

THE HON'BLE SRI JUSTICE SANJAY KUMAR
CIVIL MISCELLANEOUS APPEAL NO.143 OF 2008

J U D G M E N T

This appeal under Section 28 of the Hindu Marriage Act, 1955 (for brevity, 'the Act of 1955'), arose out of the order dated 13.09.2007 of the learned Senior Civil Judge, Addanki, dismissing O.P.No.70 of 2006 filed by the appellant-wife under Section 13(1)(ia) and (ib) of the Act of 1955 seeking dissolution of her marriage with the respondent-husband on the grounds of cruelty and desertion.

By separate judgments delivered on 17.09.2016, the two learned Judges of this Court who heard this appeal disagreed with each other. The Hon'ble The Acting Chief Justice allowed the appeal holding that the wife was entitled to divorce on the grounds urged by her and also because the marriage between the parties had, for all practical purposes, irretrievably broken down. On the other hand, Hon'ble Sri Justice U.Durga Prasad Rao dismissed the appeal holding against the wife on the cited grounds of cruelty and desertion and noting that the plea of the wife that her marriage had irretrievably broken down did not merit consideration on facts, apart from the fact that it is not a ground for granting divorce under Section 13 of the Act of 1955.

In the light of the difference of opinion between the two learned Judges constituting the Bench, the matter was referred to this Court under Clause 36 of the Letters Patent. Though this clause requires the learned Judges who differed to state the point upon which they differed so that the case is heard upon that point by the third Judge, no such reference was made. However, as Clause 36 specifically requires the third Judge to whom the case is referred to decide upon

the point of difference, it would be necessary for this Court to frame the same. Having perused the opinions expressed by both the learned Judges, the following points are framed for consideration:

- (1) Whether the appellant-wife established cruelty on the part of the respondent-husband in terms of Section 13(1)(ia) of the Act of 1955?
- (2) Whether the appellant-wife established desertion on the part of the respondent-husband in terms of Section 13(1)(ib) of the Act of 1955?
- (3) Whether the marriage between the parties can be said to have irretrievably broken down on facts and if so, whether the same can be taken into consideration, notwithstanding the fact that Section 13 of the Act of 1955 does not provide for dissolution of a marriage on the ground of irretrievable break-down?

Heard Sri Ansari, learned counsel representing Sri Ghanta Rama Rao, learned counsel for the appellant-wife, and Ms. Nimmagadda Revathi, learned counsel appearing for Sri Nimmagadda Satyanarayana, learned counsel for the respondent-husband.

The case of the wife was as under: The marriage between the parties was solemnized on 16.03.2001. No children were born out of their wedlock. They parted company in August 2003 and have been residing separately since then. At the time of their marriage, her parents presented her husband with dowry of Rs.20,000/- and other household paraphernalia. He was addicted to vices like gambling and drinking even prior to his marriage but the same was not within her knowledge or that of her parents. They came to know about this only sometime after the marriage. The husband and his family members, viz., his mother, elder brother and sister, started ill-treating her by demanding additional dowry. She was driven away by

her husband from the house. Thereupon, her parents somehow arranged for Rs.4,000/- and sent her back to her husband so that they could lead conjugal life. However, her husband squandered away the money for his vices and again started pressurizing her for more money. Ultimately, she was driven away from the house in August 2003. Conciliatory efforts made by her parents through elders, like P.W.3, did not fructify. She therefore sought dissolution of her marriage by filing the subject O.P. in the year 2006.

Per contra, the husband's case was thus: He was not addicted to any vices as alleged and never harassed his wife physically or mentally for additional dowry. On the other hand, she insisted that he shift his family to Addanki, her parental town, but he refused as he had to look after his old mother at Ammanabrolu. Disgruntled, she used to often go to her parents' house without informing him and ultimately, she left the matrimonial home in August 2003. His efforts at mediation to bring her back, through R.W.2 and others, failed because of her insistence and that of her parents to shift his residence to their place. He therefore claimed that it was the wife who left his society on her own accord and filed the O.P. so as to secure a divorce. He claimed that he had love and affection for her and was willing to take her back if she joined him.

The trial Court disbelieved the wife's plea of cruelty and desertion. The trial Court observed that the elder brother of the husband was residing separately and his elder sister was married long prior to his marriage and resided elsewhere and therefore, the wife could not allege that they had also harassed her in connection with dowry demands. The wife's allegation that she was subjected to physical cruelty by causing cigarette burns and that she had taken

treatment in connection therewith was disbelieved as no evidence had been produced in that regard and the doctor who allegedly treated her was not examined. Her further plea that a joint deed of divorce was executed between the parties at Addanki police station, at the instance of elders, was also not accepted as it was introduced only during cross-examination of the husband. The claimed efforts at mediation by P.W.3 and others were also discarded owing to inconsistencies between the depositions of the wife (P.W.1) and P.Ws.2 & 3. The trial Court also noted the fact that the husband set up a separate home leaving his old mother in his own house, which indicated that he did so at the insistence of the wife as there would have been no need for such a step otherwise. The plea of the wife that having set up a separate family, the husband left her to her fate and went to different places like Vijayawada and Hyderabad but came back ultimately in August 2003 and drove her away demanding additional dowry, was also disbelieved as there was no proof thereof.

‘Cruelty’ falling within the ambit of Section 13(1)(ia) of the Act of 1955 has not been defined in the said enactment. However, it is settled law that to satisfy the requirement of this provision, cruelty must be conduct of such character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. It must be willful and unjustifiable conduct of such character as to cause danger to, or a reasonable apprehension thereof, to life, limb or health. It must be grave and weighty conduct which would aid the Court in coming to the conclusion that the complaining spouse cannot be reasonably expected to live with the other spouse. (**PARVEEN MEHTA V/s.**

INDERJIT MEHTA¹ and **A.JAYACHANDRA V/s. ANEEL KAUR²**). The conduct must therefore be something more than 'ordinary wear and tear of married life'. (**NAVEEN KOHLI V/s. NEELU KOHLI³**).

Hon'ble Sri Justice U.Durga Prasad Rao, who penned his opinion first, found that except the self-serving statement of the wife and her father (P.Ws.1 and 2), there was no independent evidence regarding her harassment by the husband and his family members in connection with dowry demands. Reference was made by the learned Judge to the wife's own statements in her cross-examination to the effect that the husband's brother was working as an Attender in Lingasamudram and that his sister was married even before her own marriage. The learned Judge therefore observed that this admission on her part falsified her statement that the aforesaid two persons resided in the same house and harassed her for additional dowry. As regards the alleged harassment in this regard by the husband and his mother, the learned Judge dismissed the charge as the wife admitted that for two years after the marriage, they lived happily together. As regards payment of additional dowry of Rs.4,000/- by the wife's parents, the learned Judge found that the claim of the wife's father, P.W.2, was that he secured the sum of Rs.4,000/- and gave it to the husband through the wife. However, the wife could not, in turn, state the date on which the sum of money was given to her husband by her father and in whose presence. The learned Judge therefore found against the wife as she could not confirm the payment of this sum of money to the husband and there was no other evidence in proof thereof. The learned Judge further noted that

¹ AIR 2002 SC 2582

² (2005) 2 SCC 22

³ (2006) 4 SCC 558

though the wife stated that she had taken in-patient treatment for a month for burn injuries, Dr.Subba Rao, the RMP who allegedly treated her was not even examined. Further, this in-patient treatment undergone by her was not mentioned either in her pleadings or in her chief-examination but only divulged in her cross-examination. No medical evidence in documentary form was also produced. P.W.2, the wife's father, also did not speak about the husband causing her any burn injuries and her taking treatment therefor. As regards efforts at mediation conducted on behalf of the wife by her people, the learned Judge found that there were discrepancies in the evidence of the wife, on the one hand, and P.Ws.2 and 3, on the other. According to her, the husband drove her away because of his demand for additional dowry and he refused to take her back unless such additional dowry was provided to him. However, P.Ws.2 and 3 stated to the effect that the husband declared that he had lost liking towards the wife and thus decided to leave her to her fate. The learned Judge did not attach any importance to the joint divorce deed allegedly executed by the parties in Addanki police station, as no such deed was referred to in the divorce petition or in the evidence of P.W.1.

As regards the ground of desertion, the learned Judge pointed out that in terms of Section 13(1)(ib) of the Act of 1955, such desertion must have been for a period of two years prior to presentation of the petition. Taking note of the fact that the parties had been living apart since 2003, the learned Judge observed that it would have to be seen whether the wife herself withdrew from the society of the husband or it was otherwise, as alleged by her. In this regard, the husband speaking as R.W.1 denied having set up a

separate family with the wife leaving his old mother in his own house, but the mediator, R.W.2, admitted this fact. According to the wife, she, the husband and his mother lived at one house. The learned Judge was inclined to believe that the husband set up a separate house by leaving his mother on her own and the same must have been done due to the insistence of the wife, as otherwise there was no reason for him to do so. The learned Judge found no cogent evidence that after staying in this separate house for one month, the husband left her and wandered around in Vijayawada and Hyderabad. The learned Judge accordingly concluded that the wife herself withdrew from the society of the husband, disgruntled by his not shifting to Addanki. In consequence, the learned Judge disallowed the plea of the wife that she had been deserted by her husband. Finally, referring to the plea that her marriage had irretrievably broken down, the learned Judge noted that it is not a ground under Section 13 of the Act of 1955 for grant of a divorce. Even otherwise, the learned Judge held on facts that this plea did not hold water as the husband claimed that he had love and affection for wife and was willing to take her into the matrimonial fold if she joined him. In effect, the learned Judge held against the wife on all counts and confirmed the judgment and decree of the trial Court dismissing her O.P.

On the other hand, the Hon'ble The Acting Chief Justice opined as under: The parties were married on 16.05.2001 but were living apart for the past 13 years i.e. from August 2003 onwards. They did not have any children. The wife had not sought divorce in a rush of blood or in a fit of rage, as it was evidently her well-thought out and conscious decision to file the subject O.P. in 2006, i.e., more than three years after she started living apart from him. As to irretrievable

break-down of marriage not being a ground for dissolution of marriage under the Act of 1955, the Hon'ble The Acting Chief Justice opined that this would not disable the Court from setting the wife free. The oral and documentary evidence adduced by the parties was referred to at length. In this regard, the evidence of the husband was found to be significant. He admitted his signatures on the joint divorce deed dated 24.11.2006, which was executed on a stamp paper of Rs.50/- along with a white paper attached thereto. He further stated that the wife went to her parents' house about twenty times during her stay with him after their marriage. He admitted that he never issued any legal notice for restitution of conjugal rights. In his re-examination, he stated that his signatures had been obtained on blank papers forcibly and under threat. In his further cross-examination, he conceded that he did not give any police report or legal notice about this. He denied that he fully knew the contents of the said document and had voluntarily agreed thereto by signing the same. Reference was made by the Hon'ble The Acting Chief Justice to the observation of the trial Court that there were laches on the part of both parties in taking legal steps for restitution of conjugal rights and also the conclusion of the trial Court that the wife failed to prove the alleged cruelty suffered at the hands of her husband for additional dowry and that her living away from the husband amounted to desertion on her part. Upon a comprehensive overview of case law on the issue of cruelty in matrimonial conduct, the Hon'ble The Acting Chief Justice opined that the wife, on facts, had established the same. The Hon'ble The Acting Chief Justice held that on a preponderance of rival testimonies, payment of dowry of Rs.20,000/- in the first instance, and Rs.4,000/- thereafter, was

utmost believable and worthy of acceptance. The plea of the wife that she was also subjected to physical harassment by the husband, who used to burn her body with cigarettes, requiring her to take medical treatment was also accepted. In this regard, reference was made to the evidence of the husband that she left the marital home about twenty times to visit her parental home after their marriage but she always came back. This was taken to be indicative of the efforts made by her to save her marriage. Accepting that the husband had set up a separate home at Ammanabrolu, the Hon'ble The Acting Chief Justice observed that this would have placated the grievance, if any, of the wife, as the husband alleged that she did not wish to live with his mother, and therefore probablized her contention that she was driven out of the marital home thereafter for not meeting the demands of the husband for dowry. As regards the joint divorce deed, the Hon'ble The Acting Chief Justice found that though it was introduced before the Court below belatedly, it was eminently believable as the husband admitted his signatures therein. Further, no monetary demands found mention therein and this, coupled with the fact that he did not complain to any one about his signatures being obtained on blank papers as claimed by him, probablized its execution. The Hon'ble The Acting Chief Justice therefore held that the wife had established cruelty and desertion, on facts, in terms of Section 13(1)(ia) and (ib) of the Act of 1955. As regards the plea of irretrievable break down of the marriage, taking note of the fact that the same was not a ground for divorce under the Act of 1955, the Hon'ble The Acting Chief Justice referred to case law which held to the effect that it must be taken to be a weighty circumstance, amongst others, necessitating severance of the marital tie.

(**K.SRINIVAS RAO V/s. D.A.DEEPA⁴, V.BHAGAT V/s. D.BHAGAT⁵** and **NAVEEN KOHLI³**). The Hon'ble The Acting Chief Justice observed that the emotional substratum in the marriage had completely disappeared and that affirming the order of the trial Court would only result in perpetuating bitterness as there was no acceptable way in which the parties could be compelled to resume life together (**NAVEEN KOHLI³**). Observing that humane aspects, which the Court must consider, include the fact that the wife was 20 years of age when she was married; the couple had lived together for merely two years; they had been living separately for the past more than 13 years since August 2003; the parties had crossed the point of no return; and a workable solution was not possible, the Hon'ble The Acting Chief Justice opined that the irrefutable conclusion to be drawn from these facts was that the parties could no longer stay together as wife and husband. Observing that there would be a ray of hope for the parties if a decree of divorce was granted so that they may start life afresh, the Hon'ble The Acting Chief Justice held in favour of the wife and opined that the order under appeal should be set aside and the appeal should be allowed.

Sri Ansari, learned counsel, placed reliance on **ROMESH CHANDER V/s. SAVITRI⁶**, wherein the Supreme Court, taking note of the fact that the spouses had lived apart for 25 years, relied upon its earlier judgment in **CHANDERKALA TRIVEDI V/s. DR S.P.TRIVEDI⁷** and held that if a marriage was dead and there was no chance of it being retrieved, it is better to bring it to an end. This decision was however rendered by the Supreme Court in exercise of its power

⁴ (2013) 5 SCC 226

⁵ (1994) 1 SCC 337

⁶ (1995) 2 SCC 7

⁷ (1993) 4 SCC 232

under Article 142 of the Constitution. As such power is not bestowed upon this Court in exercise of its appellate jurisdiction under Section 28 of the Act of 1955, this judgment has no relevance.

At this stage, it may be noted that evidence of the mediators of both parties does not merit consideration. The so-called mediators were allied with respective parties and therefore spoke in their favour. Though the wife seems to have asserted that the family lived jointly, this was not so as the brother and sister of the husband did not live with them. Notwithstanding the same, they would have been frequent visitors to her marital home and her allegation that they also participated in the harassment for additional dowry cannot be discounted merely because they did not live there. Further, harassment by the wife in the initial period of the marriage may also not be worthy of credence, as she herself stated that they lived happily for some time. However, as pointed out by the Hon'ble The Acting Chief Justice, the plea of the wife and her father that they paid the initial amount of Rs.20,000/- towards dowry is utmost believable, given the milieu and the strata of society to which the parties belong. Trite to state, payment of dowry, however unpalatable it may be, is an undeniable reality in our Indian society. All the more so, when a bridegroom's family is financially wanting. The husband in the present case was working as a coolie and married the daughter of a coolie. As per prevailing societal norms, the husband's family would in all probability have taken dowry from the bride's family. That is what both P.W.1 and P.W.2 said. There is no requirement in law that there should always be independent witnesses to the giving of dowry and that evidence of the family members should be viewed with doubt. The factum of payment of dowry by P.W.2, supported by the

oral evidence adduced, is therefore proved, being grounded in the established Indian practice, especially in the lower sections of Indian society. The plea of the husband, on the other hand, was that the wife was demanding that he set up home at Addanki, where her parents resided. R.W.2, a mediator who spoke on behalf of the husband, stated that the husband set up a separate home at Ammanabrolu, leaving his mother in his own house. This was also stated by the wife's father, P.W.2. Even if the version of the husband is accepted, once a separate home was set up as desired by the wife, if not at Addanki, at least at Ammanabrolu, there would have been no reason for her to desert him. The husband admitted that during the two years of their marital life, the wife went to her parents' house about twenty times. The very fact that she returned every time she went back to her parents' home clearly demonstrates her effort to make the marriage work. The wife claimed that she was driven from the separate home set up at Ammanabrolu in August 2003, whereas the husband claimed that she left on her own. His further claim before the trial Court was that he was willing to take her back as he had love and affection for her. This proclamation by him was well after three years since their separation in August 2003. However, he admitted that he never caused any notice to be issued to her for restitution of conjugal rights. If he really had love and affection for his wife and wanted to resume conjugal life, he would not have kept quiet for so long after the failure of his so-called mediation efforts through R.W.2. This failure on his part speaks volumes as to his *bonafides* in claiming that he had love and affection for his wife and was willing to resume marital life. That apart, though the joint divorce deed dated 24.11.2006 has no real bearing upon the issues

presently under consideration, it appears that this document recorded that the parties had agreed to separate and not put forth any claim, if either of them wanted someone else. No monetary demands were made by either of the parties thereunder against the other. The fact that the husband admitted his signatures in this document fortifies the plea of the wife that it was, in fact, executed by and between the parties. His failure to raise any protest if his signatures had been obtained at Addanki police station against his will, as claimed by him, further fortifies this conclusion. These two factors taken together add weight to the wife's plea that it was the husband who deserted her apart from subjecting her to cruelty in connection with his demand for additional dowry.

Ms.Nimmagadda Revathi, learned counsel, relied on **K.SRINIVAS V/s. K.SUNITA**⁸ in support of her contention that a party to a marriage could not take advantage of his or her own conduct to sue for dissolution thereof. In the present case, as the finding of the trial Court that the wife herself deserted the matrimonial home is not worthy of acceptance, this judgment does not benefit the husband.

This Court therefore find itself in agreement with the Hon'ble The Acting Chief Justice that both the grounds, i.e., cruelty and desertion on the part of the husband, were adequately established by the wife as required by Section 13(1)(ia) and (ib) of the Act of 1955.

As regards the plea of the wife that her marriage had broken down irretrievably, it is no doubt true that the same is not a ground for grant of divorce under the Act of 1955. As long back as in the year 2006, the Supreme Court in **NAVEEN KOHLI**³ recommended to

⁸ (2014) 16 SCC 34

the Union of India to seriously consider bringing an amendment to the Act of 1955 to incorporate irretrievable break-down of marriage as a ground for grant of divorce. However, it is yet to materialize.

Ms. Nimmagadda Revathi, learned counsel, relied on **NEELAM KUMAR V/s. DAYARANI**⁹, wherein the Supreme Court refused to dissolve a marriage on the ground of irretrievable break-down holding that if it did so, it would be adding a new ground to the statutory provision. However, as pointed out by the Supreme Court in other decisions, irretrievable break-down of a marriage, which is patent on facts, cannot also be ignored and would be a weighty factor in deciding an application for dissolution of marriage on the grounds stipulated under Section 13 of the Act of 1955.

Further, as pointed out by the Hon'ble The Acting Chief Justice, irretrievable break-down of marriage would be a weighty factor to be taken into consideration while dealing with an application for dissolution of marriage on the ground of cruelty. Merely because the same is not cited as a separate ground for divorce under the Act of 1955, it does not mean that it cannot be considered in the context of the cruelty made out by the petitioning spouse.

Significant to note, in **SAMAR GHOSH V/s. JAYA GHOSH**¹⁰, the Supreme Court, while observing that no uniform standard can be laid down as to instances of human behaviour which may be relevant in a case of mental cruelty, indicated some illustrations, one of which reads as under:

‘**101.** (xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by

⁹ (2010) 13 SCC 298

¹⁰ (2007) 4 SCC 511

a legal tie. By refusing to sever that tie, the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.'

It would thus be within the scope of the Court to consider this factor also while deciding an application for dissolution of marriage on the ground of cruelty. In the case on hand, it is evident beyond the pale of doubt that the parties are irreconcilable. They have been living apart since August 2003. They do not even have children. Despite an attempt at conciliation by this Court, there was no positive result. In spite of all this, the continued insistence by the husband on preserving the marital tie would therefore constitute an independent act of cruelty. It would therefore be wholly inhumane to refuse dissolution of such a marriage, which has irretrievably broken down, by adopting a pedantic and technical approach.

Thus, on all three counts, this Court finds itself in agreement with the opinion expressed by the Hon'ble The Acting Chief Justice. In consequence, the appeal is allowed setting aside the order dated 13.09.2007 passed in O.P.No.70 of 2006 by the learned Senior Civil Judge, Addanki. The marriage between the parties shall stand dissolved by a decree of divorce granted under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955. Pending miscellaneous petitions, if any, shall stand closed. In the circumstances, there shall be no order as to costs.

SANJAY KUMAR, J

1st SEPTEMBER, 2017

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