

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

%

Date of decision: 27.02.2020

+ **MAT.APP.(F.C.) 29/2020 and CM APPLs. 3707-3708/2020**

SUMAN

..... Appellant

Through: Mr. Mahesh Tiwari and Mr. Bishnu
Tiwari, Advocates

versus

KAILASH KUMAR

..... Respondent

Through: None

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ASHA MENON, J.

1. This appeal is directed against the final judgment and decree dated 31.10.2019, passed by the learned Family Court, Patiala House Courts, New Delhi, thereby dissolving the marriage between the parties on a petition moved by the respondent/petitioner for seeking divorce from the appellant/respondent on the grounds of cruelty and desertion under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (in short Act).

2. The facts as are relevant for the disposal of this appeal are that the parties were married in accordance with the Hindu rites and ceremonies on 24.11.1999, at Jaipur. After the marriage, the parties set up their matrimonial home in Delhi. Two children, a boy and a girl were born to them, the son on 22.01.2001 and the daughter on 22.09.2002. The respondent/petitioner alleged that the appellant/respondent had treated him with cruelty inasmuch as her conduct was such that caused him embarrassment and sullied his

reputation and that of his family. In the course of their matrimonial life, he found that he could not trust the appellant/respondent as she was prone to borrow money from neighbours, strangers and even from the teachers and other staff at the school of his children. She further mortgaged the jewellery of his married sister with Muthoot Finance and had stealthily taken out Rs.16,000/- from his account by using the ATM Card, without his knowledge. There was an occasion when he had to defend the character of the appellant/respondent. In the said episode, he even lost his teeth as his neighbour physically assaulted him, for which an FIR was lodged. Moreover, the respondent/petitioner found that the children had learnt to steal money from him, upon seeing their mother do so. Though he tried to put up with everything in order to preserve the sanctity of the marriage, the appellant/respondent left the matrimonial home in the year 2011 and did not care to return.

3. On the other hand, appellant/respondent contended that the respondent/petitioner was irked with her as he had wanted only one child but she had wanted two and had conceived the second child against his wishes and that was the cause of differences between them. She denied that she had ever stealthily taken his money or had mortgaged the ornaments of her sister-in-law or had withdrawn money from her husband's account. Instead, she alleged that in March 2011, she had gone to her maternal home due to the death of her uncle but thereafter, she was not allowed entry in the matrimonial home.

4. On the basis of these pleadings, the following issues were settled by the learned Family Court on 16.10.2019: -

a) Whether the respondent after the solemnization of the marriage has treated the petitioner with cruelty within the meaning of Section 13 (1) (i-a) of Hindu Marriage Act? - OPP.

b) Whether the respondent has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition within the meaning of Section 13 (1) (i-b) of Hindu Marriage Act? – OPP.

c) Whether the petitioner is entitled to decree of divorce as prayed for? -OPP

d) Relief.

5. The respondent/petitioner examined two neighbours and friends Ms. Seema (PW-1) and Shri Soni (PW-2) and entered the witness box as PW-3, while the appellant/respondent examined herself as RW-1. The learned Family Court analysed the evidence and the material that had come on record and concluded that the respondent/petitioner had successfully proved that he had been subjected to cruelty within the meaning of Section 13-1(i-a) and had also been deserted within the meaning of Section 13(1) (i-b) of the Act. For coming to the said conclusion, the following facts were noted by the learned Family Court:

a) The appellant/respondent had hidden the fact of a second conception from her husband and returned to the matrimonial home only for the purpose of delivery of the second child leaving behind the first born child who at that time, was about two and half years old. The learned Family Court observed that she had done so only to ‘defeat the will of the petitioner (husband) to have only one child’, though there would have been more polite ways of convincing the

husband as the marriage is founded on mutual respect and trust. It was concluded that this conduct of the appellant/respondent amounted to causing mental cruelty to the respondent/petitioner.

b) Despite her own allegations that she had been thrown out of the matrimonial home by the respondent/petitioner, the appellant/respondent had not made any effort to reach out to her children by seeking their custody or at least claiming visitation rights. The learned Family Court concluded the decision of the appellant/respondent to leave her young children aged 10 years and 8 years at the matrimonial home, to live at her parental home was cruelty not only upon the respondent/petitioner, but also upon the children.

c) The evidence brought on record established that without the knowledge of the respondent/petitioner, the appellant/respondent had pawned 1 Kg silver and gold ornaments belonging to the respondent/petitioner, his mother and his married sister with Muthoot Finance and some local Jewellers and the respondent/petitioner had to pay about Rs.53,000/- to get the same released. The learned Family Court concluded that this was definitely an act causing mental cruelty to the respondent/petitioner as it had created a great embarrassment for him and his family members and could have spoiled the matrimonial life of his married sister if he had not been unable to get the jewellery released and returned to her.

d) Despite failing to prove that the respondent/petitioner was denying her any pocket money or that she was kept in want by him and his mother, the appellant/respondent was habitually borrowing money from all and sundry including Shri Amrit Lal, Shri G.S.

Pandey, Shri Soni, School teachers, staff and even the peons at the school of the children, causing a huge embarrassment to the respondent/petitioner as also to the children as the lenders demanded repayment from them. The learned Family Court held that such acts bring down the reputation of a person in the society and no reasonable person could be expected to live with such repeated behaviour of an erring spouse.

e) In the year 2009, the appellant/respondent had stolen the ATM card of the respondent/petitioner at 6 AM in the morning when he was sleeping and had withdrawn a sum of Rs.16,000/- from his bank account without his knowledge. He came to know of it only when he had the occasion to withdraw money from the ATM. Only on his threatening that he would lodge a complaint with the police and the identity of the person would be revealed through the CCTV footage, did the appellant/respondent admit to having withdrawn the said amount. The learned Family Court concluded that such conduct of any spouse would create suspicion and distrust and though the act may have been condoned by the respondent/petitioner since the parties had continued to reside together till March 2011, repetition of similar behaviour subsequently, was sufficient to establish cruelty.

f) Finally, the fact that the children had also stolen money from the drawer of the respondent/petitioner by using the nail cutter just as the appellant/respondent had done to remove money was also a factor that weighed against the appellant/respondent.

6. In the totality of all such conduct, the learned Family Court concluded

that the respondent/petitioner was entitled to divorce from the appellant/respondent on the ground of cruelty.

7. With regard to the plea of desertion, the learned Family Court observed that the appellant/respondent had left the respondent/petitioner in the month of March 2011 and though she contended that she had made efforts to reconcile, the said claims were not convincing. Thus, the learned Family Court concluded that the respondent/petitioner had proved that he had been living separately from the appellant/respondent for over two years as she had deserted him with no intention to join him thereby bringing cohabitation to an end, without there being adequate cause and further, without his consent.

8. Aggrieved by the said decision of the learned Family Court to dissolve the marriage between the parties, the appellant/respondent has filed the present appeal contending that the evidence has not been properly considered, Mr. Tiwari, learned counsel for the appellant/respondent submitted that admittedly, the respondent/petitioner had wanted only one child whereas she wanted two children; that the learned Family Court had ignored the testimony of the appellant/respondent that she had not been allowed to join the matrimonial home and the respondent/petitioner had not attended her phone calls; that she had lived with the respondent/petitioner happily till the year 2013 and the divorce petition having been filed by her on 29.07.2013, could not have been allowed on the ground of desertion as there was no evidence of desertion for two years immediately preceding filing of the petition. With regard to cruelty, it was contended that no abusive or violent conduct on the part of the appellant/respondent had been brought on record.

9. Lastly, it was contended on behalf of the appellant/respondent that the learned Family Court has overlooked the clear statement made by her during her cross-examination to the effect that she did not wish to give divorce to the respondent/petitioner and she desired to stay with him for the sake of her children and herself and that she had also filed a petition under Section 9 for restitution of conjugal rights registered as Case No.82/2018. According to the appellant/respondent the parties have resided happily together for 13 years and the divorce was only on account of the egoistical nature of the respondent/petitioner who is a gazetted officer being a M.A., LL.B while she was only 8th class pass. It is her case that the decree of divorce has resulted in gross miscarriage of justice.

10. Having heard the learned counsel for the appellant/respondent and on perusing the evidence and the material brought on record before the learned Family Court, which record has been requisitioned and examined, we find no force in the pleas taken by learned counsel for the appellant/respondent. Even if it is accepted that there is some reference to purported acts of cruelty in September 2011 in the evidence led by the parties, casting some doubt on the date when the appellant/respondent had left the matrimonial home, the appellant/respondent had herself claimed in the written statement that she had left Delhi in March 2011 and according to her, was not permitted to return to the matrimonial home. The petition for divorce was filed by the respondent/petitioner on 27.09.2013. Therefore, nothing much turns on this. There is no proof brought on record to establish that the parties had cohabited till the year 2013 to debar the filing of the petition on the ground of desertion.

11. More importantly, there is sufficient evidence to establish that the

conduct of the appellant/respondent was far removed from decency and in addition, was resulting in the children going astray. The evidence by way of his affidavit (Ex.PW-3/1) of the respondent/petitioner who appeared as PW-3 sets out several instances when the appellant/respondent had borrowed money from the shopkeepers/neighbours/school staff, etc. and of mortgaging valuables, resulting in surprise demands of repayment being sprung on him left, right and centre. The cross-examination of PW-3 has not shaken the credibility of his version.

12. On the other hand, in the affidavit by way of evidence filed by the appellant/respondent, she has glossed over all these assertions made by the respondent/petitioner and baldly denied having taken loans or withdrawing cash without the permission of the respondent/petitioner or mortgaging silver and gold belonging to her sister-in-law or mother-in-law. Nowhere has she denied that she did not know PW-1 Seema, or PW-2 Sonu, both of whom have been examined by the respondent/petitioner to prove that the appellant/respondent had taken the gold ornaments from the sister of the respondent/petitioner and had mortgaged them with Muthoot Finance Company in the presence of PW-1 and had used the ATM card of the respondent/petitioner to withdraw money from his account and had handed over the said amount of Rs.16,000/- to PW-2. A perusal of the cross-examination of PW-3, i.e. the respondent/petitioner clearly establishes that the conclusions drawn by the learned Family Court cannot be faulted.

13. There does not appear to be any dispute that the appellant/respondent had left the matrimonial home in the year 2002, without disclosing to the respondent/petitioner that she was pregnant and even when the respondent/petitioner used to talk to her, initially she did not even disclose to

him that she was pregnant. It was the mother of the respondent/petitioner who brought her back to Delhi when she was 8 months pregnant and a daughter was born at Mata Chanan Devi Hospital, Janakpuri. Thus, for several months, the appellant/respondent left her two year old son with the respondent/petitioner, his parents and sister. She had left her matrimonial home without even informing the respondent/petitioner and it was his parents, who had told him so. The conduct of the appellant/respondent in failing to inform the respondent/petitioner of such an important event in their lives, is nothing but cruelty, particularly when the husband did not want a second child. Despite this the respondent/petitioner has taken absolute care of both the children, whereas the appellant/respondent who wanted two children, left them to their fate.

14. The respondent/petitioner has also testified to the character assassination of his young sister by the appellant/respondent that almost pushed his sister to commit suicide. Though these facts were elicited during his cross-examination, there has been no contradiction of such statements made by the respondent/petitioner.

15. Admittedly, one Shri Yudhveer Singh Negi used to visit the appellant/respondent at the matrimonial home; one Shri Amrit Lal, who had a watch repair shop in INA Market, was known to the appellant/respondent as the children had duly informed their grandmother about the fact that they were paid some money by the said Amrit Lal with which they bought toys, while leaving their mother to converse with him. The respondent/petitioner has also testified that the said Amrit Lal had visited his house under the influence of alcohol when the children were about 9 and 11 years old, demanding return of money from the appellant/respondent.

16. Again, there is no reason for the court to doubt the testimony of the respondent/petitioner, that on 02.03.2009, the appellant/respondent had tactfully obtained the PIN number of his ATM card around 10 PM which he had revealed to her as implicit trust was important between the spouses but the result was that around 6 AM on the next morning, the appellant/respondent had stealthily withdrawn Rs.16,000/- in two transactions of Rs.10,000 and Rs.6,000 and had returned the ATM Card in the purse of the respondent/petitioner, while he was still asleep.

17. Having glossed over this misdemeanour on the part of his wife at that time, the respondent/petitioner was faced with the need to release the family jewellery from Muthoot Finance in February, 2012 which was after the appellant/respondent had left the matrimonial home when he had learnt from his sister that the appellant/respondent had taken one kg of Silver from the neighbour and 27.5 grams of gold from her to pawn it with Muthoot Finance, and some local jewellers at Kotla Mubarakplur. The respondent/petitioner had to pay a sum of Rs.52,892/- against receipt (Ex. PW-3/E) to Muthoot Finance, which was issued in the name of PW-1, Smt. Seema, who has testified in court that she had provided the identity papers for the purposes of taking a loan from Muthoot Finance. PW-1 has testified to having accompanied the appellant/respondent to her sister in law's house to collect the jewellery from her and had gone straightaway to Muthoot Finance for mortgaging the same. The mother of the respondent/petitioner has also fully supported her son on all these facts. It is also to be noted that in the affidavit of evidence (Ex.PW-3/1), the respondent/petitioner had stated as under: -

“20. That the respondent had even taken loans from the teachers, sweeper and watchman of the school of the children and the said persons used to harass the children by asking them for repayment of the loans taken by the respondent and the deponent has many times made payments to the aforesaid persons for the loan taken by the respondent. It is submitted that the respondent has not even left her children from harassment. Deponent requested the principal of the school that no staff of the school will ask for money from children. If some amount is to be paid, the deponent is ready to pay the amount taken by the respondent. Principal of the school assured the deponent that this will not happen in future again. Deponent observed that the academic performance of both the kids were decreasing day-by-day and the behaviour of both the kids were very strange, sad, cheerless, distressing, etc. The deponent finally got them admitted in new school. This action of the deponent did not work immediately but took at least six months to perform better in their academic as well as sports.

21. That the respondent was having a habit of stealing things and money from the house of the deponent and everything had come in the knowledge of the children and once upon a time the children also had stolen Rs.1000/- from the deponent purse, which remains locked in drawer of bed by adopting the same method as was adopted by the respondent on earlier occasion, i.e., unlocked the drawer with the help of nail-cutter, as was disclosed by the children before the deponent. ”

(emphasis added)

18. No question was put to the respondent/petitioner during his cross-examination to challenge the aforesaid statements.

19. The constant strain to which the respondent/petitioner was being subjected on account of the conduct of the appellant/respondent, is evident from his testimony. Cruelty is no doubt, not measurable as a tangible

commodity, but the standard for determining as to whether a particular conduct amounts to cruelty or only to normal wear and tear of marriage, has been the subject matter of several decisions of the Supreme Court. In this context, the learned Family Court had rightly relied on the observations of the Supreme Court in N.G. Dastane (Dr) v. S. Dastane, (1975) 2 SCC 326, which reads as follows: -

“30. An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, Section 10(1)(b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides:

“10. (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the District Court praying for a decree for judicial separation on the ground that the other party—

(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;”

The inquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English law, that the cruelty must be of such a character as to cause “danger” to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other.”

(emphasis added)

20. The observations of Supreme Court in V. Bhagat vs. Mrs. D. Bhagat, AIR 1994 SC 710, as cited by the learned Family Court in para 32 of the impugned judgment, are equally apposite:

“16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.”

(emphasis added)

21. In the present instance, the respondent/petitioner has shown great forbearance and tolerance and had even tried to protect the appellant/respondent when his neighbour questioned her character and an FIR was lodged by him at Police Station Sarojini Nagar, having lost his teeth in a fight for the honour of the appellant/respondent who at that time, was his

wife. But such valour seems to have been lost on the appellant/respondent as she continued with her unacceptable conduct. The respondent/petitioner is a gazetted officer and entitled to a certain respectable status in society. The family honour was being repeatedly compromised by the appellant/respondent, the pain would have been doubly felt by the respondent/petitioner as the children were being adversely affected by the conduct of the appellant/respondent. The conduct of the appellant/respondent was such that a genuine and reasonable apprehension would have arisen in the mind of the respondent/petitioner that it would be harmful and injurious for him to continue to live with her. The continuous mental pain and suffering caused to the respondent/petitioner on account of the public embarrassment because of the obnoxious conduct of the appellant/respondent, impacting his social status was such that it could not be expected that he could continue living with her any longer.

22. In the light of the foregoing discussion, we do not find any reason to interfere with the impugned judgment which is upheld. The present appeal is dismissed as meritless alongwith the pending applications. Trial Court Record be returned forthwith.

(ASHA MENON)
JUDGE

(HIMA KOHLI)
JUDGE

FEBRUARY 27th, 2020
pkb/s