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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 27.03.2019

Date of pronouncement: 8.07.2019

+ **MAT.APP(F.C.) 5/2018**

S G

..... Appellant

Through: Mr. Arun Batta, Advocate

versus

R K G

..... Respondent

Through: Ms. Vikas Jain, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

MAT. APP. (F.C.) 5/2018

1. The present appeal has been filed challenging the judgment dated 23.09.2017 passed by the Family Court in HMA No. 783/14 whereby the petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'HMA') filed by the respondent/husband for dissolution of marriage has been allowed and the marriage has been dissolved by a decree of divorce.
2. The relevant facts necessary for the disposal of the present appeal are that the parties got married on 06.07.1989 as per Hindu rites and ceremonies at Shahjahanpur, U.P. Two sons were born out of the said wedlock on 09.08.1990 and 29.10.1992 respectively and are in the

care and custody of the Appellant at Janakpuri, Delhi. The parties are living separately since the year 2008.

3. Disputes and differences having arisen between the parties, the respondent/husband filed a petition under Section 13(1)(ia) of HMA seeking dissolution of marriage by passing a decree of divorce on the ground of 'cruelty'. The grounds on which the divorce petition was filed were that it was a simple marriage and no dowry articles were demanded by the respondent herein. It was pleaded by the respondent (petitioner in the Family Court) that since the very beginning, the appellant (respondent before the Family Court) was not inclined to live in the matrimonial home with his other family members and showed her aggressive attitude. In order to get mental peace in his matrimonial life, the respondent herein started residing separately from his other family members but still the attitude of the appellant did not change. The respondent further pleaded that the appellant always ridiculed him in social circle because he had studied only up to class 10th whereas the appellant is post graduate in economics. It was also pleaded by the respondent that the appellant never used to do the household work and picked up a quarrel whenever asked to do the same.
4. The further case of the respondent was that the appellant used to beat him up with the help of her brother to pressurize him to transfer the entire property in her name and the appellant had filed a complaint on 02.01.2009 with PS Janakpuri. Both children, according to him, were under the dominance and control of the appellant and she always alienated him from the children. She even filed a false and fabricated

complaint at the CAW Cell but due to lack of evidence, the same was disposed of against her. The appellant is also stated to have filed a case under Section 12 of the DV Act.

5. The respondent was also aggrieved that the appellant never respected the elders and other family members of the respondent and very often abused them. Her conduct was such that the respondent had gone into depression and even suffered losses in the business and was thus constrained to file the divorce petition.
6. The appellant contested the petitioner by filing her written statement on 26.05.2010. It was pleaded therein that she was never given even a single penny for running the household expenses in the last 3 years; she was ill-treated by her in-laws; on many occasions she had been turned out of the matrimonial home; all her streedhan was misappropriated by her in-laws; the respondent was ill-tempered and violent and both she and her children remained in a state of tension, depression, constant fear and trauma, and that the present petition is only a counter blast to her DV Act case. On merits, the appellant had denied the cruelties alleged in the petition. It was pleaded that she was often beaten for bringing insufficient dowry. The respondent was for the last 3 years having his meals in his brother's house and in fact, it was her brother who was with great difficulty looking after the basic needs of the appellant and her two sons.
7. In the replication filed by the respondent, he reiterated the averments made in the petition and denied those in the written statements which

were contrary to his case. On 08.12.2010, the following issues were framed by the Family Court;

“(i) Whether the respondent has treated the petitioner with cruelty? OPP

(ii) Whether the petitioner is entitled to decree of dissolution of marriage U/s 13(1)(ia) of HMA? OPP

(iii) Relief”

8. In support of his case, the respondent examined himself as PW-1 and tendered his affidavit in evidence as Exhibit PW-1/1 and relied upon documents viz. Exhibit PW-1/A to E. Documents CW-1/D and E were photocopies and were marked as Mark X and Y. He was cross-examined by the appellant herein. In order to prove his case, the respondent also examined PW-2, who was the record clerk from DDU Hospital with reference to the MLC of the respondent Mark PX-1. PW-3 was the Head Constable from PS Janakpuri who brought the DD Register to prove the DD entry no. 36B dated 11.07.2008 which was a complaint filed by the appellant. He testified that the record of the complaint had been destroyed. He brought the photocopy of the MLC dated 11.07.2008 and which was marked as Mark B. PW-4 was the CMO from DDU Hospital, who was brought to prove the MLC prepared by Dr. Sajid on 11.07.2008 as Dr. Sajid had left the Hospital and his whereabouts were not known.
9. In support of her case, the appellant wife tendered her affidavit in evidence vide Exhibit DW-1/A and relied on documents Exhibit DW-1/1 to DW-1/3. She was extensively cross-examined by the respondent. Son of the parties namely Ankit Gupta appeared as RW-2

and tendered his affidavit in evidence as Exhibit RW-2/A and relied on the Bank Account statement of the respondent as Mark A. RW-3 is Niranjana Garg, the brother of the appellant, who tendered his affidavit in evidence as Exhibit RW-3/A and relied on a copy of the Bank Passbook of RW-1 as Exhibit RW-3/1. RW-4 was the Record Clerk from DDU Hospital who proved the MLC of Niranjana Garg and identified the signatures of the doctors on the MLC.

10. The Family Court after examining the pleadings and the evidence on record, noticed that the parties jointly owned two houses, one in which they were living and the other was let out and the rent was being received by the appellant. It has come on record that the respondent is living on the first floor whereas the appellant is residing on the ground floor of the matrimonial home. As regards the MLC's produced by both sides, the Family Court found that in the MLC of the respondent there was a history of assault as mentioned by the Police but the perpetrator of the assault was not mentioned. In the MLC produced by the appellant, of her brother, RW-3, the claim of the appellant that in the quarrel both the respondent and her brother sustained injuries was found as not amounting to an act of cruelty on the part of the appellant.
11. The Family Court, however, came to a finding that the appellant was not cooking food for him, she was comfortable with her sons and would render no emotional support to her husband and his non-contribution to the house tax and electricity charges etc. could be understood, as he was earning a meagre amount, by doing a typing job and had no kind of support from the appellant. The Family Court has

heavily relied on the cross-examination of the appellant where according to the Court, she had admitted that she alleged extra-marital relationship of the respondent with his Bhabhi and concluded that such single utterance amounted to grave mental cruelty to the respondent as a marital life is based on trust and faith between the parties.

12. In addition to the above, the Family Court found that in any event, the parties had been living separately since 2008 and the marriage was dead for all purposes. To allow such a marriage to continue only for name sake, would be travesty of justice and as the appellant only ridiculed the respondent because of his low educational status and traumatized him in various ways, the marriage deserved to be dissolved.
13. Reliance was placed on the judgments in MAT Appeal (FC) 36/2014 decided on 21.10.2016 titled *Sandhya Kumari & Ors. vs. Manish Kumar & Ors., Madhvi Ramesh Dudani vs. Ramesh K. Dudani*, 2006 (2) Mh LJ 307 and *Shrikumar V. Unnitan vs. Manju K. Nair*, 2007 (4) KHC 807, where the concept of cruelty was blended by the Court with irretrievable breakdown of marriage to pass a decree of divorce.
14. We have heard learned counsels for the parties and examined their rival submissions together with the pleadings and evidence on record.
15. A perusal of the pleadings and evidence exchanged between the parties indicates that the basic cause of differences having arisen between the parties was the difference in their level of education as the appellant is a post graduate while the respondent is 10th pass.

Respondent was admittedly well off financially at the time when the marriage was solemnized, but eventually he suffered losses in business and this became a contributory factor in the differences getting enlarged between the parties. The judgment of the family court reveals that both the parties had claimed that mutual duties and obligations were not being fulfilled towards each other, such as the appellant wife was not cooking food; was comfortable with her sons and was even guilty of assaulting the respondent in support of which an MLC was produced. The respondent/husband on the other hand did not pay any maintenance to the wife and had assaulted the brother of the appellant on account of which he sustained injuries. He never paid household expenses either, such as, electricity bills, house tax, etc. The Family Court, however, has not given any finding as to how these alleged acts by the appellant amounted to cruelty. The petition had been filed by the respondent/husband seeking a decree of divorce under Section 13 (i) (i-a) of HMA and an issue was framed as to whether the appellant had treated the respondent with cruelty. The respondent, however, could not prove any of these allegations. In the absence of the respondent substantiating, with evidence, the acts alleged, a decree cannot be passed. In fact, the Family Court has itself not given any finding how the allegations in the petition were proved or how they amounted to cruelty.

16. A perusal of the impugned judgment shows that what has primarily weighed with the Family Court to conclude that the appellant had treated the respondent with mental cruelty was the alleged deposition of the wife in her cross-examination that she had alleged that her

husband had extramarital relationship with his *bhabhi*. In fact, the Family Court has observed in para 27 of the judgment that the appellant has in her cross-examination admitted that she had made such an allegation. This has heavily weighed with the Family Court to come to a conclusion that this single utterance by the wife amounted to grave mental cruelty towards the husband. The Family Court has observed that the appellant being an educated lady and an owner of two joint properties, given to her by her husband, should not have defamed him in such a manner. Another factor which has weighed to the Family Court is that the parties have been separated since 2008 and it was practically a dead marriage and thus applying the judgments in the case of *Sandhya Kumari (supra)*, it is found that there is an irretrievable breakdown of marriage.

17. We have carefully gone through the cross-examination of the appellant. We quote the relevant part of the cross-examination for ready reference hereinunder:-

“Q. Have you blamed the petitioner by dragging his name with his Bhabi (Shashi Gupta who is married to elder brother of petitioner Promod)?

A. Yes, Voluntarily, when Shashi Gupta who is married to elder brother of petitioner Promod abused me and threatened me to take the divorce and left the house then I dragging his name with his Bhabi.”

18. The question put to the appellant in the cross-examination was whether she had blamed her husband by dragging his name with his *bhabhi*, Shashi Gupta. The appellant answered in the affirmative, but volunteered that when Shashi Gupta, who is married to the elder

brother of her husband, abused her and threatened her to take divorce and leave the house, it is then that she dragged the name of her husband with the *bhabhi*. Being confronted with this, learned counsel for the appellant explained that the Family Court has erred in construing this answer as an admission that she had made allegations of extramarital affair of her husband with the *bhabhi*. He submitted that the answer has been taken out of context. In this regard, he drew the attention of this court to certain paragraphs of the written statement filed by the appellant and which we quote as under:-

“D. That it is pertinent to mention here that after Muhdikhaai the Respondent had to hand over all the gifts received from the relatives of her maternal side from the relatives of her maternal side and in law to her sister in law (Zethani Smt. Shashi Gupta) on the instructions of her husband, i.e. the Petitioner, which were never returned back to her.

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G. That the Petitioner has also concealed the fact from the Hon'ble Court that just after the marriage the Petitioner had started torturing Respondent for not bringing sufficient dowry. The Petitioner and Zethani Smt. Shashi Gupta used to beat the Respondent every now and then. They always used to taunt the Respondent by saying that “We have married Rakesh in a pauper family, they have given nothing in dowry and we can not even face the society.”

H. That for whatever work, the Respondent did or responsibility she took over, she was always taunted that it was not done properly. Her sister in law (Zethani) Smt. Shashi Gupta used to interfere in every matter connected with the Respondent. Since the next day of the marriage, the Respondent was doing almost everything in the house from sweeping, cleaning, washing to cooking etc. her above named sister-in-law (Zethani) used to shout and scream and humiliate

her. The work load was so much that the Respondent never got the time to rest.”

19. The argument is that in the written statement the appellant had averred that she was tortured for getting insufficient dowry and the respondent along with Shashi Gupta used to beat her every now and then. Her *jethani* Smt. Shashi Gupta used to interfere in every matter connected with her and used to often shout and scream to humiliate her. It is in this context that the appellant has volunteered in the cross-examination that her husband along with her *bhabhi* used to abuse her and threaten her and that is why she dragged his name with the *bhabhi*. He clarified that there was no allegation that the respondent was having an extra-marital affair with the *bhabhi*. He submitted that no such statement was made in the cross-examination or any part of the pleadings before the Family Court and the question of admitting such a statement did not arise.
20. Having perused the written statement and the cross-examination we are in agreement with the learned counsel for the appellant that the Family Court has erred in holding that the appellant had admitted to having made an allegation of extra-marital affair of her husband with his *bhabhi*. The cross-examination and the written statement do not support this observation of the Family Court. Thus, taking this as an admission and making this as a ground of mental cruelty so as to dissolve the marriage between the parties, in our view, is erroneous.
21. As regards the irretrievable breakdown of marriage, as observed by the Family Court, we find that this part of the finding of the Family

Court is also erroneous and not supported from the record of the case. It has been a common case of the parties that the parties have been living together in the same house, though on different floors. The respondent had purchased the properties in the joint name of the parties, though it may have been at the instance of the appellant. The *inter se* allegations of the parties of not cooking food, not paying certain electricity charges, house tax, etc. for some time on account of business loss, having ego issues, about difference in educational qualifications, etc. in our view are nothing more than a normal wear and tear of an ordinary married life. The issue of cruelty having been framed, the petition could only have been allowed if the petitioner therein would have proved cruelty. We find that the petitioner therein has not been able to substantiate the allegations of cruelty made by him and thus the judgment of the Family Court dissolving the marriage between the parties suffers from infirmity of law and deserves to be set aside. No doubt, that irretrievable breakdown of marriage has been blended with cruelty in recent judgments so as to dissolve the marriage between the parties, where the marriage is completely dead and beyond repair. We do not agree with the Family Court that in the present case the marriage is beyond salvage. In any case, irretrievable breakdown of marriage by itself is not a ground under the Hindu Marriage Act, on which alone a decree of divorce can be passed. Even applying the judgments relied upon by the Family Court, the irretrievable breakdown of marriage can only be a circumstance which the Court can take into account when cruelty is proved and blend them together. We have already observed above

that in this case, the respondent could not substantiate the allegations of cruelty, we cannot sustain the judgment of the Family Court on account of irretrievable breakdown of marriage alone.

22. We thus find that the impugned judgment of the Family Court is not sustainable in law and we hereby set aside the same and allow the present appeal.

JYOTI SINGH, J.

G. S. SISTANI, J

JULY 8th, 2019
AK/rd