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

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Date of Decision: 09th April, 2018

+ MAT.APP. 68/2010

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..... Appellant

Through: Ms. Deepali Gupta, Adv.

versus

V

..... Respondent

Through: Mr. K.C. Gupta, Adv. for Bank of India.

Mr. N.K. Sharma, Adv. as amicus curiae.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T

1. The appellant has challenged the judgment dated 25th February, 2010 whereby the learned Trial Court dissolved the marriage between the parties by a decree of divorce on the ground of cruelty under Section 13(1)(ia) of the Hindu Marriage Act, 1955. For the sake of convenience, the respondent herein is referred to as “the petitioner” and the appellant is referred to as “the respondent”, as per their nomenclature before the learned Trial Court.

2. The petitioner instituted a petition for divorce against the respondent under Sections 13(1)(ia) and (ib) of the Hindu Marriage Act on the averments that the parties were married according to the Hindu rites and ceremonies on 07th November, 1987; the respondent’s behavior was cruel, unfaithful, harsh and abnormal toward the petitioner and other family members of the petitioner; respondent was in the habit of leaving her matrimonial home without any intimation or information to the petitioner and the respondent would telephonically call the petitioner that she had gone

to some of her friends and she would be back soon; whenever the petitioner asked the respondent about her missing from home for days respondent would abuse and insult the petitioner and told him that he had no right to ask about the whereabouts of the respondent; on various occasions the respondent called the petitioner by bad names like “*Haramzada*”, “*Kutta*”, “*Kamina*”, impotent etc.; the respondent deprived the petitioner from enjoying marital relations by refusing to cooperate and she often said that she had already enjoyed marital relations with some other persons and she was completely tired for any marital relations with the petitioner; the respondent left her matrimonial home at Shahdara, Delhi with her baggage when the petitioner was away to the place of his duty on 19th April, 2001 and the respondent gave a telephone call to his office that she had left the matrimonial home for good; more than an year passed since the respondent deserted the petitioner; the respondent was in habit of visiting the Dargah of Nizamuddin Aulia for seeking a saint’s blessings for getting an issue where she came in contact with one Asgar Khan and developed frantic love for him; she moved in Asgar Khan’s company from one town to another where she got herself photographed with Asgar Khan in amorous mood; the movement of the respondent with Asgar Khan from one town to another was without any information/intimation to the petitioner/husband; the respondent has indulged in adultery with Asgar Khan; having been constrained and anguished by the above said misdeeds of the respondent and finding himself alone, the petitioner shifted to his friend, Surender Singh’s house in Mansarovar Park, Shahdara more than a year back since the respondent had deserted him and had joined the company of Asgar Khan more than a year back; on 30th May, 2002, the respondent dropped two letters in her own hand

at the aforesaid residential address of the petitioner in which the respondent admitted that she was in the company of Asgar Khan, and on 17th August, 1999, the respondent and the Asgar Khan both entered into a marriage by an agreement in the Patiala House Courts, New Delhi.

3. The respondent contested the above petition for denying the averments made by the petitioner. The respondent denied any relation with Asgar Khan. With respect to the photographs relied upon by the petitioner, the respondent pleaded that the photographs were of a play in which the petitioner and Asgar Khan had acted. The respondent further pleaded that she treated Asgar Khan as a brother being a fellow artist.

4. The following issues were framed by learned Trial court on 19th April, 2004:

- “1. Whether the respondent after solemnization of marriage had treated the petitioner with cruelty? OPP
2. Whether the respondent had deserted the petitioner for a period of not less than two years immediately preceding the presentation of the petition?
3. Relief.”

5. The petitioner examined himself as PW-3 and reiterated the averments made in the petition. The petitioner deposed that the respondent, during his lifetime, married Asgar Khan. PW-3 also deposed with respect to the adulterous relationship of respondent with Asgar Khan depicted in the photographs. However, the respondent did not put any suggestion to the petitioner in cross-examination with respect to the falsity of her adulterous relations with Asgar Khan or the photographs.

6. The petitioner examined the Notary Public, Meena Sharma, as PW-1 to prove the affidavits *Mark 'A'* and *'B'* with respect to the marriage

between the respondent and Asgar Khan. The petitioner also examined the stamp vendor as PW-2 with respect to the affidavits *Mark 'A'* and *'B'*.

7. The petitioner examined Asgar Khan as PW-4 who deposed that he was a lineman with MTNL and denied any relationship with the respondent. PW-4 deposed that he met the respondent once at a Dargah at Nizamuddin Aulia. He identified himself and the respondent in the marked photographs but denied any relationship with the respondent.

8. The respondent appeared in the witness box as RW-1 and denied the averments made by the petitioner. The respondent deposed that the petitioner used to beat her for dowry, though this was not her defence in the written statement. The respondent further deposed that the petitioner implored her a number of times to commit suicide but even this was not her case in the written statement. The respondent examined her brother, Surender Behl as RW-2 who deposed that the respondent was tortured by the petitioner on the ground of dowry and further that the respondent could not conceive a child due to the weakness of the petitioner.

9. The learned Trial Court held that the respondent was having an unholy relationship with Asgar Khan which amounts to cruelty. The findings of learned Trial Court are reproduced hereunder:

“29. The petitioner’s main allegations of cruelty hinges around the adulterous relations of the respondent with Asgar Khan. The petitioner in his petition in para 8 & 9 has categorically and specifically stated that respondent has developed frantic love with Asgar Khan and visiting from one town to another where she photographed herself with Asgar Khan in a amorous mood unbecoming of devoted wife which amount to adultery and had enclosed the photographs relating to the Asgar Khan garlanding the respondent in a Dargah and vice versa and further respondent like a newly weeded wife lying with Asgar Khan and her various photographs with Asgar Khan at Vashino Devi, Ajmer Sharif Dargah and Pushkar Raj Temple at Ajmer and further stated these photographs are emerged from

her attachi case and this is also deposed by petitioner in his deposition Ex.PW3/A.

30.The respondent in her written statement has not acting denied these photographs but has stated that these were taken while acting in a play and has handed over the same photographs to the petitioner and he used these photographs selectively. Though the respondent has denied photographs later on in her cross-examination and stated that these are concocted photographs and her deposition is altogether different from her written statement.

31.The respondent had not given even a suggestion to the petitioner in his cross-examination regarding falsity of adulterous relations with Asgar Khan and neither posed any suggestion that the photographs of her with Asgar Khan are false and fabricated. The combined reading of the deposition of PW3 along with his cross-examination and the petition and the written statement firmly established that the respondent has some unholy relations with PW4 Asgar Khan, which are at least not brotherly or holy. The defence of the photographs being of a play or drama is also patently false as the respondent herself has abandoned her defence. However, the photograph do not depict adultery but surely tend to cause cruelty to the petitioner.

32. The petitioner's second ground of cruelty is that the respondent is disobedient and always rebuked and insulted the petitioner and at any time without intimation or information remained outdoors and further in order to defame the petitioner and his family members in estimation of other known persons, many a times the respondent calls the petitioner "haramzada", Kutta, Kameena". The petitioner on the aspect has withstood the cross-examination and in cross-examination he has also confirmed that the respondent used to abuse him as "Kutta, Kameena and Nupansak". Insults, remaining outdoors without intimation and abuses clearly depicts cruel behaviour of respondent.

33.The petitioner in his deposition Ex PW3/A has deposed that on 30.5.2002 the respondent dropped two letters written in her own hand at his residential address wherein she has stated respondent Shashi Khan as wife of Asgar Khan and Asgar Khan was instrumental in breaking the relations of husband and wife and entrapped the respondent by clever tactics in Dargah and further stated that Asgar Khan lied to her that he was unmarried though he was married and having children and she has numerated his relations with Asgar Khan. In letter dated 19.4.2002 she further admitted that on 17.8.99 Nikah was done in the Dargah with

respondent and Asgar Khan and also in Patiala House Court. These letters have not been proved on record by the petitioner nor put to the respondent. However, the respondent did not dispute the oral averments of the petitioner. These averments are running from para 16 to para 34 but there is no suggestion put by the respondent of falsity of the averments from para 16 to 34. Therefore, these submissions are unrebutted and unchallenged and unequivocally points towards the unholy relations of respondent with Asgar Khan.

34. There are other circumstances which shows that there are unholy relationship between Asgar Khan and the respondent. Asgar Khan was examined by the petitioner and in his cross-examination he has identified himself in photographs Mark XR1 to XR5 and PW2/P1-P27 and also stated that other person appeared to be respondent but stated he did know how these photographs were taken. There is no question put to him in his cross-examination by the respondent that these photographs were morphed, forged or fabricated and has not given any suggestion regarding the fabrication of these photographs. This clearly shows that the Asgar Khan and the respondent had some intimate relationship which at least is not a holy one.

35. The respondent in her written statement has stated that the photographs of garlanding each other and photographs of visiting of various holy places were that of acting in a play but the respondent even in the cross-examination of petitioner has not put any question or suggestion to this effect. Thus she has admitted the version of the petitioner.

36. PW4 Asgar Khan has deposed in his cross-examination-in-chief that he only knew the respondent during the course of the duties in MTNL as Lineman but these two contradictory stands i.e. actors in play and knowing only as Lineman in MTNL itself shows that both know each other and have some intimacy but are deliberately concealing the same.

37. The respondent in her deposition Ex RW1/A had deposed that petitioner caused cruelties to her for want of dowry on the instance of Smt. Vidyawati (mother in law), Sh. Sham Lal (Jeth) and Ms. Neeta Arora (Nanad). It is pertinent to mention that these allegations are made first time in her deposition and not part of the pleadings and, therefore, cannot be relied.

38. RW-1 in her deposition had stated that the petitioner has levelling allegation of having marriage with Asgar Khan and placed concocted

and false photocopies of photographs. This is in contradiction to her written statement wherein she has stated that these are the photographs of a play or drama and she herself handed over the same to the petitioner. In her cross-examination she also denied these photographs but has nowhere stated that these were false, morphed or fabricated. This all shows the respondent is making false statement before the court and her evidence is not reliable and credit worthy.

39. Adultery is having sexual relationship outside matrimony. The petitioner has shown his anguish due to adulterous relationship. He has used the term in the language of an ordinary person. It is not in the strict sense of law. As discussed above the photograph do not show the adultery in the strict sense of the word as used in law. At the most the petitioner is able to make out a case of cruelty due to these photographs as the acts exhibited in them. The acts and omissions of the respondent as established on record depict cruelty to the petitioner. Therefore, this issue is decided against the respondent and in favour of the petitioner.

(Emphasis Supplied)

10. Learned counsel for the appellant/wife in appeal urged at the time of hearing that petitioner/husband had made false allegations of adultery and marriage to Asgar Khan against the appellant. The photographs produced by petitioner were not supported by any negative and are morphed, forged and manipulated. The appellant gave these photographs to petitioner as she acted in a play which has been misused by petitioner with ulterior motive. It was further contented that the petitioner has produced forged and fabricated affidavits of Asgar Khan and respondent.

11. The petitioner expired during the pendency of this appeal on 04th August, 2015 and was survived by his mother, Vidyawati and Court notice was issued to her by this Court on 05th July, 2017. However, Vidyawati, mother of the deceased petitioner/husband, refused to accept the summons stating that she is too old to attend the Court whereupon this Court appointed Mr. N.K. Sharma, Advocate, as amicus curiae who contacted Vidyawati. On

27th September, 2017, Vidyawati appeared before the Court and stated that she was aged about 90 years and was not in a position to contest this appeal.

12. Mr. N.K. Sharma, learned amicus curiae, urged at the time of the hearing that the respondent threw out her mother-in-law, Vidyawati, from the house which was in the name of the petitioner. The petitioner was employed with Bank of India at the time of his death. Learned amicus curiae submitted that Asgar Khan was examined by the petitioner and in his cross-examination, he identified himself in photographs *Mark XR1 to XR5* and *PW2/P1-P27* which clearly show that Asgar Khan and the respondent had an intimate unholy relationship. He further submitted that the respondent in her written statement had stated that the photographs of exchanging garlands with Asgar Khan and photographs of visiting various holy places with Asgar Khan were that of acting in a play but the respondent did not put any question or suggestion to this effect to the petitioner in his cross-examination and thereby, admitted the version of the petitioner. He further submitted that Asgar Khan deposed in his examination-in-chief that he knew the respondent during the course of the duties in MTNL as Lineman which is contradictory to the respondent's stand of knowing Asgar Khan as a fellow artist acting in a play which shows that they both knew each other and had an unholy intimacy.

Findings

13. The object of a trial is first to ascertain the truth and then do justice on the basis of truth. It is the fundamental duty of the Court to ascertain the truth. The Indian Evidence Act, 1872 does not define truth. In ***Ved Parkash Kharbanda v. Vimal Bindal***, 2013 (198) DLT 555, this Court had the occasion to discuss the meaning of truth and the principles relating to the

discovery of truth and Sections 3 and 114 of the Indian Evidence Act, 1872 have been summarized as under:

“21. Summary of Principles

21.1 Truth should be the Guiding Star in the Entire Judicial Process

- *Truth is foundation of Justice. Dispensation of justice, based on truth, is an essential and inevitable feature in the justice delivery system. Justice is truth in action.*
- *It is the duty of the Judge to discover truth to do complete justice. The entire judicial system has been created only to discern and find out the real truth.*
- *The justice based on truth would establish peace in the society. For the common man truth and justice are synonymous. So when truth fails, justice fails. People would have faith in Courts when truth alone triumphs.*
- *Every trial is voyage of discovery in which truth is the quest. Truth should be reigning objective of every trial. Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth.*
- *The Trial Judge is the key-man in the judicial system and he is in a unique position to strongly impact the quality of a trial to affect system's capacity to produce and assimilate truth. The Trial Judge should explore all avenues open to him in order to discover the truth. Trial Judge has the advantage of looking at the demeanour of the witnesses. In spite of the right of appeal, there are many cases in which appeals are not filed. It is mostly with the Trial Judge rather than with the appellate Judge that the members of the general public come in contact, whether as parties or as witnesses.*

21.2 What is 'Truth' and how to discover it

- *Law's Truth is synonymous with facts established in accordance with the procedure prescribed by law.*
- *The purpose of judicial inquiry is to establish the existence of facts in accordance with law.*
- *Facts are proved through lawfully prescribed methods and standards.*
- *The belief of Courts about existence of facts must be based on reason, rationality and justification, strictly on the basis of relevant and admissible evidence, judicial notice or legally*

permitted presumptions. It must be based on a prescribed methodology of proof. It must be objective and verifiable.

21.3 Section 3 of Indian Evidence Act, 1872

- *“Evidence” of a fact and “proof” of a fact are not synonymous terms. “Proof” in the strict sense means the effect of evidence.*
- *A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.*
- *The term “after considering the matters before it” in Section 3 of the Evidence Act means that for judging whether a fact is or not proved, the Court is entitled to take into consideration all matters before it which shall include the statement of the witnesses, admissions of the parties, confession of the accused, documents proved in evidence, judicial notice, demeanour of witnesses, local inspections and presumptions.*
- *The term “believes it to exist” in the definition of “proof” is a “judicial belief” of the Judge based on logical/rational thinking and the power of reason, and the Court is required to give reasons for the belief. The reasons are live links between the mind of the decision maker and the belief formed. Reasons convey judicial idea in words and sentences. Reasons are rational explanation of the conclusion. Reason is the very life of law. It is the heart beat of every belief and without it, law becomes lifeless. Reasons also ensure transparency and fairness in the decision making process. The reasons substitute subjectivity by objectivity. Recording of reasons also play as a vital restraint on possible arbitrary use of the judicial power. The recording of reasons serve the following four purposes:-*
 - *To clarify the thought process.*
 - *To explain the decision to the parties.*
 - *To communicate the reasons to the public.*
 - *To provide the reasons for an appellate Court to consider.*
- *Non-recording of reasons would cause prejudice to the litigant who would be unable to know the ground which weighed with the Court and also cause impediment in his taking adequate grounds before the appellate Court in the event of challenge.*

- *Nothing can be said to be “proved”, however much material there may be available, until the Court believes the fact to exist or considers its existence so probable that a prudent man will act under the supposition that it exists. For example, ten witnesses may say that they saw the sun rising from the West and all the witnesses may withstand the cross-examination, the Court would not believe it to be true being against the law of nature and, therefore, the fact is ‘disproved’. In mathematical terms, the entire evidence is multiplied with zero and, therefore, it is not required to be put on judicial scales. Where the Court believes the case of both the parties, their respective case is to be put on judicial scales to apply the test of preponderance.*
- *The approach of the Trial Court has to be as under:-*
- *If on consideration of all the matters before it, the Court believes a fact to exist or considers its existence probable, the fact is said to be ‘proved’. On the other hand, if the Court does not believe a fact either to exist or probable, such fact is said to be ‘disproved’. A fact is said to be ‘not proved’ if it is neither proved nor disproved.*
- *The test whether a fact is proved is such degree of probability as would satisfy the mind of a reasonable man as to its existence. The standard of certainty required is of a prudent man. The Judge like a prudent man has to use its own judgment and experience and is not bound by any rule except his own judicial discretion, human experience, and judicial sense.*

21.4 Section 114 of the Indian Evidence Act, 1872

- *Section 114 is a useful device to aid the Court in its quest for truth by using common sense as a judicial tool. Section 114 recognizes the general power of the Court to raise inferences as to the existence or non-existence of unknown facts on proof or admission of other facts.*
- *Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts.*
- *The source of presumptions is the common course of natural events, human conduct and public or private business, and the Section proceeds on the assumption that just as in nature there prevails a fixed order of things, so the volitional acts of men placed in similar circumstances exhibits, on the whole, a distinct*

uniformity which is traceable to the impulses of human nature, customs and habits of society.

- *The illustrations though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the section itself.*
- *Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the Court can draw an inference and that would remain until such inference is either disproved or dispelled.*
- *Presumptions of fact can be used by the Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. The function of a presumption is to fill a gap in evidence.*
- *Section 114 of the Indian Evidence Act applies to both civil and criminal proceedings.*
- *Whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex and room must be left for play in the joints. It is not possible to formulate a series of exact propositions and con-flue human behaviour within straitjackets.*
- *No rule of evidence can guide the Judge on the fundamental question whether evidence as to a relevant fact should be believed or not. Secondly, assuming that the Judge believes very few cases, guide him on the question what inference he should draw from it as to assist a Judge in the very smallest degree in determining the master question of the whole subject – whether and how far he ought to believe what the witnesses say? The rules of evidence do not guide what inference the Judge ought to draw from the facts in which, after considering the statements made to him, he believes. In every judicial proceeding whatever these two questions – Is this true, and, if it is true what then? - ought to be constantly present in the mind of the Judge, and the rules of evidence do not throw the smallest portion of light upon them.”*

(Emphasis Supplied)

14. Applying the aforesaid principles of law to the facts of the present case, this Court believes the case setup by the petitioner/husband that the respondent/wife has treated the petitioner/husband with cruelty to be true which is sufficient to dissolve the marriage between the parties whereas the entire defence set up by the respondent is not believed to be true and is, therefore, disproved. This Court agrees with the reasoning and findings of the learned Trial Court that the respondent/wife had an unholy relationship with Asgar Khan which amounts to cruelty. The petitioner/husband has also proved that the respondent/wife used to abuse him as 'kuttha', 'kamina', impotent etc. and she remained out-door without intimation which clearly depicts cruel behavior. The respondent/wife failed to prove her defence that she acted in a play with Asgar Khan and the photographs were related to the alleged play. There is no infirmity in the well-reasoned findings of the Trial Court.

15. The appeal is dismissed.

APRIL 09, 2018
rsk

J.R. MIDHA
(JUDGE)