

#16

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 07.05.2018

MAT.APP.(F.C.) 96/2018

S @ S

.....

Appellant

versus

C P

.....

Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Charan Singh, Advocate along with Appellant-in-person

For the Respondent : None

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE DEEPA SHARMA

J U D G M E N T

SIDDHARTH MRIDUL, J (ORAL)

CM APPL.18496/2018 (Delay in Refiling)

The present application under Section 5 of the Limitation Act, 1963 read with Section 151 of the Code of Civil Procedure, 1908 instituted on behalf of the applicant/appellant seeks condonation of delay of 19 days' in

refiling the accompanying appeal.

For the reasons stated in the application, which are duly supported by an affidavit, the application is allowed. The delay of 19 days in refiling the accompanying appeal is condoned.

The application is disposed of accordingly.

CM APPL.18495/2018 (Condonation of Delay)

The present application under Section 5 of the Limitation Act, 1963 read with Section 151 of the Code of Civil Procedure, 1908 instituted on behalf of the applicant/appellant seeks condonation of 34 days delay in filing the accompanying appeal.

For the reasons stated in the application, which are duly supported by an affidavit, the application is allowed. The delay of 34 days in filing the accompanying appeal is condoned.

The application is disposed of accordingly.

MAT.APP.(F.C.) 96/2018

1. The present appeal under Section 19(1) of the Family Courts Act, 1984 assails the judgment and order dated 07.02.2018, passed by the learned Family Court, East District, Karkardooma Courts, Delhi in H.A No.1437/2014, titled as 'C P vs. S @ S', whereby the respondent's

(hereinafter referred to as the 'husband') petition seeking divorce on the grounds of cruelty and desertion under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'said Act') was allowed and the marriage between the parties was dissolved.

2. On the pleadings of the parties, the learned Family Court struck the following issues:-

- “1. Whether the petitioner was treated with cruelty by the respondent after solemnization of the marriage? OPP
2. Whether the respondent has withdrawn from the society of the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition, without any reasonable cause? OPP
3. Relief.”

3. The husband deposed that at the time of marriage he was residing at A-50, New Ashok Nagar, New Delhi and was working as a property dealer in Delhi and NCR and that, after the marriage the appellant (hereinafter referred to as the 'wife') came to the matrimonial home at 163, Satha, District Bulandshahar, Uttar Pradesh which was the parental house of the husband (hereinafter referred to as 'the matrimonial home'). It was deposed that soon after the marriage, the wife went to her own parental home on 07.12.2008 and returned to the matrimonial home on or around 10.01.2009.

It was further deposed that she again went to her parental house on 03.03.2009 on the pretext of her first Holi celebrations and returned back on 07/08.04.2009. The wife is stated to have left for her parental home on 10.05.2009 when she was pregnant with the child of the parties and came back to her matrimonial home after 16.10.2009.

4. Furthermore, it was deposed on behalf of the husband that after the birth of their son, misunderstandings developed between the parties regarding their matrimonial residence. The husband desired that the wife should live with him at New Delhi but the latter refused to do so, on the pretext that the income of the husband was inadequate. The wife is also stated to have been uncomfortable at the matrimonial home and as a consequence thereof, went back to her parental home on 22/23.08.2009 for *Raksha Bandhan* and came back to the matrimonial home after *Bhaiya Dooj* festival on 07.11.2010 despite repeated calls by the husband. It was deposed that the wife had become short tempered and had started quarrelling frequently with the husband and his family members. She further insisted that the husband should purchase a two room flat in New Delhi as a pre-condition for her to live with him. It has been deposed that the wife went to her parental home on 24/25.12.2010 and came back in second week of

January, 2011. It has been further deposed that the wife again left her matrimonial home on 12.04.2011 after quarrelling with the husband and his parents and using abusive language. It has been deposed that despite repeated entreaties and efforts, the husband had been unable to persuade the wife to reside with him in New Delhi. It is also deposed that the wife joined the husband at the residence of the latter at New Delhi, ultimately in November, 2011 but could not adjust there and was escorted to the matrimonial home on 03.12.2011. On the very next day i.e. 04.12.2011, the wife on the pretext of appearing in some examination went to her parental home at Noida, along with her husband and has not returned to the matrimonial home since then. It was lastly deposed that on 10.12.2011 at about 11.00 a.m., the husband along with his parents and friends went to the house of the wife where they were insulted and abused and blatantly told by his wife's brothers that she would not return to live with him. Similar attempts persuading the wife to join the society of the husband were also made on behalf of the husband on subsequent occasions, but in vain.

5. It was testified on behalf of the husband that he instituted a petition for restitution of conjugal rights under Section 9 of the said Act [Suit No.994/2012] on 02.07.2012 at Bulandshahar, Uttar Pradesh but during the

course of that proceedings, the parties arrived at a settlement and agreed to institute a petition for divorce by mutual consent. It is further testified that subsequently, the wife refused to sign the petition and as a counterblast, instituted a complaint against him before the Women Commission. It was, therefore, urged on behalf of the husband that since the wife has been living separately from the husband since 04.12.2011 and no cohabitation has taken place between them, owing to the acts of the cruelty on behalf of the wife, the marriage be dissolved, in accordance with law.

6. On the other hand, it was deposed on behalf of the wife that during her stay at the matrimonial home from March, 2009 to April, 2009, the husband, as well as, his family members repeatedly taunted her for bringing insufficient dowry and neglected to look after her at every stage of her married life including, when she became pregnant. It was deposed that in April, 2009, the wife came to know that the husband was having an affair with one Ms. Deepa, who is a resident of Bulandshahar and that photographs of Ms. Deepa were seen on the mobile phone of the husband. It was testified that the parents of the husband had clearly informed the wife that Ms. Deepa is their daughter-in-law. It was deposed that on every festival, the husband, as well as, his family members harassed and beat her for not bringing dowry

as per their demands. It was also deposed that the wife remained at her parental house from 07.11.2010 to 13.01.2011 and returned to live with her husband at her matrimonial home on 14.01.2011. It was deposed that during the period April, 2011 to July, 2011 she stayed at her parents' house with the permission of her husband in a routine manner. It was testified that on 10.12.2011 when she was accompanied by her father and brother at the residence of the husband in New Delhi on the request of the parents of her husband, they saw the latter having tea with Ms. Deepa and that they told her parents and family members that Ms. Deepa would continue to reside with the husband in New Delhi and that the wife was at liberty to live with the parents of the husband at the matrimonial home in Bulandshahar.

7. Having perused the pleadings and the evidence produced on behalf of the parties and having heard learned counsel on their behalf, the issue No.1 was decided in favour of the husband in the following manner:-

- “25. Coming to the facts of this case, the petitioner makes following allegations against the respondent which as per the petitioner constitute cruelty on him:-
- (a) The marriage between the petitioner and the respondent took place on 29.11.2008. On 07.12.2008, the respondent went to her parental house and came back to her matrimonial home only on 10.01.2009. Thereafter again the respondent went to her parental house on 30.03.2009 for *Holi* festival and came back on 7/8.04.2009. She again went to her parental home on 10.05.2009 as she

was pregnant and came back on 16.10.2009. Thereafter she went to her parental home on 22/23.08.2010 and came back in second week of January 2011. She again left the matrimonial home on 12.04.2011. She came back on 04.07.2011. On 04.12.2011 the respondent went to her parental home finally under pretext of giving an exam and then she did not come back.

- (b) The petitioner desired the respondent to live with him at Delhi but the respondent was not willing to shift to Delhi on the pretext that the income of the petitioner was not sufficient to maintain her and thus the respondent preferred to remain at Bulandshahar with his parents. The respondent insisted that the petitioner should buy a two room flat or a house at Delhi, which the petitioner was not able to do. The respondent was not taking care of the relatives of the petitioner. The respondent became very short tempered and used to pick quarrels on petty issues and when the petitioner tried to reason with her, she would become violent.
- (c) On 10.12.2011 at about 11 AM, the petitioner along with his parents and a friend went to the house of the respondent. The mother and the brothers of the respondent refused to sent her with them. The petitioner was beaten by the brothers of the respondent and other persons were abused.
- (d) The petitioner filed a petition under section 9 of the Hindu Marriage Act for restitution of conjugal rights at Bulandshahar. Even then the respondent did not join the matrimonial home and in her reply made baseless allegations against the petitioner.
- (e) Allegations of adultery and demand of dowry made by the respondent in her written statement in this case and in the reply to the petition for restitution of conjugal rights constitute cruelty. The petitioner also refers to the conduct of the respondent in making phone calls to various relatives of the petitioner during the pendency of this petition and making surreptitious recordings of these private phone conversations and filing the same in this

court. It is argued that these acts also constitute cruelty.

26. Insofar as, allegation (a) is concerned, the respondent has not disputed that she had gone to her parental home for the periods as stated by the petitioner in the petition. However, I am of the opinion that these acts do not disclose cruelty on the part of the respondent. These visits appear to be normal visits by a girl who has recently got married.
27. Insofar as allegation (b) and (c) are concerned, the allegations are vague. The respondent has denied these allegations. No other person who had allegedly accompanied the petitioner on 10.12.2011 has been examined as a witness. These allegations are not proved.
28. As far as allegations (d) and (e) are concerned, the material on record shows that the petitioner herein had earlier filed a petition under Section 9 of the Hindu Marriage Act at Bulandshahar being Marriage Petition No.999/12 (Ex.PW1/2). In the reply filed by the respondent, she alleged that she was taunted by the petitioner and his family members for bringing less dowry and for not being a beautiful girl. She also alleged that the petitioner and his family members wanted a plot at Noida from her parents. She also alleged that it was the petitioner who had left her with his parents at Bulandshahar while he is residing with one Deepa at Ashok Nagar, Delhi. The respondent stated that she could not reside with the petitioner as the petitioner was residing with Deepa at Delhi. That petition under section 9 of The Hindu Marriage Act got dismissed in default and around the same time present petition for divorce came to be filed by the petitioner.
29. The respondent in her reply to this petition has again stated that she is not able to live with the petitioner as he is living with Deepa. She has alleged that it was in the month of April 2009 that she came to know that the petitioner is having an affair with Deepa. It is stated that one day, the respondent checked the mobile phone of the petitioner and at that time she saw some

photographs of Deepa in the mobile phone of the petitioner. On the photographs was dated 17.10.2008 which was the day of *karva chouth* festival. On the asking of the respondent, the parents of the petitioner told the respondent that Deepa is their daughter in law. In para 20 of her written statement, it is also stated that on 10.12.2011, the parents of the petitioner asked the respondent, her brother and parents to come to A-50, New Ashok Nagar, Delhi where the petitioner was residing and when these persons reached that house, they saw that parents of the petitioner were having tea with Deepa. The petitioner was also sitting there. On seeing the respondent and her family members, Deepa ran away. At that time the parents of the petitioner told the respondent and her family members that Deepa will reside with the petitioner at all costs and asked the respondent to reside with them at Bulandshahar if she can adjust to such a situation and they also repeated their old demand of plot in Noida. She has made the same allegations in her affidavit filed by way of evidence. In her cross examination, the respondent stated as follows:-

“the primary cause of dispute between me and my husband are as follows:

Firstly despite my wanting, my husband was not keeping me with him, secondly my husband was actually living with one Ms. Deepa in a live-in-relationship and thirdly my husband was not at all caring for me and my child.”

- 30 No such allegations were made by the respondent in her reply to the petition for restitution of conjugal rights though it was stated without any further particulars that the petitioner was residing in live-in-relationship with Deepa at Ashok Nagar, Delhi.
31. The petitioner has denied that he was in relationship with Deepa.
32. The respondent has made allegations of adultery and illicit relationship of the petitioner outside the matrimonial bond between the parties. She has also alleged that even the parents of the petitioner are

supporting him in this extramarital relationship. The petitioner was required to establish these allegations or at least show that these allegations were based on some tangible material.

33. Apart from the self serving oral statement of the respondent, there is no evidence to substantiate that the petitioner is residing or had elicited relationship with Deepa. Petitioner in his statement has denied any such relationship. I am of the opinion that the statement of the respondent by way of evidence cannot be accepted on its face value. During cross examination, the respondent refused to answer the question as to how many of her brothers and sisters are married? She refused to answer that question even after being told that her refusal to answer the question in cross examination can be read adversely against her. During further cross examination she refused to show the mobile phone which she was carrying at that time on the ground that the said phone belongs to her brother. She denied the suggestion that she did not want to show her mobile phone as she was using an i-phone and thus she did not want her husband or the court to see her mobile phone. Such a conduct on the part of a witness does not speak very highly about her and statement of such a witness cannot be taken as a gospel truth.
34. The respondent has also filed a couple of print-outs from the 'Facebook' page of the petitioner (Mark-RW1/E). She has also filed certain recorded telephone conversations in two CDs (Mark A to D) with transcripts.
35. Learned counsel for the petitioner has raised objections to reading of printouts of Facebook page of the petitioner and transcripts of telephonic conversations in the CDs. It is contended that these alleged pieces of evidence cannot be looked into as provisions of section 65B of Indian Evidence Act have not been complied with. It is also contended that these relatives have not been summoned as witnesses in this case and the petitioner did not have an opportunity to cross examine these persons or seek explanation about the intention

and meaning of statements made here or there during these alleged telephonic conversations. He has also contended that such surreptitious recordings of telephone conversations violate right of privacy of the relatives of the petitioner and thus cannot be considered as legally admissible pieces of evidence. In that regard he referred to the judgment of the Hon'ble Andhra Pradesh High Court reported as Rayala M. Bhuvaneshwari v. Nagaphanender Rayala [II (2008) DMC 327].

36. Judgment in Rayala M. Bhuvaneshari (supra) though under Hindu Marriage Act was not in the context of a family court. Section 14 of Family Courts Act, 1984 stipulates that a Family Court may receive as evidence any report, statement, document, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would otherwise relevant or admissible under the Indian Evidence Act. Having regard to the wide discretion conferred on this court under section of 14 of Family Courts Act, I am of the opinion that this court can examine the printouts from the Facebook page of the petitioner and CDs filed by the respondent in this court.
37. After going through the printouts from the Facebook (Mark-RW1/E), I am of the opinion that they are of no help to the respondent. The printouts of Facebook only show that one Deepa is acquainted with the petitioner but there is no indication of any objectionable relationship between them in these printouts or an indication that she is living with the petitioner.
38. The CDs (Mark A to D) in issue are stated to contain recordings of four telephonic conversations. One telephonic conversation is between the respondent and a cousin brother of the petitioner. The second telephonic conversation is between the respondent and a cousin sister of the petitioner. The third telephonic conversation is between the respondent and another cousin sister of the petitioner. The fourth telephonic conversation is between the respondent and an aunt

(Bua) of the petitioner. These conversations are stated to have been recorded during February/March-2015 i.e. during pendency of the present petition by the respondent. All these telephone calls were made by the respondent to those relatives of the petitioner. From the tenor of the calls, it is apparent that those relatives are not aware that the calls are being recorded. The respondent has also filed transcripts of these conversations with portions relied by her duly highlighted.

39. On a careful reading of the transcripts in totality, to my mind, it appears that the relatives of the petitioner are reluctant to discuss anything about the dispute between the respondent and her husband which is essentially their own private matrimonial dispute. Reading of the portions highlighted by the respondent in the transcripts show that the relatives of the petitioner do not share the belief of the respondent that the petitioner is in relationship with Deepa. At best, the transcript would show that at some earlier point of time, the petitioner had some acquaintance with that woman. It must be noted that these relatives have not deposed before this court. To my mind, the transcripts do not show that the petitioner is having illicit relationship with Deepa or is in live/in-relationship with Deepa after marriage.
40. Thus it must be held that the respondent has not been able to substantiate allegations of extra-marital relations made by her against the petitioner. Moreover, I am in agreement with the contention on behalf of the petitioner that these acts of surreptitious recordings of private telephonic conversations with relatives of the petitioner and then filing them in this court would have adversely affected the relationship of the petitioner and his family with their relatives. I am of the opinion that these acts of the respondent of making surreptitious recordings of telephonic conversations and filing the same in this court is also an act of cruelty on the part of the respondent.
41. The respondent has also made allegations of demand of dowry namely a plot at Noida against the petitioner

and his family members. Again, other than the oral deposition of the respondent and her complaint to the police which led to registration of FIR there is nothing to substantiate this allegation of the respondent. Response of the respondent to the question about primary causes of disputes between her and the petitioner has been reproduced above and that did not include demand of dowry. The complaint that led to registration of FIR against the petitioner was filed in the year 2014 by the respondent. Telephonic conversations in the CDs do not refer to any such demand. I am of the opinion that it is not established that there was demand of dowry on the part of the petitioner or his parents.

42. Above discussion would show that the respondent did not positively respond to the offer of the petitioner for resumption of cohabitation through the petition for restitution of conjugal rights. All through she has been making allegations of adultery and extra marital live-in-relationship against the petitioner with one Deepa. She has also alleged that even the parents of the petitioner were supporting the petitioner in continuing his relationship with Deepa. These allegations are not substantiated. The respondent has also made allegations of demand of dowry against the petitioner and his parents which are again not substantiated by evidence. The respondent made surreptitious recordings of private telephonic conversations with relatives of the petitioner who otherwise had no concern with this case and then filed those recordings in this court. These recordings also do not advance the case of the respondent.
43. The conduct of the respondent throughout this legal proceeding has been an attempt to impeach the character of the petitioner. The respondent is an educated girl i.e. a graduate. In her cross examination she admitted that she has now also passed one out of two tests of Central Teacher Eligibility Test (CTET). The allegations were not made by her in sudden outburst but after careful consideration and she persisted throughout with these allegations. I am of

the opinion that the conduct of the respondent, seen in totality, has been such that no reasonable person with ordinary prudence would tolerate it. I am of the opinion that the petitioner cannot now reasonably be expected to live with the respondent. Systematic impeachment of character of the petitioner by the respondent in this court cannot be considered as an ordinary wear and tear of normal married life.

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47. In view of above, I am of the opinion that the petitioner has been able to show that the conduct of the respondent has been such that the (the petitioner) cannot reasonably be expected to put up with it. The conduct of the respondent taken cumulatively falls within the parameters of the cruelty under section 13(1) (i-a) of The Hindu Marriage Act, 1955. Issue No.1 is thus decided in favour of the petitioner and against the respondent.

8. A perusal of the above extracted paragraphs would show that the wife has not been able to substantiate the allegations of extra-marital relations, alleged by her, against her husband. It is further observed that the allegations of demand of dowry against the husband, as well as, his parents have not been substantiated by giving any cogent evidence either.

9. In view of the foregoing, whilst relying on the decisions of this Court in **Mahendra Kumar Sharma vs. Sunita Sharma**, reported as **1 (2005) DMC 325 (Delhi)** it was held by the learned Family Court that the husband

has been able to show that the conduct of the wife has been such that the former cannot reasonably be expected to put up with it and the said conduct of the wife taken cumulatively, falls within the parameters of ‘cruelty’ under section 13(1)(ia) of the said Act.

10. It is trite to state that making unsubstantiated allegations of adultery against the spouse in the pleadings amounts to causing mental cruelty to the other spouse. [Ref: K. Srinivas Rao vs. D.A. Deepa, reported as (2013) 5 SCC 226 and Dr. (Mrs.) Malathi Ravi vs. Dr. B.V. Ravi, reported as (2010) DMC 451 (SC)].

11. In view of the foregoing, it is observed that the husband was entitled to dissolution of marriage on the grounds of cruelty alone, however, in relation to the issue of desertion and as to whether the wife had withdrawn from the society of the husband for a continuous period of not less than two years, immediately preceding the presentation of the petition without reasonable cause is concerned, the learned Family Court held as follows:-

“51. There is no dispute that the petitioner and the respondent are residing separately since 04.12.2011. Thus factum of separation is not a dispute. The petitioner made efforts to resume cohabitation by filing a petition for restitution of conjugal rights but the respondent did not reciprocate that offer. Instead she filed a reply seeking dismissal of petition on the ground that the petitioner was living with another woman and there was demand of dowry by the petitioner and his family. I have held above that the

respondent has failed to substantiate these allegations. The respondent has thus failed to show that she left the company of petitioner for a justifiable cause. This also shows animus deserendi on the part of the respondent. The present petition was filed on 15.07.2014. By that time the period of desertion for two years by the respondent was complete.

52. In the facts of this case it must also be held that the respondent has deserted the petitioner for a period of two years preceding to the filing of this petition.”

12. Having observed as above, the learned Family Court by way of the impugned order, allowed the petition instituted on behalf of the husband and granted the decree of dissolution of the marriage between the parties on the ground of cruelty and desertion.

13. On behalf of the wife, the allegations against the husband have been reiterated before this Court. It is vehemently urged that, the conduct of the latter in cohabiting with Ms. Deepa was a ground enough to disentitle him from a decree of divorce. In this behalf, our attention is sought to be invited to the CDs produced on behalf of the wife before the learned Family Court. Upon a careful reading of the transcripts of the CDs produced in evidence, it was observed by the learned Family Court as follows:-

“39. On a careful reading of the transcripts in totality, to my mind, it appears that the relatives of the petitioner are reluctant to discuss anything about the dispute between the respondent and her husband which is essentially their own private matrimonial dispute. Reading of the portions highlighted by the respondent

in the transcripts show that the relatives of the petitioner do not share the belief of the respondent that the petitioner is in relationship with Deepa. At best, the transcript would show that at some earlier point of time, the petitioner had some acquaintance with that woman. It must be noted that these relatives have not deposed before this Court. To my mind, the transcripts do not show that the petitioner is having illicit relationship with Deepa or is in live-in-relationship with Deepa after marriage.”

14. It is in this view of the matter, that the decision in Chetan Dass vs. Kamla Devi, reported as AIR 2001 SC 1709 as canvassed on behalf of the wife does not come to her aid, inasmuch as, neither was she able to establish by cogent and convincing evidence, the adulterous conduct of her husband nor did she chose to examine any other witnesses so to do.

15. It was also urged by the learned counsel appearing on behalf of the wife that they be provided an opportunity to produce further additional evidence to establish their allegations of the adulterous conduct of the husband. It is further not clarified whether such material was available to the wife at the time of the proceeding before the Family Court or whether this material has come to their knowledge subsequent thereon.

16. Be that as it may, having heard learned counsel appearing on behalf of the wife and carefully considering the impugned judgment and order, as well as, the material on record, we are in agreement with the finding and

conclusion arrived at by the learned Family Court in the impugned order and see no reason to interfere with the same in the present appeal.

17. The appeal is accordingly dismissed.

18. No costs.

**SIDDHARTH MRIDUL
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

MAY 07, 2018
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