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

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Date of Decision: 17th August, 2018

+ MAT.APP. 79/2010

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..... Appellant

Through: Ms. Kajal Chandra, Ms. Perna
Chopra and Mr. Vivek Kapur,
Advocates

versus

A

..... Respondent

Through: Mr. I.V. Raghav, Advocate along with
respondent in person.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T

1. The appellant has challenged the judgment dated 23rd February, 2010 whereby his petition for dissolution of marriage on the ground of cruelty under Section 13(1)(ia) of Hindu Marriage Act has been dismissed.

2. The parties were married according to the Hindu rites and ceremonies on 1st April, 1988 and three children were born out of their wedlock, namely, one daughter and two sons. On 29th April, 2005, the appellant filed a petition for dissolution of marriage on the ground of cruelty on various grounds *inter alia* that the respondent had treated the appellant with cruelty; there were continuous fights between the parties since marriage; the respondent did not take care of appellant during his illness in 2002-2004; the respondent made false allegations of illicit relationship against the appellant;

the respondent left matrimonial home for days without information; the respondent filed false and frivolous cases against the appellant; and the appellant had to leave the matrimonial home in October 2004 and was living separately since then. The appellant averred that the respondent mixed the powder given by a *tantric* in the food of the appellant due to which the appellant fell sick.

3. The respondent contested the petition on various grounds inter alia that the appellant had an illicit relationship with a lady named 'Pushpa' in his office and he left the matrimonial home on his own due to his involvement with Pushpa.

4. The appellant appeared in the witness box as PW-1 and reiterated the averments made in the divorce petition. The appellant examined his landlord and friend, PW-2, B.R. Madan who supported the appellant's case.

5. The respondent appeared in the witness box as RW-1 and reiterated her defence in the written statement. The respondent examined her neighbor Mohan Lal as RW-2 who deposed that the appellant was having an illicit relationship with the lady in his office.

6. The Trial Court held that the appellant had miserably failed to prove the allegation of cruelty. The relevant portion of the judgment is reproduced hereunder:

"31. PW1 (petitioner/husband) in his deposition deposed that the marriage was solemnized on 1.4.88 according to Hindu rites and ceremonies at Haryana and it was an arranged marriage and there were three issues from the marriage namely Baby Mahuri, Master Mohit Singh and Master Vishal Singh and all the children are in custody of the respondent/mother.

32. PW1 in his statement deposed that after marriage, they resided at A-47, Street No.2, New Modern Shahdara, Delhi. He deposed that respondent was never cordial to him since

marriage and used to quarrel on each and every day on one or another pretext and further used to ask to transfer the house in her name and there was lot of interference of her family members in their family affairs and therefore, he has severed the relationship with the family of the respondent. In the year 1992, after fighting with the petitioner, respondent went to her parental home with children of 1 and ½ year.

33. In cross-examination PW1 was asked questions regarding that he had physically and mentally tortured the respondent and she tolerated all the harassment in order to save the marriage and she has never requested for transfer of house in her name and further was asked that in November 1992, she was mercilessly beaten and finally her father came and took her. Although he has denied all the suggestions but as the allegations of non cordiality and family interference etc. are general and vague in nature these allegations cannot be relied upon.

34. PW1 further deposed that respondent used to allege that he has illicit relations with other woman which could not be said in the petition and further stated that the respondent has filed a suit for permanent injunction Ex.PW1/1 and this court can see the kind of allegations she used to make upon the petitioner and stated that subsequently suit was withdrawn by the counsel admitting that this is not technically correct suit. The respondent had suggested PW1 in cross-examination that she had filed suit of injunction as the petitioner wanted to throw her out of the house. Therefore, mere filing of injunction suit does not suggest any kind of cruelty on the part of the respondent. It is only an exercise of a legal right by respondent. It, on the other hand, indicates the apprehension of the respondent that the petitioner might at any time throw her and children out of the house. The respondent had further stated that this suit was withdrawn as the matter was compromised. PW1 deposed that the suit was withdrawn because it was not technically correct suit even cannot be believed as the petitioner himself has not filed any order or proceedings of the court regarding this. Therefore, filing of permanent injunction suit cannot be considered as a ground of

cruelty on petitioner but on the other hand, it shows cruelty upon respondent.

35. The allegation, as leveled in his deposition ExPW1/A, that his condition being not good since year 2002 and he was suffering from diarrhea, stomachache, headache etc, local doctors could not be able to diagnose, therefore, he was referred to hospital where all kinds of tests including ultrasound etc., were conducted but ultimate result is that no disease was diagnosed but his condition was deteriorating day by day and whenever petitioner takes food at the time of dinner, he suffers through vomiting, diarrhea, headache and stomachache which remains throughout the night and on next day, he feels that he has no energy for any work.

36. Petitioner further deposed that he saw respondent putting some powder in his food and when he tried to inquire, respondent replied him that this was garam masala and therefore, he has no knowledge what was mixed. Though respondent has placed medical records that he is under treatment and various tests were conducted on him but he himself has stated that the doctor could not diagnose the disease. However, he has not produced any doctor in his evidence who could state what is the cause of his deteriorating health. There is nothing on record to show that cause of his ill health is the food served by respondent. In his cross-examination, he was suggested that he used to take meal most of the time outside house.

37. There is a question asked by the respondent in cross-examination to petitioner (PW1):-

Q:- Who asked you that you should not eat the food prepared by the respondent?

A:- She never cooked the food for me.

38. This answer of the petitioner falsifies his entire story, that the respondent used to cook food for him and used to put some powder in that which deteriorated his health. However, in his deposition Ex.PW1/A, he stated that doctor advised him not to take food prepared by the respondent but in cross-examination, he stated that I have not written this in my pleadings. This further makes the entire allegation of food adulteration false and frivolous.

39. *PW1 in his statement has stated that it has been confirmed to him that powder used in the food was given by some tantric (sic) of Nand Nagari to the respondent. This deposition in itself is vague and unbelievable. He has not stated how it was confirmed to him that powder is given by some tantric (sic) nor he has disclosed the name of tantric (sic). In his cross-examination, he stated that this fact of tantric was in fact told by his wife herself and same is denied by wife/respondent in pleadings as well as in evidence. The petitioner is leveling the allegations in air without any foundation and on hearsay only. His allegations of contact of the respondent with tantric is also unbelievable.*

40. *Petitioner in his deposition stated that respondent used to fight with the petitioner in a regular way and at times even police was called and therefore, in the month of October, 2004, he has left the house and took a separate accommodation on rent at Krishna Nagar @ Rs.1500/- per month and when in the month of December 2004, the petitioner came to the house for taking(sic) his remaining clothes, the respondent started fighting and called the police and case was registered under Section 107/151 Cr.P.C. and he was sent to Judicial Custody. The respondent in cross-examination of PW1 had suggested him that the police was called because the petitioner had beaten the respondent.*

41. *The petitioner has filed a copy of the kalandra Mark B collectively. A perusal of the kalandra shows that the petitioner went to the house with the intention to beat and abuse the respondent. In view of the evidence on record, it is not established that the act of the respondent was wrong or false. It was only an exercise of a legal right. There is no evidence that it was vexatious or abuse of the power.*

42. *Further, for corroborating this incident, the petitioner has examined PW2 Bodh (sic) Raj who stated that he accompanied with the petitioner on that day to invite the respondent for his son's marriage (according to kalandra Mark B and the petitioner, the date of incident is 4th December, 2002). It is pertinent to mention that it is not the case of the petitioner either in pleadings or in his deposition that on 4.12.2002, Bodh (sic) Raj accompanied him to the house.*

43. PW2 in his cross-examination has stated that his son's marriage is of 4th and 5th December, 2004 and he has gone to the respondent's place for invitation 10-12 days before that, some time in the month of November. Therefore, this averment that he has accompanied the petitioner on the night (i.e. 4.12.2004) when the police was called is false and shows that PW2 was not present and deposing falsely.

44. The petitioner has examined PW2, Budh Raj, who vide his deposition Ex.PW2/A stated that he is family friend and knows both of them since 1988 and he has seen that the respondent used to quarrel with the petitioner on one pretext or another and petitioner also left matrimonial home in the year 1990 and further stated that the petitioner has no illicit relations or does not even touch liquor and the petitioner is not in good health for almost three years and when in the first week of December, he went to serve the invitation card of marriage of his son to the respondent. She started leveling allegations against the petitioner and called the police. In order to avoid conflicting circumstances, he along with petitioner left the house.

45. In his cross-examination, PW2 Bodh Raj submits that he did not go to meet petitioner but he comes to him and he tried to give good counseling to both of them. It is evident from his cross-examination that he does not go to the house of the petitioner and therefore, he cannot direct evidence to any incident of misbehavior of the respondent with the petitioner.

46. PW2 (Bodh Raj) miserably failed to prove incident of misbehavior by respondent on 4.12.2004 by calling police as already discussed and thus this witness is concocted and unreliable.

47. PW1 in his deposition as Ex.PW1/A has stated that petitioner used to allege that he has illicit relations with other woman. In cross-examination, the respondent had asked that he had illegal relations with one Pushpa working in his office and he denied this suggestion. RW1 in her statement also stated that the petitioner has illicit relations with other woman and due to this, he has left the respondent and children and living separately. In the cross-examination of respondent (RW1), the petitioner has asked:-

Q:- Can you bring any proof to establish your allegation that the petitioner is a drunkard or a womanizer?

A:- I will bring the proof on the next date (sic).

48. Cross-examination of RW1 then deferred for the next date. In further cross-examination, the petitioner has not cross-examined respondent (RW1) on the point of illicit relations. For corroboration respondent examined RW2, he in his deposition Ex.RW2/A has stated that the petitioner has illegal relations with a girl who is working in Gas Agency with him and this is cause of quarrel between two but on this point, RW2 was not cross-examined by petitioner on this point. The petitioner failed to cross examine both RW1 and RW2 on point of illicit relations. Therefore, respondent's allegations of illicit relation of petitioner with some girl working in his Gas Agency namely Pushpa have some elements of truth as the petitioner in cross-examination could not able to discredit the witnesses RW1 and RW2 on that aspect. Therefore, this allegation of illicit relationship does not appear to be patently unfounded or false and therefore, petitioner cannot take any benefit out of the same.

49. RW1 in her deposition Ex.RW1/A has stated that the respondent was subjected to both physical and mental cruelty by the petitioner and petitioner used to quarrel with her without any rhyme or reason and she has never asked the petitioner to transfer his house in her name and her family has never interfered in her family affairs. The respondent deposed that she was compelled to do all household work without rest. Furthermore, was subjected to extreme cruelty both physically and mentally for demand of dowry as well as on other petty matters. The allegations of dowry demand and cruelty physical and mental by the respondent are general and vague in nature. She could not give any particulars or specific time and date when she was tortured for demand of dowry or when physical and mental cruelty committed on her. Therefore, this allegation of the respondent is not believable.

50. RW1 further stated that due to illicit and illegal relation with other woman, petitioner left the respondent and the children and is living separately with some other woman. The petitioner has not cross-examined the respondent on point of illicit relation but has only raised one question whether she can bring any proof regarding the petitioner is drunkard and womanizer. This kind of general question is not sufficient to discredit the witness on allegations of illicit relation as direct proof is hardly available of these allegations. The petitioner has not given suggestion to RW1 and RW2 that he has no illicit relation with any woman. Therefore, this allegation of illicit

relation though not very specific but at least given an impression that the petitioner has illicit relations on considering the entire evidence as such.

51. In her statement, RW1 further stated that she has filed a petition under Section 125 Cr.P.C. and a suit for permanent injunction. This further corroborates that the petitioner is not maintaining the respondent and the child and even trying to throw them out of the house.

52. The respondent has examined RW2 Mohan Lal who stated that the petitioner and respondent resided on rent at 849 Geeta Colony and from there he knows them. Main crux of his evidence is that the petitioner has illicit relation with a girl working in his Gas Agency and this is the cause of quarrel between them and further the petitioner used to beat the respondent. The petitioner could not materially discredit this witness by cross-examination. He even had not put a single suggestion to the effect that the allegations of illicit relation false.

53. The burden of proof is on the petitioner but the petitioner has miserably failed to prove his allegations of cruelty. As per Bharat Bhushan vs. Pratibha, 2007 (6) AD (Delhi) 58 the burden is on the petitioner to positively prove his case but petitioner is unable to discharge his onus of proof. Though respondent has not been able to prove her version on certain aspects of dowry demand etc. but these are not foundations of cruelties as per case of petitioner. It is settled law that the case of petitioner does not get proved even if the defence of the respondent fails. His case must stand on its own legs.

54. In the totality of the facts and circumstances of the case, issue no.1 is decided in favour of the respondent and against the petitioner.”

(Emphasis Supplied)

7. Learned counsel for the appellant urged at the time of the hearing that the respondent had treated the appellant with cruelty. It is submitted that the respondent showed absolute indifference and neglect towards the appellant during his illness in 2002-2004. It is further submitted that the respondent leveled false allegations of illicit relationship with Pushpa. It is further submitted that the respondent leveled false allegations of being drunkard on

the appellant whereas the appellant is a teetotaler. It is further submitted that the respondent filed false cases against the appellant. It is further submitted that the parties are living separately since 2004 and the marriage between the parties has irretrievably broken down and therefore, the marriage be dissolved by a decree of divorce. Reliance is placed on *Samar Ghosh v. Jaya Ghosh*, 2007 (4) SCC 511, *Satish Sitole v. Ganga*, (2008) 7 SCC 734, *Romesh Chander v. Savitri*, (1995) 2 SCC 7, *V.Bhagat v. Mrs. D. Bhagat*, AIR 1994 SC 710, *G.V.N. Kameswara Rao v. G. Jabilli*, AIR 2002 SC 576, *Parveen Mehta v. Inderjit Mehta*, (2002) SCC 706, *Dr. Vimla Balani v. Sh. Jai Krishan Balani*, 158 (2009) DLT 75, *Smt. Kavita v. Rakesh Kumar*, 178 (2011) DLT 743, *Vimla Mehra v. K.S. Mehra*, 158 (2009) DLT 136, *Sadhana Shrivastava v. Arvind Kumar Shrivastava*, AIR 2006 ALLAHBAD 7, *Sardar Avtar Singh v. Amarjeet Kaur Gandhi*, 207 (2014) DLT 294, *Ajeet Panwar v. Babita*, 2016 Lawsuit(Del) 4829 and *K. Srinivas v. K. Sunita*, 2014 LawSuit (SC) 919.

8. Learned counsel for the respondent urged the following submissions at the time of the hearing:-

8.1 The marriage between the parties solemnized on 1st April, 1988 and three children from this wedlock were born on 30th August, 1989, 13th November, 1991 and 30th June, 1996. The appellant left the house on 13th October, 2004 and threatened to sell out the residential property bearing H.No.A-47, Street No.2, New Modern Shahdara, Delhi with a view to enjoy his life without fulfillment of any liability towards the respondent and his children. The respondent filed a civil suit for permanent injunction and a petition under Section 125 Cr.P.C for maintenance against the appellant. The civil suit was settled between the parties in the Mediation Cell on 3rd

December, 2007 on the terms that the appellant will not interfere in the peaceful possession of the house by the respondent, without following due process of law and the divorce petition was filed by the appellant under Section 13(1)(ia) of HMA which was dismissed.

8.2 The appellant has left the respondent and children with a view to enjoy his life without any interference of any kind from the side of respondent as well as his children as he is a drunkard and a person of romantic nature and he filed a divorce petition on completely false averments and tried to take the advantage of his own wrongs. As per allegations in the petition, some kind of powder given by a *tantric* was mixed in his food by the respondent due to which the appellant had fallen sick and to prove this allegation, the appellant neither examined the *tantric* nor the doctor. PW1 contradicted this stated in his cross-examination dated 8th December, 2007 when he stated that “*she (respondent) never cooked the food for me (appellant)*”.

8.3 All the allegations are vague in nature and the appellant could not prove these allegations whereas the appellant must stand on his own legs and to prove his own case to succeed. The appellant cannot be allowed to take the advantage of his own wrongs, firstly by leaving the house with an ulterior motive to enjoy his life without performing his legal duties towards the respondent and his children and secondly, urging the ground for irretrievable break-down of marriage which is purely due to the conduct/act of the appellant himself.

8.4 The respondent appeared in the witness box as RW-1 and deposed that the appellant had an illicit relationship with another woman and he left the respondent and the children and was living separately with another

woman and was enjoying his illicit relationship. In cross-examination, the appellant had put only one question to the respondent as to whether the respondent can bring any proof to establish that the appellant was a womanizer to which the respondent answered in affirmative that she can bring the proof on the next date whereupon the cross-examination was deferred. However, on the next date of cross-examination, the appellant did not put any question on the aforesaid allegation.

8.5 The respondent examined her neighbor, Mr. Mohan Lal as RW-2 who deposed that the appellant was having love affair with a lady in his office and he used to go out with her. RW-2 further deposed that the appellant even threatened the respondent to keep the lady with her otherwise he will leave respondent. The appellant did not cross-examine RW-2 on the aforesaid statement.

8.6 With respect to the appellant's allegation that the respondent used to mix some powder given by the *tantric* in his food, the appellant himself admitted in his cross-examination that the respondent never cooked the food for the appellant.

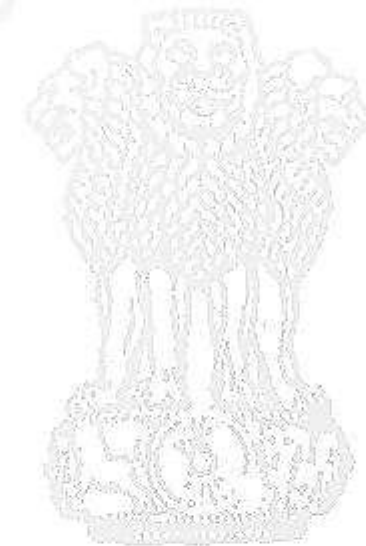
9. On careful consideration of the rival contentions of the parties, this Court agrees with the learned Trial Court that the appellant has failed to prove cruelty and the respondent has duly proved that the appellant cannot be permitted to take benefit of his wrong. The Respondent deposed the appellant had illicit and immoral relations with a lady named, Pushpa working in his office and he left the matrimonial home for this reason but the appellant chose not to cross-examine her on this aspect. The respondent also produced RW-2 who corroborated respondent's allegations and the appellant chose not to cross-examine RW-2 on this aspect. There is no

infirmity in the well reasoned findings of the learned Trial Court reproduced herein above. With respect to the appellant's prayer for dissolution of marriage on the ground of irretrievable breakdown, this Court is of the view that this Court is not empowered to dissolve the marriage on the ground of irretrievable breakdown. Reference be made to the judgement of Division bench of this Court in *Mini Appa Kanda Swami @ Mani v. M. Indra*, (2016) 234 DLT 243 (DB).

10. The appeal is dismissed.

AUGUST 17, 2018
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J.R. MIDHA
(JUDGE)



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