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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 08.03.2018

MAT.APP.(F.C.) 169/2016

R

..... Appellant

versus

B @ H B

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Ashok Gurnani, Advocate

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)

1. The present appeal under Section 19 of the Family Courts Act, 1984 assails the judgment and decree dated 24.09.2016, rendered by the learned Family Court in HMA No.561839/2016 (Old No.609/2014) titled as '*Smt. R vs. Sh. B @ H B*' (hereinafter referred to as 'subject petition'), whereby, the petition filed by the appellant-wife (hereinafter referred to as 'the wife')

came to be dismissed.

2. The wife had instituted the subject petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the said Act') against the respondent-husband (hereinafter referred to as 'the husband'), seeking dissolution of the marriage by a decree of divorce essentially on the ground of cruelty.

3. It was averred on behalf of the wife before the learned Family Court that the marriage between the parties was solemnized at Delhi on 17.04.2002, as per Hindu rites and customs. Subsequent thereto, one female child, namely, baby A was born from the wedlock on 19.07.2006. Further, that soon after the marriage, the husband and his family members started taunting her for having brought less and sub-standard dowry and inflicted physical and mental torture on her. Every conceivable torment was inflicted on her, in order to coerce and compel her to bring more dowry.

4. The wife in order to maintain peace and protect the marriage between the parties, bore this torture with equanimity in the hope that better sense would prevail in due course of time. All the hopes and expectations of the wife were belied and crushed and her quest for happiness was in vain because when she conceived and was pregnant, the husband and his family

neglected to provide her with food, medicines and diet, as were necessary. Medical attention was also denied to her and eventually she had to rely on her family members for all her requirements, including pre and post delivery expenses.

5. To compound matters, on the birth of the said minor child, the husband and his family members berated the wife for not having delivered a male child, and refused to provide any sustenance to both of them. To make matters worse, it was testified that in the month of January, 2008, her husband and his family members demanded a sum of Rs.50,000/- from her family, and despite her mother's inability to disburse such an amount; in order to secure the well-being of the wife and her minor daughter, a sum of Rs.50,000/- was given to the husband. Not satisfied with this amount, it was categorically asseverated that on 21.08.2009, the wife was physically assaulted and threatened to sign some blank papers, ostensibly for taking a loan, and when she refused to sign the same the husband placed a knife on her neck to obtain her signatures. It was further testified on behalf of the wife that she made a call to the Police Control Room, and the police arrived and pacified the parties; but soon after she and her minor daughter were turned out of her matrimonial home in just the clothes they were wearing on

their person. The dowry articles and istridhan of the wife were illegally retained and withheld by the husband and his family members and have never been returned. The wife and her minor daughter have been residing at her parental home from 21.08.2009, and the husband has made no attempts to take her back to the matrimonial home.

6. Helpless and abandoned, the wife in the month of November, 2010 eventually filed a petition under Section 125 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') against the husband, seeking maintenance from the latter. In addition thereto, the wife also instituted a petition under Section 13 (1) (ia) of the said Act, seeking a decree of divorce, dissolving the marriage between the parties. During the latter proceedings, a compromise was arrived at between the parties, whereby, it was agreed that a petition seeking decree of divorce by mutual consent would be filed. In terms of the compromise arrived at between parties, the wife withdrew the earlier petition seeking maintenance under Section 125 Cr.P.C., as well as, the said petition seeking divorce on the same day.

7. Although, a joint petition is stated to have been filed before the court of competent jurisdiction on 05.12.2013, under Section 13B (1) of the said Act for a decree of divorce by mutual consent; the same was eventually

withdrawn on account of the circumstance that the husband stopped appearing before the Court despite several opportunities.

8. Aggrieved by the acts of physical and mental cruelty and neglect inflicted by the husband, the wife instituted the subject petition under Section 13(1)(ia) of the said Act, seeking the relief of dissolution of marriage by a decree of divorce essentially on the ground of cruelty.

9. Despite service of notice of the said subject petition through publication, the husband did not appear in court and was eventually proceeded *ex parte* on 14.05.2015. It is observed that in the present appeal as well there has been no appearance on behalf of the husband despite service of notice through publication, and this Court proceeded *ex parte* against him vide order dated 31.08.2017.

10. Mr. Ashok Gurnani, learned counsel appearing on behalf of the wife has taken us through the material on record, as well as, the impugned judgment. It is urged on behalf of the wife that not only is she entitled to a decree of divorce on the grounds of extreme cruelty and desertion; but is independently entitled to the same in view of complete and irretrievable breakdown of the marriage, as is evidenced from the circumstance that the parties have not resided together since 21.08.2009.

11. A perusal of the impugned judgment reflects that the learned Family Court was of the opinion that the testimony of the wife was a bald narrative, unsubstantiated by necessary evidence. Further, the impugned judgment was predicated on the circumstance that no incident of physical or mental cruelty had been pleaded by her. It was lastly opined that in view of the circumstance that the wife did not institute any proceeding for restitution of conjugal rights since the date of being turned out from her matrimonial home, *“what blatantly comes to the fore is that the petitioner intended a permanent and willful forsaking of the respondent and all her obligations and duties qua him arising out of the matrimony.”*

12. We are completely unable to concur with the reasoning and finding arrived at by the learned Family Court. Although, it is trite to state that the wife’s case must stand on his own legs; the uncontroverted averments made on her behalf in her pleadings and her testimony before the learned Family Court, leaves no manner of doubt that the husband has completely forsaken her.

13. The law stipulates that the appellant need not prove a fact which is not categorically traversed on behalf of the respondent. The rule of procedure requires pronouncement of judgment or decree on the failure of the

respondent to file a written statement to controvert and refute the averments made on behalf appellant. In the present case, the husband despite service of notice by publication before the learned Family Court, as well as, this Court, has chosen not to appear and defend himself and has resultantly been proceeded *ex parte* on both the occasions.

14. The conduct of the husband, as is evidenced from the uncontroverted testimony of the wife, is tantamount to causing danger to the life, limb and health of the latter, and gives rise to the reasonable apprehension of physical and mental danger and trauma.

15. Further, the parties in the present proceedings have been living separately without any contact whatsoever since the year 2009, and the wife has been left to her own devices to fend for herself, as well as, her minor daughter. The apathy and the conduct of the husband cannot but be characterized as having caused intense mental cruelty to the wife. Furthermore, as has been urged with utmost erudition by Mr. Ashok Gurnani, learned counsel appearing on behalf of the wife, that although breakdown of marriage is not a ground for divorce, the concept of cruelty has been blended by the Courts with irretrievable breakdown of marriage. In support of his submission in this behalf, our attention has been invited to

the following decisions:-

- (i) **Madhvi Ramesh Dudani v. Ramesh K. Dudani**, reported as **2006 (2) Mh. LJ 307**;
- (ii) **Shrikumar V. Unnithan vs. Manju K. Nair**, reported as **2007 (4) KHC 807**.

16. In view of the foregoing discussion, we are of the considered view that; it is not possible for the wife and the husband to retain the matrimonial bond, which is a relevant factor to determine the issue of cruelty, for the obvious reason that the continuance of the marriage by the parties is the pursuit of happiness and not to torment or traumatize each other. In these circumstances, to insist upon the wife to retain the matrimonial bond would tantamount to putting her under intense mental cruelty.

17. We are also constrained to observe that a reading of the impugned judgment discloses a rather hyper technical approach on the part of the learned Family Court, both in relation to appreciation of evidence and understanding of the circumstances antecedent and attendant in the present case. The same in our considered view has lead to complete miscarriage of justice.

18. Resultantly, the impugned judgment and decree dated 24.09.2016,

passed by the learned Family Court in HMA Petition No.561839/16 (Old No.609/14) titled as 'Smt. R vs. Sh. B @ H B', is set aside and quashed. The present appeal instituted by the wife against the husband seeking dissolution of marriage, is hereby allowed. A decree of divorce be drawn forthwith.

19. With the above directions, the appeal is allowed and disposed of accordingly.

**SIDDHARTH MRIDUL
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

MARCH 08, 2018

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