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

% *Date of Judgment: 24.04.2019*

+ **MAT.APP(F.C.) 234/2018**

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..... Appellant

Through: Ms. Jyoti Sharma and Mr. Devdas,
Advocates

versus

R K S

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

CM APPL 38285/2018

1. For the reasons stated in the application, the same is allowed and the delay of 190 days in filing the appeal is condoned.
2. The application stands disposed of.

MAT.APP(F.C.) 234/2018

3. The present appeal has been filed by the appellant/wife assailing the judgement of the Family Court dated 29.01.2018 whereby the petition filed by the appellant/wife under section 13 (i) (ia) and (ib) of Hindu Marriage Act (hereinafter referred to as 'HMA') has been dismissed by the Family Court.
4. Brief facts necessary for adjudication of the present appeal are that the marriage between the parties were solemnized on 26.03.2007 in Arya

Samaj Mandir against the wishes of the father of the appellant/wife. Infact, it was a love marriage. After the marriage, the parties cohabited and a son namely Adhayayan was born out of the said wedlock on 18.06.2009.

5. Disputes and differences having arisen between the parties, the appellant/wife filed a petition under Section 13(1)(ia) and (ib) of HMA seeking dissolution of the marriage by passing a decree of divorce on the grounds of 'cruelty' and 'desertion'. The case of the appellant as pleaded before the Family Court was that the respondent/husband committed physical and mental cruelty upon her and she was not provided even the basic facilities. It was further pleaded that the respondent used to beat her on petty affairs and created pressure on her to bring cash, jewellery and a car from her father and also to get the flat bearing no. 276, Pocket-B, Dilshad Garden (which is in the name of the mother of the Appellant) transferred in his name. It was further pleaded that her father allowed the parties to reside together in this flat and they shifted in July 2007. According to the petitioner, all the household articles etc. in the flat were bought by her out of her own savings. The respondent, according to the petitioner, obtained two personal loans of Rs. 84,000/- and Rs. 73,000/- in her name but the amount was kept by him. The petition also contained allegations against the respondent of attempting to kill her and the child, besides his habit of withdrawing money from her account through the ATM, without even informing her.

6. The respondent filed his written statement, wherein he denied all the allegations and even offered to take the appellant back to the matrimonial home along with the child. It was the case of the respondent that after getting a good job, the nature of the appellant changed and the ego of the appellant was hurt in living with the respondent.
7. On the basis of the pleadings, following issues were framed by the Family Court on 16.02.2010;

“(1) Whether the respondent has treated the petitioner with cruelty as alleged after the solemnization of the marriage? OPP

(2) Whether the petitioner has been deserted by the respondent for the last more than two years before filing of the present petition? OPP

(3) Whether the petitioner is entitled for the claim prayed for? OPP

(4) Relief.”
8. To prove her case, the appellant examined herself as PW-2, her father, Shri Sandeep Gupta as PW-3. Two official witnesses, namely, Mr. Ishwar Singh from Fullerton India Credit Co., and Mr. P. Ranjan from Citi Financial Co. were examined as PW-1 and PW-4 respectively. Evidence by way of affidavit was filed by PW-2 and PW-3. On the other hand, respondent examined himself as RW-1.
9. The learned Family Court after examining the pleadings and the evidence came to a conclusion as regards issue No. 1 that the appellant had failed to prove cruelty and decided the issue against the appellant herein. According to the Family Court, the appellant was not able to

prove that the loan amount was taken at the instance of the respondent or was utilized by him only. Even the two official witnesses did not depose that the respondent was associated during the process of taking the loan. Insofar as the ground of physical cruelty was concerned, the Family Court found that the appellant had not been able to furnish any details as to when, where and under what circumstances, the beating was given and the allegations were vague and unspecific. The appellant, according to the Family Court, had not produced any MLC or medical prescriptions regarding the injuries which she allegedly suffered when the respondent threw hot water on her face. The allegation of the respondent trying to kill the appellant and the child by pressing their mouths by a pillow was also disbelieved on the ground that no police complaint was lodged in that regard. The Family Court also noted that for the alleged demand of money, jewellery etc., the father who stepped in as a witness, PW-3, admitted in his cross-examination that no financial help was sought by the respondent. Whatever demands were made were communicated only through the daughter. PW-3 did not give any dates or month etc. when he financed the respondent. According to the Family Court, even the statement of PW-3 that he had given Rs. 25,000/- to the respondent for shifting his factory could not be proved from any bank record. The Family Court has also noted that due to the paucity of space in the matrimonial home, PW-3 himself had allowed the parties to live in his flat in Dilshad Garden but the respondent never asked him to change its ownership. The Court thus concluded that the possibility could not be ruled out that the Flat was given at the request

of the appellant herself. According to the Family Court, PW-3 is only a hearsay witness because most of his narration is based on information given by his daughter. The Family Court, after analyzing the pleadings and evidence, came to a conclusion that the basic reason for a clash between the parties was their ego and/or difference of opinion between them. The appellant was a working and independent girl. She had fought with her parents and married the respondent, despite their protest and also that the appellant could not prove any act of the respondent which amounted to cruelty.

10. Insofar as the second issue of desertion is concerned, the petition has been dismissed on two counts. Firstly, according to the Family Court, the statutory period of two years as required under Section 13(1)(ib) of HMA was not complete when the petition was filed inasmuch as the alleged desertion took place on 14.08.2009 and the petition was filed on 22.10.2009. Secondly, the Family Court was of the view that the evidence indicated that it was the appellant who was not willing to go back. The respondent had repeatedly stated in his written statement and the affidavit of evidence that he wanted to take the appellant and the child back to the matrimonial home. The Family Court has also given weightage to the fact that the appellant had admitted in her cross-examination that the respondent used to love her prior to 14.08.2009 but now she did not want to go back on any term. The Family Court has also gone by the fact that during the pendency of the case, the appellant left the country in connection with a job, leaving behind the minor child, with her father. The Family Court has thus dismissed the petition and has also imposed costs of Rs. 25,000/- on

the appellant, for having harassed the respondent and having filed a false case, fabricating a story of cruelty and desertion.

11. Before we proceed to examine the case of merits, we must note that in the present appeal, notice was issued to the respondent on 01.10.2018 returnable on 7.1.2019. As per the service report, respondent was served but there was no appearance on his behalf on 07.01.2019. The case was, adjourned for 19.02.2019, noting his absence and also recording that in case the respondent was not present or represented on 19.02.2019, the case would be heard in his absence. On 19.02.2019, again there was no appearance on behalf of the respondent and the case was renotified in the interest of justice for 13.03.2019. On 13.03.2019, there was a request on behalf of the appellant for an adjournment and the case was renotified for today.
12. We had passed over the matter once but even on the second call there was no appearance on behalf of the respondent.
13. We have heard the learned counsel for the appellant. At the outset, the learned counsel submits that the respondent is no longer interested in living with the appellant. The parties are living separately since 14.08.2009. The respondent has not met the child for the last several years; is not ready and willing to keep the child and has showed no intention to maintain the child or pay for his day-to-day needs. She submits that in the last 9 years that the parties have lived separately, the parties have been in protracted litigation and there is no chance of any reconciliation. In the proceedings under Section 125 Cr.P.C., an interim maintenance of Rs. 5000/- per month was awarded to the

appellant and the child, but the respondent has failed to pay the same despite warrants of attachment having been issued. Even the cheque that the respondent had given for a sum of Rs.15000/- towards maintenance of the child bounced and a case under Section 138 of the Negotiable Instruments Act is pending, in which Non-bailable Warrants have been issued against him. In a nutshell, her submission is that the marriage between the parties is dead and is beyond any hope of salvage. The conduct of the respondent is a clear indication that he has no love and affection for her or for the child and the marriage be dissolved by a decree of divorce.

14. Learned counsel for the appellant further submits that the Family Court had erred in holding that the appellant was not able to prove cruelty. She submits that both in her petition for divorce and the affidavit leading evidence, she had clearly narrated how the respondent and his family members, had pressurized her to bring money, jewellery and a car from her father. Her sister-in-law with her two children lived in her matrimonial home and added to the misery in her life, by day-to-day interference in the personal affairs of the parties. She submits that the appellant (PW-2) had clearly testified that soon after marriage, the parties were always surrounded by the entire family and had no privacy. She further testified that when the parties shifted to the house of her father, it was the appellant who bought all the household articles out of her savings. Her father had to very often give money to the respondent which he never returned. She testified that the respondent had taken two personal loans in the name of the appellant and she paid the EMIs, but the money never came to

her. The respondent would often beat her, take away the money kept by her in the locker. He did not refrain from ill-treating her even when she was pregnant. He never took care of the child and even attempted to kill them on 12.08.2009, but she somehow saved herself and the child. Learned counsel submits that most of this testimony of the appellant has gone unrebutted in the cross-examination by the respondent. She further submits that the appellant withstood the cross-examination, stated and supported whatever she has testified against the respondent. She submits that despite the fact that the respondent could not demolish the version of the appellant, the Family Court has come to a conclusion, erroneously, that the cruelty is not proved.

15. We have gone through pleadings as well as the affidavit. The appellant had testified in her cross-examination that there were repeated demands of money, jewellery and car from her father. That the matrimonial home was a small place with two rooms and she was not even provided a separate room in the house. Her father had to perforce permit them to live in his flat in Dilshad Garden, as besides paucity of space, there was lot of interference in the personal lives of the parties by the appellant's mother-in-law and one of the sister-in-law. The appellant also testified that after shifting to her father's flat, she had to pay for all the household articles bought by the family and her father had also given about Rs. 80,000 in installments to the respondent which he never returned. Appellant's gold articles were taken by the respondent and retained by him. She also testified that the respondent had taken two personal loans in her name and she had

to pay the EMIs but even the money was not given to her. She not only mentioned the amounts taken as loan in the year 2008 but also gave the exact amount of the EMI and the account statements from the Bank were exhibited. Respondent instead of taking special care of her during pregnancy, ill-treated her. On the birth of the child, he did not pay any expenses towards the delivery and it was her father, who had borne the said expenses. In fact, after the birth of the child, the respondent did not take care of the child either. He, in fact, started taking money from her locker and from the ATM without informing her. She has also testified with an exact date that on 23.06.2009, the respondent threw hot water on her face. Another serious incident mentioned by her was on 12.08.2009, when the respondent attempted to kill her and her son with a pillow.

16. We have gone through the cross-examination of the appellant by the respondent. The respondent has not cross-examined the appellant on any of these depositions made by her in her testimony. The testimony of the appellant is thus unrebutted and unimpeached, as rightly contended by the learned counsel for the appellant. This Court, in a recent case, *NV vs. AV* in MAT. APP. (FC) 12/2018 had the occasion to examine a similar issue, relying on a judgment of the Apex Court in the case of *Gannon Dunkerlay & Co. Ltd. vs. Their Workmen* 1972 (3) SCC 443, we have held as under:

“19. the credibility and authenticity of the evidence produced by one party can be challenged by the other party by cross-examining the party. However, if a witness deposes a particular fact and no suggestion is given to the contrary during the cross-

examination, the party against whom the deposition is made is deemed to have admitted that part of the deposition, which thereby remains unimpeached. As we have mentioned above, the entire testimony of the appellant remained unimpeached and hence all the allegations would be deemed to be admitted by the respondent. In our view, therefore, the Family Court has erred in coming to a conclusion that the testimony was unreliable or that the appellant had not proved cruelty.”

17. Since the testimony of the appellant is unimpeached, all her averments and allegations would be deemed to be admitted by the respondent. Needless to say that the acts of the respondent, such as demanding dowry, beating, attempting to kill, throwing hot water, etc., as mentioned above, certainly amount to cruelty on the part of the respondent. This, in our view, clearly entitles the appellant to a decree of divorce.
18. We also find merit in the contention of the learned counsel for the appellant that the marriage between the parties in any case is dead and there is no hope of any reconciliation between the parties. The parties have been separated for the last 9 years. The respondent has made no attempts to meet the child. He has never offered to pay any maintenance for the child or look after his welfare. In fact, as rightly contended by the learned counsel, he has even defaulted in paying maintenance, despite judicial orders to that effect. The respondent has not appeared in the proceedings under the DV Act and in fact in the present appeal also, despite service and despite the matter being re-notified for three dates, he has chosen not to enter appearance. This is clearly indicative of the fact that the respondent is not interested in

defending the present appeal or saving the marriage. In our opinion, the marriage has broken beyond any hope of salvage.

19. The Hon'ble Apex Court in the case of ***Samar Ghosh vs. Jaya Ghosh 2007 (4) SCC 511*** and ***Naveen Kohli vs. Neelu Kohli 2006 (4) SCC 558*** etc., has clearly held that while irretrievable breakdown of marriage is not a statutorily recognized ground of divorce, it is a circumstance which could weigh with the court blended with cruelty to pass a decree of divorce between the parties. We find that the dicta of the Apex Court applies in all four corners to this case.
20. In our view, the Family Court has clearly erred in dismissing the Divorce Petition by holding that the cruelty was not proved by the appellant. The Family Court has lost sight of the fact that some serious instances were mentioned by the appellant in her petition, and she had testified on those lines in her examination in chief. The respondent has chosen not to cross-examine her on those instances and even suggestions to the contrary were not put. This was despite the fact that he had extensively cross-examined her, but as the cross-examination reveals, it was on issues which were unrelated to the examination in chief. There was no other way in which the appellant could have substantiated her averments in the petition.
21. While we do agree with the Family Court that the allegations should not be vague but at the same time in matrimonial matters, it cannot be expected that each and every incident would be narrated with exact details, time and date. Human memory is not a computer in which a data can be stored and output can be expected with mathematical

precision. The appellant has successfully pleaded and testified some of the major incidences that had occurred unfortunately in her matrimonial life and in our view, those are enough to hold in favour of the appellant.

22. The Family Court has disbelieved most of the incidences only on the ground that there were no police complaints made by the appellant and nor were any medical documents produced for the alleged injuries. Whilst the appellant could have resorted to police complaints on the two occasions when the respondent had thrown hot water on her face or when he attempted to kill her, but the reality of life is that in our society, it is not very easily that women take recourse to lodging police complaints, as there is always an endeavor to save the matrimonial life.
23. We also do not agree with the Family Court that the evidence of the appellant's father was a hearsay evidence and cannot be believed. The father of the appellant has clearly deposed that some of the incidences were told to him by the appellant but insofar as the demand of money was concerned, he had deposed that sometimes the respondent had directly asked him for cash. He also testified that he was the one who would often advised the respondent to mend his ways and not ill-treat the appellant. In fact, the appellant has been staying with her father since she separated from the respondent. In matrimonial matters, most of the incidences are between the parties. It is very difficult to have a third party witness who would be privy to all the conversations or the incidences as an eye witness. Having perused the testimony of the father of the appellant, we find that he has corroborated most of the

testimony of the appellant and his testimony is also unimpeached, as there is no cross-examination by the respondent on those aspects. The Family Court seems to have been influenced by the fact that the appellant has gone abroad to do a job leaving behind the child with the father of the appellant. The appellant has explained that she had gone for a limited period to do some job, on a contractual basis. We are informed that she is now back in India. In any case, if the job requirement necessitated the appellant to travel abroad, this cannot be a ground to deny the decree of divorce to the appellant. The Family Court in our opinion has also erred in imposing costs of Rs. 25,000/- on the appellant.

24. We find that the appellant has made out a case for grant of a decree of divorce. We accordingly allow the present appeal. The judgment of the Family Court dated 29.01.2018 is hereby set aside. The marriage between the parties is dissolved under Section 13(1)(ia) on the grounds of cruelty. A decree sheet be drawn up accordingly.

JYOTI SINGH, J

G.S.SISTANI, J

APRIL 24th, 2019
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