

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

Reserved on: 19.07.2016
Pronounced on: 03.08.2016

+ **MAT. APP. (FC) 150/2015**

GOPAL KRISHAN DUAAppellant
Through: Sh. Davinder Hora and Sh. Sikandar Khan,
Advocates.

Versus

RAJNI DUA AND ANOTHERRespondents
Through: Sh. Sunil Mittal, Sr. Advocate with Sh. Dhruv
Grover, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal under Section 19 of the Family Courts Act, 1984 is directed against the judgment dated 22.08.2015 passed by the Principal Judge, Family Courts, Tis Hazari. The learned Judge allowed the wife's petition for divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereafter "the Act") and dismissed the husband's counter claim for restitution of conjugal rights under Section 9 of the Act.

2. The facts relevant to decide the case are that the wife ("respondent") married the appellant on 09.08.1989 in New Delhi; two sons were born from the wedlock on 26.10.1992 and 17.06.1996. The wife, in her petition before the learned Judge alleged various acts of mental as well as physical cruelty to

which she was subjected by the appellant husband. In her petition she alleged that the appellant used to constantly taunt her for getting insufficient dowry and would, at times, lock her up in a room. It is also alleged that the appellant is highly aggressive and accustomed to inflicting cruelty because of which his previous marriage ended in divorce within just a few months. The wife alleged that the appellant humiliated and abused her on a daily basis, which impacted the children as well. It was alleged by the respondent wife that once in July 2004, the appellant beat her and banged her head on the wall leading to her sustaining multiple injuries; she did not, however, disclose it for the sake of her children. She claims that this sort of physical violence as well as cruelty and humiliation was regular feature that she suffered for several years for the welfare of her children.

3. The wife had alleged that matters took a turn for the worse when on 01.05.2006 at about 4.00 pm, the Appellant abused her and began beating his son. A PCR had to be called to diffuse the situation. The same night, upon the wife returning home with her son, the appellant refused to open the door and let them in; he threatened to kill her and the children. Yet again PCR was called so that they could enter the house. On 01.05.2006 and 03.05.2006 the wife was constrained to file criminal complaints with the SHO, C.R. Park and demanded police security. It is under these circumstances that the respondent sought dissolution of marriage and instituted the petition on 06.03.2007.

4. The appellant husband in his defence, denied all allegations of cruelty and accused the respondent wife of misconduct. He filed a counter claim, under Section 9 of the Act, for restitution of conjugal rights, and impleaded Himanshu Deshpal (“Himanshu”) who is respondent No. 2 in the present

appeal. He alleged that the respondent wife complained for the first time only in 2006, after more than 18 years of marriage as she was in an extra-marital affair with Himanshu Deshpal, which is continuing ever since. He alleged that the respondent/wife and Himanshu Deshpal had made several outstation trips including one to Agra along with the children. He alleged that the wife was a serial litigant who had filed a complaint before the CAW Cell as well as filed a complaint under the Domestic Violence Act under section 498A/406 of the Indian Penal Code which was ultimately dismissed by the learned Metropolitan Magistrate, thus suggesting the appellant's innocence.

5. Based on the claims of the respondent and counter claim of the appellant, the learned Judge framed the following issues for determination on 12.05.2008:

“1. Whether the respondent Sh. Gopal Krishan Dua has, after solemnization of marriage treated the petitioner with cruelty? OPP

2. Whether the petitioner Rajni Dua, wife has withdrawn from the society of Gopal Krishan Dua without reasonable excuse? OPR1

3. Whether the petitioner Rajni Dua had illicit relations with Himashu Deshpal @ Hunny and thus after the solemnization marriage, had voluntary sexual intercourse with any person other than her spouse? OPR1

4. Whether the petitioner is entitled to relief claimed? OPP

5. Whether the respondent is entitled to relief claimed? OPR1

The following additional issue was also framed on 13.01.2011:

1. Whether the petitioner by her acts and conduct has condoned the acts of cruelty? OPR

Relief.”

6. In support of her case the respondent examined herself as PW 1 and tendered documentary evidence, which included photographs of her visit to Agra with several friends and her children. She also placed on record criminal complaints filed by her dated 01.05.2006 and 03.05.2006 before SHO, C.R. Park, complaint dated 01.10.2007 and 03.10.2007 filed before SHO, PS Kasana, Greater Noida; medical report relating to the treatment undergone by her for bruises suffered by her by the alleged assault by her husband; complaint dated 05.12.2007 by their son before SHO, C.R. Park; complaint of 25.12.2007 before DCP, South District; and FIR dated 01.01.2008. As against this, the appellant placed on record a photograph dated 28.01.2007 of the respondent with Himanshu Deshpal taken in Agra; and statement of account from 01.11.1999 to 08.09.2007. He brought on a record a copy of a diary allegedly written by Himanshu. The appellant was cross-examined on several dates and finally on 24.10.2013. After that day, citing one reason or another he avoided further cross-examination. Due to the appellant's conduct, the Court closed his cross-examination, against which he unavailingly approached this Court at an earlier stage in an interlocutory appeal.

7. The Family Court- in the impugned judgment went on to make issue wise determination of the case. It was argued by the respondent that from the very inception of her marriage to the appellant he had subjected her to illegal

demand of dowry and kept her locked in a room. She also alleged that her father gave ₹ 3 lakhs to the respondent to stop harassing her. As per her own admission, the respondent belonged to a middle class family and when asked, she could not pinpoint the source of ₹3 lakhs that her father had given. The Court was of the opinion that the wife's evasive replies during her testimony as well as the fact that she made several improvements to her earlier statements failed to show any demand for dowry by the appellant; similarly it refused to believe, as incredible, her allegation that the appellant had locked her up in a room and inflicted physical cruelty. The learned Judge observed that the appellant and his family owned and managed a joint business; however, due to certain disputes a settlement was arrived at between members of his family by which the appellant was given several properties as well as factories in Delhi and Noida. Two factories namely M/s Rajni Industries and M/s Gopal Industries were handed over to the respondent wife and appellant respectively; in fact, she managed several of the family businesses. Despite this, the wife made allegations of illegal dowry demand against the appellant, which she was unable to substantiate her assertions with evidence. Thereafter, the respondent in her petition before the Family Court had alleged that the appellant had extracted ₹ 8 lakhs from her under coercion which she later learnt was deposited in the Court of the Ld. Civil Judge, Ludhiana. However, she also admitted that she did not file any complaint in this regard. As regards this, the Court while dismissing the contention, was of the opinion that *“her contemporaneous conduct in voluntarily furnishing the quantified amount to the respondent to be utilized as FDR without any complaint to any authority leads to the inference that she did such act voluntarily and not under any force or*

coercion.” Based on the above reasoning the learned Judge was of the opinion that the parties shared cordial business relations and that the respondent had failed to prove dowry allegations.

8. The learned Judge thereafter analysed if mental cruelty by the appellant was inflicted against the respondent. Answering in the affirmative, it was held that a strong element of mental cruelty existed; the wife, because of the allegations of adultery made against her by the appellant suffered mental agony and stress. The Court while holding that allegations of adulterous relationship by one spouse against another amounts to mental cruelty, relied upon the following cases- *Hemwanti Tripathi vs. Harish Narai Tripathi*, AIR 2012 Delhi 1; *D.N. Sharma vs. Usha Sharma* AIR 2004 Delhi 198; *Jai Dayal vs. Shakuntala Devi* AIR 2004 Delhi 39; *Ramesh Kumar Sharma vs. Aakash Sharma* 2008 DMC 315 and *Nirmala Devi vs. Dev Prakash* (1989) DMC 23.

9. In his counter claim before the Court, the appellant alleged that the respondent was having an extra-marital affair, but sought restitution of conjugal rights on the condition that the respondent discontinue her adulterous relationship with Himanshu Deshpal. During her cross-examination the wife denied the allegation of having an adulterous relationship. The appellant in order to prove the adulterous relationship of the respondent with Himanshu relied upon a photograph of the both of them taken in Agra, which he placed on record. Further, he placed a copy of the diary supposedly maintained by Himanshu, though the appellant failed to produce it in original. He was, however, unable to prove the authenticity of the copied record and was unaware of Himanshu’s handwriting. The appellant went on to assert that the respondent was spending extravagantly

on Himanshu and apprehended that the wife and Himanshu may have secretly married. Though the appellant had not actually seen the respondent and Himanshu together in Agra, his basis for this allegation was the statement allegedly made by one Tulsi Ram who was the respondent's driver and of her mother in the CAW Cell; he denied seeing the wife sharing any kind of affinity with Himanshu in public. The appellant urged that several letters were exchanged between the respondent and Himanshu; though he was unable to corroborate the same with evidence. It is the case of the appellant that the respondent filed the complaint under the Domestic Violence Act as well as the divorce petition after she found out that the appellant knew of her extra-marital affair.

10. Based on the statements made by the appellant in his pleadings as well as during cross-examination, the learned Judge was of the opinion that the entire allegation of the extra-marital affair was only a figment of his imagination without any substantial proof. In the opinion of the trial court simply visiting a place in the company of her children and Himanshu could not conclusively prove allegations of adultery. The appellant led no other credible evidence in this regard. The Court held that the actions of the appellant fell squarely within the definition of those, which inflict mental cruelty. Notice was also brought to a publication made at the appellant's behest in a local newspaper maligning the respondent after the dismissal of the case under the Domestic Violence Act. The Court opined that the intention of the appellant to defame his wife was not only restricted to close family circles but to everyone generally. In the absence of cogent proof, levelling such allegation through publication in a newspaper was enough to constitute mental cruelty. The respondent did not leave the society of the

appellant without any reason and was compelled to do so because of the distasteful remarks made against her. Similarly she did not condone the acts of cruelty by the appellant but suffered them for the sake of her children; it could not be said that she forgave the appellant's acts impliedly because she resided with him under the same roof and carried on with their joint business, which is in reality run by several officers of the company. However, she was impelled to take legal recourse and sought dissolution of marriage because of the derogatory allegations made by him.

11. In view of the above discussion the Court dissolved the marriage of the appellant with the respondent on grounds of mental cruelty and rejected the counter claim of the appellant, especially, because he sought restitution of his conjugal rights on a conditional basis. The Court held:

“73. In view of my foregoing discussion, the respondent is not entitled to the relief claimed as he has given rider for rejoining of his society only if the petitioner snaps all her relations with respondent no. 2 Himanshu. Levelling of allegations of adulterous relationship per se amounts to mental cruelty. Therefore, counter claim of the respondent no.1 stands dismissed.

RELIEF

74. In view of my decision on all the issues above, the petition is allowed in favour of the petitioner and against the respondent and counter claim of the respondent is dismissed as a result the marriage of the petitioner Rajni Dua with the respondent Gopal Krishan Dua is dissolved w.e.f today 22-08-2015 u/s 13(1)(ia), HMA, 1955 on the ground of cruelty. Decree sheet be drawn accordingly. File be consigned to record room.”

12. In his appeal, the appellant has contended- and his counsel urges that owing to his financial status and businesses, he never sought any dowry from the respondent; on the contrary, he ensured to the best of his ability that the

respondent and their children led a comfortable life. It thus came as a shocker to the appellant that after having an incident free marriage for 18 years, the respondent would initiate divorce proceedings against the appellant. The appellant, however, maintains that it was hardly a coincidence that the respondent filed the divorce petition at the same time the appellant found out about her extra-marital affair with Himanshu who has been impleaded as second respondent in the present proceedings. The appellant avers that the respondent threw all caution to the wind while getting intimate with Himanshu in public and many family members as well as friends of the appellant have seen the respondent with the latter. In the appeal, the appellant maintains that the respondent still has an extra-marital affair and sought dissolution of marriage so that she could remarry.

13. Counsel for the appellant also argued that the Family Court fell into error in holding that the wife's unfounded allegations of dowry harassment, and other such wild assertions completely undermined her credibility. Her evidence had to be read as a whole; the Court, he submitted, was unduly swayed by the Police complaints lodged by the wife, over which the appellant husband had no control. The truth of those allegations- in the police complaint- had never been established in any credible manner; there was nothing to suggest that such complaints had been followed up with investigation or any indictment. Therefore, the learned Family Judge should not have based his findings on the appellant's supposed cruelty, on such scant materials.

14. It is further contended by the appellant that after conclusion of evidence the matter was fixed for oral arguments but due to a personal

difficulty of the appellant's lawyer, he could not appear before the Family Court. The appellant sought and was refused adjournment and on the next date impugned judgment and decree was passed. In the context of these allegations it is relevant to produce the following extract from the impugned judgment:

“32. He was cross examined on 19.04.2011, 16.05.2011, 06.11.2012, 07.11.2012, 22.11.2012, 24.10.2013. Thereafter on one pretext or the other the respondent shyed away from subjecting himself to his cross examination and his cross examination was closed by order of the court and his efforts to reopen his cross examination by obtaining a favourable order from Hon'ble High Court could not succeed on account of his failure to abide by the directions of Hon'ble High Court in this regard in letter and spirit.”

It was submitted that the appellant was not given sufficient opportunity to establish his case, as his evidence was prematurely closed.

15. Counsel for the wife urged that the husband's inability to prove the wild and reckless allegations constituted cruelty. Besides, submitted the learned counsel, the last instances of cruelty- physical and mental, were substantiated by convincing evidence. Therefore, he urged the court not to interfere with the findings and judgment of the Family Court.

Analysis and Findings

16. A combined reading of the order of this Court dated 06.07.2015 as well as the above extract show that despite giving several opportunities to make a representation, the appellant was only interested in prolonging the litigation and did not take the opportunity afforded by this court seriously. It was observed in the judgment of this court, dated 06.07.2015 as follows:

“ 10. The order dated 17.03.2015, the relevant portion whereof has been extracted hereon above, is clear as daylight. There can be no ambiguity or confusion about the terms on which the petitioner was granted one last opportunity to lead his evidence and cross examination. Admittedly, the petitioner has not availed the said opportunity. He did not pay in advance the aggregate costs of Rs.50,000/- before offering himself for cross-examination. The submission that the petitioner was under a bonafide belief that the earlier cheque of Rs.20,000/- had been encashed by the respondent/wife is untrue to the record. As noticed above, the cheque of Rs.20,000/- given to the respondent on 30.04.2013 had not been encashed on account of the same containing unwarranted writings at the back, and by subsequent order of 10.09.2013, the petitioner was instructed to bring another cheque, which he failed to do. While passing the order dated 17.03.2015, this Court was conscious of the fact that the earlier costs of Rs.35,000/- was outstanding, and this was so recorded in the order dated 17.03.2015. The petitioner was also conscious of this position and, therefore, did not come back to the court to submit that the costs are not Rs.35,000/- but only Rs. 15,000/- - on the assumption that the earlier cheque of Rs.20,000/- given to the respondent had been encashed.

11. Despite this being the position, even on the date fixed for recording his cross examination, the respondent only tendered two cheques of Rs. 15,000/-. If he were serious about compliance of the order he would have either brought cash or pay order for the entire amount of Rs.50,000/-.

12. The conduct of the respondent has to be viewed in the light of the earlier proceedings. It is seen from the earlier proceedings that on repeated occasions, the respondent did not appear and offer himself for cross examination, which is why his right to lead evidence and cross examination was closed. Thus, this Court, while indulging in the petitioner on 17.03.2015 observed that on merits the petitioner was not deserving of relief, i.e. of interference with the orders dated

13.05.2014, 06.10.2014 and 21.01.2015. It is clear that the petitioner is only seeking to drag the proceedings and to prevent the conclusion of the proceedings before the Family Court. I am, therefore, not inclined to grant any further indulgence and I find no error of jurisdiction in the impugned order.”

17. In these circumstances it is not for the appellant to urge that he was not given an opportunity to represent himself adequately. As is apparent from the record, the appellant defaulted time and again with payment of amount, which was the condition precedent for his appearance. This Court by its order dated 17.03.2015 felt it proper in the interest of justice to allow the appellant a chance of cross-examination despite there being no merit in his arguments. The appellant chose to fritter away the opportunity given to him through his callous attitude and is estopped through his conduct from raising such ground in appeal.

18. On the merits, the trial Court was of the opinion that the appellant had caused mental cruelty to the respondent wife by making utterly unfounded allegations of adultery against her. In his appeal, the husband claims that his counter claim for restitution of conjugal rights should be allowed. The learned Judge rejected it on the ground that the firstly the appellant's remarks against his wife inflicted cruelty on her and secondly restitution could not come with riders (the sort the appellant placed) given the circumstances of the case; he claimed restitution subject to the respondent giving up her adulterous relationship. The Court also referred to a newspaper article, which was published at the direction of the appellant which reported the dismissed case under the Domestic Violence Act and referred to the respondent as adulterous. The article has been admitted by the appellant and

goes to show that the appellant was on a mission to humiliate the respondent in public which clearly amounted to mental cruelty.

19. This court now proposes to proceed to determine whether the act of alleging adulterous relationship in the circumstances of this case would warrant dissolution of marriage under Section 13(1)(ia) of the Act i.e. cruelty. While Section 13(1)(ia) contemplates both physical and mental cruelty, the current appeal pertains to mental cruelty. Mental cruelty cannot be defined through a straitjacket formula and there is no exhaustive list as to what constitutes it. As a starting point, to establish cruelty one may analyse the intention, knowledge or character of the respondent, the nature of the spouse alleging cruelty including his/her mental and physical weaknesses; in essence there can be no general rules and one must proceed on a case-by-case basis to determine what constitutes mental cruelty. Mental cruelty can at times cause more grievous harm than physical cruelty and create in the mind of the suffering spouse a reasonable apprehension that it will be unsafe to live with the other spouse. In cases of mental cruelty the facts need to be delved into; the Court is required to deconstruct the mental process as well as extrapolate the effects of such incidents through evidence brought on record. When the whole conduct of the spouse shows instances of ill-treatment including allegations which cast aspersions on the fidelity of the other spouse which in turn could demoralize the affected spouse causing mental agony and stress then under such circumstances a strong case of mental cruelty exists. The Supreme Court ruled, in *Vishwanath Agrawal vs. Sarla Agrawal*, AIR 2012 SC 2586 that uncalled for allegations (of extra-marital affairs) are bound to create mental agony and anguish. In that case, the wife had made baseless allegations unsupported by evidence, of her husband having an

extra-marital affair. She also published an article in a newspaper making allegations about her husband's womanizing ways. The husband filed for divorce on grounds of cruelty which was rejected by the trial court as well as the High Court. However, in appeal, the Supreme Court allowed dissolution of marriage. It was observed:

“We really fail to fathom how from this incident and some cryptic evidence on record, it can be concluded that the respondent-wife had established that the husband had an extra marital relationship with Neeta Gujarathi. That apart, in the application for grant of interim maintenance, she had pleaded that the husband was a womaniser and drunkard. This pleading was wholly unwarranted and, in fact, amounts to a deliberate assault on the character. Thus, we have no scintilla of doubt that the uncalled for allegations are bound to create mental agony and anguish in the mind of the husband.”

20. The appellant in his written statement before the Family Court denied all allegations levelled against him by the respondent and went on to allege that the latter was in an adulterous relationship, without any concrete evidence. All he produced was a photograph of the respondent with Himanshu in Agra, which does not conclusively determine the existence of an extra-marital relationship as alleged by him. Further, the publication of an article in a newspaper referring to the respondent as adulterous, a fact admitted by the appellant during trial suggests a mental element in defaming the respondent to the world at large. It is also admitted that he inflicted physical harm upon his son, of such kind, which led to the respondent seeking police assistance. Under the circumstances, it is fathomable that the respondent was not inclined to return to her matrimonial home and sought dissolution of her marriage with the appellant. The appellant could not bring

before this Court cogent evidence to prove his wife's affair though he still continues to allege it. In the circumstances, the appellant's version of events is liable to be dismissed as being nothing but exaggerated tales.

21. Marriages- more than any other relationships- are founded and sustained on trust and mutual understanding. If suspicion enters this relationship, it is in the interests of both spouses to clear the air, or else doubts would simmer, take ominous shape in the form of phantasmagoria of enormous magnitude. In this case, the husband appears to have harboured such suspicions, and, all too willingly allowed them to fester and assume large proportions. Distressingly, this led him to level wild and unfounded allegations, which he persisted with, even in the present appeal. Such feelings are utterly uncondusive of any meaningful conjugal relationships. Cruelty, otherwise, is a phrase of many hues. Courts are advisedly circumspect in stereotyping what is cruelty or what can be described as cruelty because acceptable behaviour in one *mileu* can be entirely anathema in another. One recollects the wise instruction of A.P. Sen, J in *Shobha Rani vs. Madhukar Reddi*, AIR 1988 SC 121:

"There has been a marked change in the life around us. In matrimonial duties and responsibilities in particular, there is a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. The Judges and lawyers, therefore, should not import their own notions of life. Judges may not go in parallel with them. There may be a

generation gap between the Judges and the parties. It would be better if the Judges keep aside their customs and manners. It would be also better if Judges less depend upon precedents."

Cruelty therefore, is contextual- to the times, to the place, to the station in life of the spouses and attendant circumstances. In a bye-gone era, perhaps it might have been acceptable for a husband to level unfounded allegations of adulterous relationships of the wife; not any longer. It is at once traumatic and destructive of the very foundation of matrimony.

22. For the above reasons, this Court is of the opinion that the Family Court's order granting divorce to the respondent and disallowing the appellant's counter claim is justified and need not be interfered with. The appeal, therefore, is dismissed. There is no order, in the circumstances, as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

AUGUST 03, 2016