW-1, the appellant/wife informed her mother after 2½ year of her marriage who in turn informed her father.

(b) PW-2 Sh.Balbir Singh – father of the appellant/wife has stated that his daughter herself told him at his own house that her husband was having illegal relations with his ‘Bhabhi’.

(c) PW-3 Kuldeep Singh Chikara – cousin of appellant/wife has stated that Sudesh i.e. the appellant/wife told him about adulterous relations of her husband 3-4 months after the marriage at her matrimonial home.

(v) It is appellant’s own case that soon after the marriage, for five months she was not taken back to the matrimonial home. If it was so then above testimony of PW-2 Balbir Singh and of PW-3 Kuldeep Singh Chikara is liable to be rejected.

(vi) The first police complaint was made on February 27, 2006 i.e. almost after the period of seven years of leaving the matrimonial home did not contain any allegation against the respondent/husband of living in adultery with his ‘Bhabhi’. It was focussed only on dowry demand and harassment. As per the appellant/wife (PW-1) the problem between them was only on account of her husband’s illicit relationship with his ‘Bhabhi’ thus ruling it out to be a case of harassment on account of dowry demand or for giving birth to a daughter.

(vii) No member of the Panchayat was examined to establish whether any Panchayat was ever convened and if so what were the issues between the

parties i.e. adulterous life of the respondent/husband or harassment on account of dowry.

(viii) If the version of the appellant/wife that her 'Jethani' never wanted her to give birth to a male child so that the inheritance is restricted to her two sons, then there could not have been any occasion to taunt her for giving birth to a daughter. Birth of a daughter should have been welcomed by her in-laws if this was the cause to prevent her from conceiving and giving birth to a male child.

24. We have already extracted the pleadings and re-examined the evidence in the cases under Section 12 of the Domestic Violence Act and under Section 125 CrPC as well in the pleadings of two HMA petitions making averments that respondent/husband was living in adultery. We have already extracted the salient features of the testimony of the three witnesses examined by the appellant/wife (including herself) to prove the said averments.

25. The expression 'cruelty' has not been defined in the Hindu Marriage Act and it includes physical as well mental cruelty. However, cruelty as envisaged under Section 13(1)(ia) of the said Act has been subject matter of discussion before the High Courts and the Supreme Court in catena of judgments. The concept of cruelty has received interpretation in somewhat broad terms.

26. The accusations by one spouse against the character of other spouse by making false, malicious unproved accusations either in the pleadings or by way of making complaints to various authorities constitute mental cruelty. It was so held in the decision reported as (2003) 3 SCR 607 Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate wherein the appellant/husband made accusations against his wife assassinating her

character and it was held as under:

'7. The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1)(i-a) of the Act. The position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extra marital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross- examination satisfy the requirement of law has also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High Court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible.'

27. In the facts of instant appeals there is a role reversal to the extent that accusations are made against the respondent/husband which had the disastrous effect on him to the extent that he had to leave his village and settled in Rajasthan. Perhaps he has taken this step to save the matrimonial life of his own brother as he was accused of having living in adultery with his wife. As per the settled legal position casting aspersion of such nature

had the deleterious effect on the mind of her husband which can be termed as one of the worst form of mental cruelty.

28. So far as dismissal of the petition and seeking restitution of conjugal rights are concerned, it was the appellant who had left the matrimonial home in the year 1998 for her delivery at her parent's home and then in the year 1999 in the company of her family members. No complaint of any physical violence, harassment of dowry demand or any other reason compelling her to leave the matrimonial home was made by her soon after leaving the matrimonial home. She was residing independently in Delhi leaving her daughter at her parental home.

29. The prayer of the appellant/wife for restitution of conjugal rights has rightly been declined by learned Judge Family Court in the given facts and circumstances. In the decision reported as (1994) 1 SCC 337 V.Bhagat Vs. D.Bhagat it was held as under:-

“A mental cruelty under Section 13(1)(ia) can 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 is held that mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. It is also held that the situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. In my view the said judgment clearly applies to the facts of this case.”

30. Even otherwise filing of a petition seeking restitution of conjugal rights in the year 2012 i.e. after 13 years of leaving the matrimonial home does not seem to be a bonafide act on her part for the re-union. That too with the background already litigating with the respondent by filing a petition under Protection of Women from Domestic Violence, 2005 as well for maintenance much prior to that. In the given facts, learned Judge, Family Court has rightly dismissed her petition seeking restitution of conjugal

rights.

31. Finding no illegality or perversity in the impugned order, both the appeals are hereby dismissed but without any order as to costs.

32. TCR be sent back alongwith copy of this order.

**PRATIBHA RANI
(JUDGE)**

**PRADEEP NANDRAJOG
(JUDGE)**

AUGUST 31, 2016
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