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

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Date of Decision: 27.11.2018

+ **MAT.APP.(F.C.) 48/2017**

A K

..... Appellant

Through: Mr.Maninder Singh and Ms.Smriti
Asmita, Advocates.

versus

S S K

..... Respondent

Through: Mr.Devinder Chaudhary and
Ms.Roopsi Sabharwal, Advocates.

+ **MAT.APP.(F.C.) 87/2018 & CM APPL. 17432/2018**

S S K

..... Appellant

Through: Mr.Devinder Chaudhary and
Ms.Roopsi Sabharwal, Advocates.

versus

A K

..... Respondent

Through: Mr.Maninder Singh and Ms.Smriti
Asmita, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S.SISTANI, J. (ORAL)

MAT.APP.(F.C.) 87/2018 & CM APPL. 17432/2018

1. This is an appeal under Section 19 of Family Courts Act, 1984 read with Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred

to as 'the Act') for setting aside judgment dated 21.12.2016 whereby a petition seeking grant of divorce on the ground of cruelty was dismissed and an alternate relief of judicial separation has been granted by the Family Court. Together with this appeal, the appellant/husband has filed an application under Section 5 of the Limitation Act seeking condonation of 447 days delay in filing the present appeal.

2. Learned counsel for the appellant/husband submits that delay in filing the appeal has been caused on account of bonafide reasons and not on account of negligence or inaction on the part of the appellant. The ground for seeking condonation is ill-health of the father of the appellant and old age diseases of his 75 years old mother.
3. Learned counsel has strongly urged before the Court that the father of the appellant had suffered a serious attack of brain haemorrhage and cellulite on both the feet. The appellant being the only son living with his parents (the other son is settled abroad) and has to look after them.
4. Reliance is placed on the copy of discharge summary in support of the above submissions so made. Photographs of the ailing father of the appellant/husband have been filed in support of the contentions so raised. It is further pointed out that prior to passing of the impugned order and post passing of the impugned order, the appellant/husband had been appearing on almost every date of hearing before the Family Court, in the proceedings pending under Section 125 of the Code of Criminal Procedure (Cr.P.C) and also in an another petition filed by the appellant on the ground of desertion.
5. Additionally, it is pointed out that the ground with regard to the father

of the appellant/husband suffering from brain haemorrhage is corroborated from the cross examination conducted on 16.12.2009 whereby he had stated that his mother is heart patient and the father has suffered from brain haemorrhage.

6. The application seeking condonation of delay has been vehemently opposed by Mr.Maninder Singh, learned counsel for the respondent. It is contended that the application is devoid of material particulars although based on the documents placed on record, he does not dispute the illness of the father of the appellant.
7. We have heard learned counsel for both the parties and considered their rival submissions.
8. While deciding the application under Section 5 of Limitation Act, the Court at the first instance must record its satisfaction that the sufficient grounds are made out for condoning the delay in filing an appeal (*see P.K. Ramachandran v. State of Kerala and Anr.* reported at **(1997) 7 SCC 556**)
9. In this case, the impugned judgment was passed on 21.12.2016. The copy of the discharge summary which has been placed on record and relied upon would show that the father of the appellant/husband was admitted on 24.08.2016 and he was discharged on 29.08.2016. In our view, reliance on this document to show that on account of the father of the appellant being admitted in the hospital, he was prevented from filing the appeal is not only misplaced but also misleading. The photographs would obviously also pertain to the same period i.e. between 24.08.2016 and 29.08.2016 which is much prior to passing of the judgment.

10. It is reasonably expected that the appellant/husband would be looking after his old and sick parents but there is no document on record to substantiate the same. No date has been mentioned which would convince this Court that on account of illness of his parents; the appellant/husband could not approach his counsel or file the present appeal. The application is vague. It lacks material particulars. It does not provide a single date as to when the certified copies were applied, when the counsel was approached and when the appeal was filed. To say that the appellant/husband applied for certified copies of the entire paper book alongwith the impugned judgment dated 21.12.2016 and the same were received on 31.01.2017 does not satisfy this Court as to when such an application was made and what prevented the appellant from obtaining the copies at an earlier point of time and what was the necessity of filing the certified copies in the matter. It may also be noted that in case the medical condition of the parties was critical, the brother of the appellant/husband would have also visited his parents but no such submission was made.
11. In the case of *State of W.B. v. Administrator, Howrah Municipality*, reported at (1972) 1 SCC 366, the Hon'ble Supreme Court reiterated the view taken in the case of *Ramlal v. Rewa Coalfields Ltd.*, reported at AIR 1962 SC 361. The relevant para 7 reads as under:

“29. It has been pointed out by this Court in Ramlal, Motilal and Chhotelal v. Rewa Coalfields Ltd. AIR 1962 SC 361, as follows:

7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the

decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightly heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice.”

(Emphasis Supplied)

12. The Hon’ble Supreme Court in the case of **Ram Nath Sao v. Gobardhan Sao** reported at (2002) 3 SCC 195, while dealing with the expression “sufficient cause” within the meaning of Section 5 of the Limitation Act held that the explanation furnished would constitute “sufficient cause” or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting an explanation furnished for the delay caused in taking steps. It was further held that *‘While considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner’*.
13. Applying the law laid down by the Apex Court to the facts of the present case, we are unable to convince ourselves that this application is either bonafide or the illness of the father was such that it was impossible for the appellant/husband to approach his lawyer and file

the appeal alongwith an application seeking condonation of delay. Furthermore, in case the illness was of such a nature, it would be expected that the brother who is settled abroad would visit his parents to look after them.

14. We find no ground to condone the delay. Accordingly, the application is dismissed.
15. We may, however, note during the hearing of the cross appeal filed by the respondent/wife and we have carefully examined the judgment passed by the Family Court.
16. Learned counsel for the appellant/husband has submitted that he had sought a decree of divorce on the ground of cruelty for the reasons that the wife had left the matrimonial home without his consent. There was constant interference by his in laws. The respondent/wife has stayed in adultery. The allegation was made against him of being impotent and thus has caused mental cruelty to the appellant/husband. However, in the written statement, the respondent/wife has alleged that the appellant/husband was living in adultery.
17. We have asked learned counsel for the appellant/husband as to whether any evidence was led with regard to the respondent/wife having an affair with various persons as alleged. We have further asked learned counsel to point out the evidence with regard to interference by the in-laws of the respondent/ wife and other grounds which have been urged. None has been brought to our notice. We are of the view that even on the merits, there is no infirmity in the order passed by Family Court. Resultantly, the appeal is devoid of any merit and the same is dismissed.

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18. The impugned order dated 21.12.2016 passed by the Family Court has also been challenged by the appellant/wife. We may note that the Family Court while declining the relief so claimed by the respondent/husband for seeking the divorce on the ground of cruelty, an alternate relief of judicial separation has been granted to the husband.
19. The necessary facts to be noticed for the disposal of both the appeals are that the marriage between the parties was solemnized on 23.12.1995 at Noida, Uttar Pradesh as per Sikh rites. The parties were blessed with two sons out of their wedlock who were born on 13.09.1998 and 02.11.2003 and are residing with the appellant/wife. The parties were separated on 23.11.2007. The divorce petition on the ground of cruelty has been filed by the respondent/husband under Section 13 (1) (ia) of the Act on 10.08.2007.
20. Mr.Maninder Singh, learned counsel appearing for the appellant/wife submits that the impugned order is bad in law, suffers from various legal infirmities and the Family Court has completely ignored the settled position of the law that the alternate relief as provided under Section 13 (A) of the Act is to be used sparingly and only in case the ground of cruelty urged by the respondent/husband would stand proved.
21. Learned counsel for the appellant/wife has relied upon three judgments i.e. (i) ***Prabhakar S. Nikam v. Satyabhama P. Nikam***, reported at ***AIR 2008 Bombay 129 (Nagpur Bench)*** (ii) ***Smt. Swapna***

Chakrawarti v. Dr.Viplay Chakrawarti, reported at *AIR 1999 Madhya Pradesh 163* and (iii) *Manisha Sahay v. Sanjay Kumar Sinha*, reported at *2012 SCC OnLine Patna 626*.

22. In *Prabhakar S. Nikam (supra)* reliance has been placed upon para 4 which is reproduced below:

“4. The learned judge of the trial court found that the appellant had failed to prove cruelty as well as desertion. He, however, found that since the marriage has irretrievably broken, the appellant was entitled for a decree of divorce. Being aggrieved by that, the respondent preferred an appeal before the District Judge. The Additional District Judge, who heard the appeal set aside the judgment and decree passed by the Trial court and dismissed the application, in view of the fact that the trial court could not have passed the decree for divorce since it was found that the case for divorce was not made out and the appellant had failed to prove the cruelty as well as desertion.

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8.To decide the controversy it would be necessary to bear in mind the provisions of section 13-A of the Act, which reads as follows.

“13-A. Alternative relief in divorce proceedings.— In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except insofar as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of section 13, the Court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.”

This section cannot be interpreted to mean that the Court can or ought to grant a decree for judicial separation where it cannot or does not grant decree for divorce. If the section is interpreted in the way as suggested, every petition may either

end in a decree for divorce or judicial separation. There would be no occasion to dismiss the petition for divorce at all. The Legislature certainly did not intend to grant decree for judicial separation even where no ground for divorce was made out. Therefore, to my mind, the section has to be interpreted differently. What section envisages is that even where ground for divorce is made out, the Court may refuse decree for divorce and instead grant a decree for judicial separation. Therefore, essentially the appellant must first make out a ground for divorce and then the Court may exercise its discretion to grant decree for judicial separation or a decree for divorce. When no ground is at all made out, there could be no occasion to use the discretion. In the instant case, we have found that the finding on issue of desertion and cruelty has gone against the appellant/petitioner and that has assumed finality. There, therefore, exists no ground for divorce. Necessarily, therefore, the Court cannot exercise the discretion of granting decree for judicial separation. There is, therefore, no substance in the appeal. It is dismissed. No order as to costs.

(Emphasis Supplied)

23. In **Smt. Swapna Chakrawarti (supra)**, reliance has been placed on paras 7, 11, 12 and 16 which are reproduced below:

“7. Learned trial Court found that the allegations of cruelty by the appellant/non-applicant against the respondent/applicant have not been proved. It was also found that the respondent/ applicant was living in adultery with Mamta Dabalgaon. It was also held that there was no cohabitation between the parties for at least a period of two years, prior to the filing of the petition by the respondent/applicant. Therefore, though the learned trial Court refused to grant decree for divorce, but instead it granted a decree for judicial separation under Section 13A of the Hindu Marriage Act.

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11. As per Section 13-A of Hindu Marriage Act, if the petition is not founded on S.13(i), (ii), (vi) and (vii) thereof,

instead of granting a decree for dissolution of marriage by a decree of divorce, a decree for judicial separation may be passed. In the instant case, the pleading of the respondent/husband was mainly to the effect that the appellant/wife used to quarrel and insult, and she nursed unfounded suspicion against the respondent/husband and used to behave in an unbecoming manner, and had severed matrimonial relations with him. Thus, allegations against the appellant/wife were that she treated the respondent/husband with cruelty. It was also alleged that the appellant/wife has deserted the respondent/ husband for the past several years. Thus, on the grounds of cruelty and desertion the decree of divorce, as-above, was sought by the applicant/ respondent.

12. The learned trial Court, in the impugned-judgment, found on appreciation of evidence, that the allegations of cruelty were not proved against the appellant/wife. Moreover, it has also been found that the respondent/husband had developed illicit relations with Mamta Dabhalgaon and, in fact, he is living with her in a separate house and is thus leading a life of adultery. The above finding has not been challenged. A perusal of statement of the respondent/applicant Dr. Viplav Chakravarti (P.W. 1) would disclose that he has himself admitted that he has cordial relations with Mamta Dabhalgaon and is presently residing with her in the same house and separately from his wife, as would be clear from paras 17 and 18 of his statement. In view of the above admission and other evidence and material on record, as discussed by the trial Court, the finding as above of the trial Court that the applicant/ respondent was leading adulterous life and had illicit relations with Mamta Dabhalgaon is fully justified.

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17. The learned counsel for the plaintiff/ respondent has also tried to support the impugned-decree for judicial separation by urging that since the marriage between the parties has irretrievably broken, relief for judicial separation could be justifiably granted. However, even if there was irretrievable break-down of marriage, since the same was occasioned and

brought about by the plaintiff/respondent, and since no ground for granting relief under S.13 or 13-A of Hindu Marriage Act was made out, he was not entitled to get relief of judicial separation. Reference in this regard may be made to Reynold Rajamani v. Union of India,: AIR 1982 SC 1261, Smt. Nitu alias Asha v. Krishanlal, AIR 1990 Delhi 1 and Uma Shankar Joshi v. Smt. Rajeshwari, AIR 1991 Raj 149.

18. The learned lower Court, therefore, in the above facts and circumstances, was not justified in granting relief of judicial separation to the plaintiff/respondent. Accordingly, this appeal of the appellant/wife deserves to be allowed and consequently the cross-objection stands dismissed.”

(Emphasis Supplied)

24. In **Manisha Sahay (supra)**, reliance has been placed on paras 8, 9, 11,12 and 13 which are reproduced below:

“8. While discussing issue no. 7-as to whether applicant Sanjay Kumar Sinha was entitled to any relief claimed for, the learned Principal Judge gave a finding that the applicant had no cause of action for the suit and hence he was not entitled for any relief claimed for. Thereafter, the learned Principal Judge has observed that as per discussions in the earlier paragraphs of the judgment it has transpired that the applicant and the respondent have suspicion in their respective minds in respect of character of each other which has led to strained relationship. On the basis of that observation the learned court below came to the conclusion that “although the applicant Sanjay Kumar Sinha does not appear entitled to get any decree of divorce but applicant Sanjay Kumar Sinha appears entitled to get a decree of judicial separation because respondent Manisha Sahay has made false and frivolous allegations of torture at the hands of applicant Sanjay Kumar Sinha for demand of dowry”.

9. As already noticed, the appellant has challenged the correctness and legality of grant of a decree of judicial separation when as per findings given by the learned Principal

Judge himself the respondent husband was not entitled to get any decree of divorce. The appellant has also claimed for enhancing the amount of maintenance allowed at the rate of Rs. 3,000/- per month on the ground that at the relevant time the Family Court granted that amount on the basis of take home salary of Rs. 8000-9000 per month.

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11. So far as challenge to decree of judicial separation is concerned, the learned counsel for the appellant has submitted that there is no cross-appeal and the findings recorded by the Principal Judge against the respondent have attained finality. The findings do not justify grant of decree of divorce and only if the findings could justify a decree of divorce instead of awarding such a decree the court below could have awarded an alternative relief by way of a decree of judicial separation. It has been emphatically submitted that unless there could be a finding to justify decree of divorce, there can be no justification in granting a decree of judicial separation which is to be granted in lieu of the original relief for divorce only in exceptional and rare circumstances and for the ends of justice.

12. We have considered the aforesaid submission and finds sufficient merit in it. Once the court below answered the issue no. 3 against the husband and held that Manisha Sahay the appellant has not treated him with cruelty, it was not proper for the court below to observe that Manisha Sahay has made false and frivolous allegations of torture and only for granting decree of judicial separation. Even if Manisha Sahay did not live with the husband till 9.5.2004, as discussed by the learned lower court, that would not furnish strength to the case of the applicant husband. He had to succeed on the basis of his own case supported by evidence but as per findings, he failed to make out any case for divorce.

13. Law is clearly laid down in Section 13A of the Hindu Marriage Act that alternative relief in a divorce proceeding can be granted on some of the grounds mentioned in Sub-section (1) of Section 13 provided it is found just to do so instead of granting the relief claimed in a divorce proceeding. This power has to be exercised sparingly and rarely only to advance cause

of justice, such as when from the circumstances the court finds that the marriage has not broken down irretrievably and needs to be given a chance. This is one of the illustrations where the court may exercise power under Section 13A and instead of granting a decree of divorce as asked for, may decide to grant alternative relief by way of decree for judicial separation. It would be unjust and contrary to Section 13(1) to grant a decree of judicial separation in a case where the applicant has failed to make out any ground for grant of divorce. It is always to be kept in mind that decree of judicial separation relieves the beneficiary of such decree from the ordinary obligation to cohabit with the spouse. Such decree has great significance because under Section 13(1A) of the Hindu Marriage Act either of the party to a marriage is entitled to seek divorce on the ground that there has been no resumption of cohabitation between the parties for a period of one year or upwards after the passing of a decree for judicial separation. Hence, grant of a decree for judicial separation requires serious deliberations because its implications are serious.”

(Emphasis Supplied)

25. In short, the submission of learned counsel for the appellant/wife is that the Family Court was not justified in exercising its discretion under Section 13(A) of the Act, when the ground of cruelty for grant of decree of divorce was not made out.
26. We deem it appropriate to reproduce paras 30 to 33 of the impugned judgment dated 21.12.2016 wherein the Family Court has analyzed the submissions made by the parties and reached the conclusion that ground of cruelty is not made out.

“30. In this case the petitioner has alleged extra marital relationship of the respondent but has failed to substantiate his claim by placing on record substantial evidence to corroborate this fact. On one hand the petitioner has alleged that respondent used to stay/live at her parental home at Noida and he used to send his driver to pick up the children so that they

attend their school in Delhi at 7.30 AM. On the other hand, he has alleged that the respondent used to often come late night with different person at her matrimonial home. Both the above stands are contradictory and cannot stand together. He has not specified the specific dates, months and years when he found the respondent coming late night with several different persons to matrimonial home nor he has given specific details in this regards when alleging that he found the respondent in compromising position. It is not expected from a husband that once seeing his wife with a stranger that too at matrimonial home, in a compromising position, he would continue to live with the respondent without the conduct being objected to by the petitioner with the respondent at the outset and without eliciting apology for such conduct from the respondent. Such conduct may be condemned once by a magnanimous husband but it is not expected that breach in marital discipline will be allowed as a rule by the wronged spouse (here the petitioner if his version is believed). Such claim of the petitioner alleging indulgence in extra marital relations by the respondent that too in matrimonial home, is not believable. The petitioner has not led the evidence of his driver picking up the children from Noida or his neighbours who could have thrown light on this aspect whether the respondent in routine lived at her parental home at Noida or at matrimonial home in Delhi. Admittedly, the petitioner did not get the residential address changed in school record. Verbal intimation to any teacher of the child with regard to such change as testified in his cross-examination is of no help to the petitioner. The core of the petitioner's case is the conduct of the respondent on her sexual behaviour. The petitioner has failed to substantiate his claim in this regard.

31. Similarly, the respondent has also levelled allegations of adultery upon the petitioner with some divorced lady Vandana but has failed to produce any documentary evidence on record to prove her such allegations. No independent witness has been examined by either side. The petitioner has alleged that the respondent is residing at Noida with her kids at her parent's house but did not examine any neighbour to prove this fact.

Both the parties have failed to substantiate their respective claims with regards to adulterous relation against each other. The respondent has alleged that since suffering brain haemorrhage by her father in law, the petitioner has been living at Deepak Guest House. However, she has not led any evidence from the front office or house keeping department of the Guest House to substantiate her claim. She has also made a bald allegation with regard to Indulgence of the petitioner in extra marital relationship with Vandana. She has not filed any counter claim seeking divorce on ground of alleged cruelty by the petitioner as mentioned her written statement. She has also failed to substantiate her allegation of dowry demands, coughing out money by her father in sum of Rs. 1 Lac, Rs.50,000/- or giving consignment material worth Rs. 2 Lacs. She admits suffering from rheumatoid arthritis which seems to be a contributory factor for impacting sexual relationships of the couple but she has on her own not attributed any such thing to herself in this regard. However she has alleged extramarital relations of the petitioner with Vandana. The petitioner is paying the maintenance to the respondent. Although the couple is living in separation for several years but this is more a case of irretrievable break down of marriage which is not a ground for divorce u/s 13 (1) (ia).

32. It would be apt that the parties are allowed judicial separation u/s 10 of the Hindu Marriage Act. Section 10 of the Hindu Marriage Act is reproduced as hereunder:-

Judicial separation: [(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.]

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner

to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if considers it just and reasonable to do so".

33. *Section 13 (1) includes the ground of cruelty committed by the other spouse and the present petition has been filed on the ground of cruelty u/s 13(1) of Hindu Marriage Act.*

34. *It is noted that the respondent has leveled allegations of adultery against the petitioner by alleging that he has extramarital relationship with one Ms Vandana but she has not substantiated her such allegations without proof amounts to mental cruelty. However, in the case the petitioner has also leveled such allegations against the respondent but without any proof. As such, in the obtaining facts and circumstances, to give time for introspection and have space and independence to track their future marital life, petitioner at this stage deserves decree of judicial separation instead of decree of divorce on the ground of cruelty."*

27. Applying afore-mentioned law to the facts of the present case, we are of the considered view that the Family Court has misplaced its reliance by taking recourse to Section 13 (A) of the Act. As what the respondent/husband could not achieve directly, he cannot be allowed to achieve indirectly. The fall out of granting judicial separation by the Family Court has far reaching consequences which has been ignored by the Family Court. Furthermore, no judgment has been produced by the respondent/husband contrary to three judgments relied upon by the counsel for the appellant/wife.

28. Resultantly, the appeal is allowed. The order pertaining to grant of judicial separation is set aside.

G.S.SISTANI, J

JYOTI SINGH, J

NOVEMBER 27, 2018

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