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

Judgment pronounced on : 26th July, 2018

+ **MAT APP. (FC) 14/2018**

TANUJ ARORA

.....Appellant

Through: Mr. M. L. Kasturi, Advocate.

Versus

PRIYA @ PATRICIA HERRERA

.....Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J. (Oral)

1. Present appeal under Section 19 (i) of the Family Courts Act, 1984 has been filed by the appellant/husband assailing the judgment and decree dated 27.09.2017 passed by the Judge, Family Court, Rohini, Delhi dismissing the petition filed by the appellant seeking decree of divorce against the respondent/wife under Section 13 (1) (ia) & (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act').
2. The facts giving rise to the present appeal as narrated by the appellant are that the appellant/husband met the respondent/wife for the first time in USA; that parties decided to get married and upon returning to India, the respondent/wife converted herself to Hinduism through a Conversion Certificate issued on 15.10.2009

by Arya Samaj Sultan Bazar, Hyderabad; that the marriage between the parties was solemnized on 17.10.2009 at Arya Samaj Temple, Sultan Bazar, Hyderabad according to Hindu Rites & Ceremonies; that no issue was born out of the wedlock of both the parties; that after marriage, respondent/wife expressed her desire to go to Mexico and despite unwillingness of the appellant/husband, finally on 24.10.2012, the respondent/wife left for Mexico on the pretext of meeting her parents and failed to return to India despite repeated requests and calls made by the appellant/husband; that the appellant/husband being left with no other option, chose to file a divorce petition against the respondent/wife after two years of desertion.

3. Learned Counsel for the appellant/husband submitted that the Trial Court failed to consider and appreciate the proved cumulative instances of mental cruelty and held that each by itself would not entitle the appellant/husband to a decree of divorce and the said approach is erroneous and contrary to law. It is also submitted that mental cruelty was clearly established and in any event the marriage has broken down irretrievably, on that score alone the decree for divorce should have been granted in favour of the appellant/husband. Learned counsel further submitted that the respondent/wife left for Mexico on 24.10.2012 and failed to return and join the company of the appellant/husband despite repeated requests and calls which entitle the appellant/husband for grant of divorce on the ground of desertion as provided under Section 13(1) (i)(ib) of HMA.

4. We have heard learned counsel for the appellant/husband and perused the material available on record.
5. On 24.01.2018, notice was directed to be issued to the respondent/wife through all modes including e-mail, returnable on 05.07.2018. On 05.07.2018, the Court was informed that notice has been served upon the respondent/wife through e-mail dated 04.04.2018 on her e-mail ID at chesterchettos1985@hotmail.com but she failed to appear or represented through counsel before this Court.
6. It is not in dispute that the parties were married as per the Hindu rites and ceremonies. No issue was born out of this wedlock. The appellant/husband and the respondent/wife lived together as husband and wife for a period of three years and thereafter they started living separately when the respondent/wife left the company of the appellant/husband. The appellant/husband made several requests to respondent/wife calling upon her to resume her matrimonial life but she refused to cohabit.
7. The appellant/husband filed a petition seeking divorce on the ground of desertion as well as cruelty. The word 'Cruelty' is not defined in the Hindu Marriage Act. It has been used in Section 13(1)(i-a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. In **A. Jayachandra Vs. Aneel Kaur** reported in **AIR (2005) SC 534**,

the Apex Court has described the expression 'Cruelty' and observed that :

10. The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

11. The expression 'cruelty' has been used in relation to human conduct or human behavior. It is the conduct in

relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

12. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely

essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

13. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

8. In the instant case, the respondent/wife failed to appear before the Trial Court despite service and proceeded *ex-parte*. The appellant/husband examined himself as PW-1 and tendered his evidence by way of affidavit which remains un rebutted. From the material placed before us, it is clear and evident that the allegations made against the respondent/wife are general in nature and not a single specific incident of cruelty by the respondent/wife has been ascribed. Hence, we have no hesitation in concluding that the Family Court has rightly held that the appellant/husband failed to

narrate any occasion which can be brought within the ambit of the term 'Cruelty'.

9. In the present appeal as well, the respondent/wife was served through e-mail on 04.04.2018 but she failed to appear. The appellant/husband filed an affidavit to this effect wherein he has stated on oath that the copy of petition was forwarded to the respondent/wife on her e-mail address at chesterchettos1985@hotmail.com which was duly responded by her. Copy of reply dated 11.05.2018 by respondent/wife wherein she has stated that '*I acknowledge all this process in I agree.*', has also been annexed along with the affidavit.
10. While challenging the order passed by the Family Court, North-west, Rohini, Delhi, the present appeal has been filed on the ground that the marriage between the parties was to be dissolved as the respondent/wife deserted the appellant for a continuous period of two years and has placed reliance on Sub-section (1) of Section 13 of the HMA which lays down the grounds on which a marriage may be dissolved by a decree of divorce. This sub-section has several clauses wherein clause (i-a) cruelty and clause (i-b) which deals with desertion for a continuous period of not less than two years immediately preceding the presentation of the petition, are grounds for granting a decree of divorce.
11. In ***Savitri Pandey vs. Prem Chandra Pandey*** reported in (2002) 2 SCC 73, the Apex Court had described the word 'Desertion', which reads as under :

"Desertion, for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words, it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. If a spouse abandons the other in a state of temporary passions for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion."

12. In the instant case, respondent/wife was served through e-mail on 04.04.2018 but she choose not to appear in Court and sent an e-mail giving her no objection to the pending legal proceedings. It is evident from the material placed on record that respondent/wife left her matrimonial home on 24.10.2012 and abandoned her interest in keeping alive the matrimonial relationship. The conduct of the respondent/wife does not show that any effort was ever made by her to join the matrimonial home with the appellant/husband in India.

13. Keeping in view the entire facts and circumstances of the present case and the material placed before us, we are of the considered view that the appellant/husband has been able to establish that parties had been living separately since 24.10.2012 and the respondent/wife has no intention of resuming cohabitation, therefore, we find it a fit case for grant of decree of divorce on the ground of desertion.
14. Resultantly, the appeal stands allowed. The petitioner is entitled to divorce on the ground as laid down under Section 13(1) (ib) of the Hindu Marriage Act, 1955. The order of the trial Court stands set aside.

SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J.

JULY 26, 2018/ gr