



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

% *Judgment delivered on: 30<sup>th</sup> November, 2023*

+ **MAT.APP. (F.C.)-100/2019**

DAULAT RAM GAUR

.....Appellant

versus

REETA

..... Respondent

**Advocates who appeared in this case:**

For the Appellant: Mr. Virendra Singh, Advocate.

For the Respondent: Mr. Raj Kumar Mittal, Mr. Yogesh Kumar and Mr. Ankit Pal, Advocates.

**CORAM:-**

**HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

**HON'BLE MR. JUSTICE VIKAS MAHAJAN**

**JUDGMENT**

**VIKAS MAHAJAN, J.**

1. The present appeal has been filed assailing the judgement dated 22.12.2018 *vide* which the Ld. Judge, Family Court (West Delhi), Tis Hazari Court in HMA No. 93/16 has dismissed the petition filed by the appellant-husband under Section 13(1) (i-a) of Hindu Marriage Act, 1955 [in short the 'Act'] seeking a decree of divorce on the ground of cruelty.

2. The Marriage between the parties was solemnized on 13.04.2014 at Arya Samaj Mandir, Daya Nand Model School, West Patel Nagar, New Delhi as per Hindu rites and customs. No child is born out of the said wedlock. The appellant/husband and the



respondent/wife both are visually handicapped as they are unable to see since birth. The appellant is working at State Bank of India and the respondent is working as a lecturer.

3. Due to temperamental issues, certain disputes and differences arose between the parties on account of which they started living separately w.e.f. 28.06.2015 and thereafter the appellant-husband filed a Divorce Petition for dissolution of marriage against the respondent-wife before the Family Court on 15.01.2016 on the grounds of cruelty.

4. As per the appellant/husband, the instances of cruelty stated to have been committed by the respondent/wife are numerous, which are enumerated as follows - (i) the respondent never respected the appellant and left no opportunity to humiliate him, (ii) she forced the appellant to sever his relations with his family, (iii) she demanded the entire salary of the respondent for the household expenses, (iv) she would refuse to have physical relations with the appellant if he contacted his sisters or continued to be in contact with them, (v) she mistreated the appellant and did not even allow his family members to take fruits and vegetables on their own, and (vi) the respondent has a house in Delhi, where the parties shifted after their marriage but the respondent never considered the said house as the joint house of the parties but always insisted to refer it as her house only.

5. It has also been pleaded in the divorce petition that the respondent has refused to co-habit with the appellant as his wife and it



has become impossible for him to continue his marriage with the respondent which has broken down irretrievably.

6. During the pendency of the aforesaid divorce petition, the Family Court made an attempt to resolve the matter by referring it to the Delhi Mediation Centre, Tis Hazari Courts, Delhi, which mediation subsequently failed as the respondent did not come forward to give her consent for the divorce by mutual consent.

7. Thereafter, a written statement was filed by the respondent submitting that the appellant has himself committed cruelty towards the respondent and the petition filed by the appellant is liable to be dismissed as the appellant has concealed material facts and has made false allegations against the respondent.

8. Respondent made counter-allegations of cruelty stating that the petitioner was only interested in her money and property and he did not give her due respect. Even on the first night, the appellant had not stayed with the respondent. The entire marriage expenses were borne by the respondent and she was also meeting the household expenses while the appellant started contributing Rs.5,000/- after a few months of marriage and that too after great persuasion.

9. It is an admitted case of the parties that they have been living separately w.e.f. 28.06.2015, though the reason given by each party for staying separately, is different. The appellant's case is that feeling insulted he shifted to rented accommodation at village Kharkhari



Nahar Delhi, on 28.06.2015. On the other hand, the stand of the respondent-wife is that petitioner left her new house on 28.06.2015 at the instigation of his mother.

10. The Family Court *vide* the impugned order dated 22.12.2018 dismissed the appellant's petition for divorce. The Family Court *inter alia* held that the petitioner has failed to substantiate the specific acts of cruelty to the extent that parties cannot be expected to live in their matrimonial relationship.

11. Mr. Virendra Singh, learned counsel appearing on behalf of the appellant submits that the entire substratum of the marriage has already disappeared. The parties are staying separately from each other w.e.f. 28.06.2015 and such separation of eight years has created an unbridgeable gap between the two. He submits that the respondent even admitted in her cross-examination that now she does not want to live with the appellant and there is no possibility at all for them to live together as husband and wife. It is thus, contended that there has been an irretrievable breakdown of marriage and that the parties cannot live together in future.

12. He submits that respondent-wife was interested in maintaining her own independent identity and she always made the appellant realize that it was not his house and whenever the appellant referred to the house as their house she objected to the same, which forced the appellant-husband to leave her house. Further, the respondent did not



allow the appellant to have sexual relations with her. She also insisted that the appellant should sever his relations with his mother, sister, niece and nephew and even maltreated his mother and nephew.

13. He refers to the impugned judgment, to contend that the Family Court has also noted that the respondent backed out of the settlement and insisted that she wanted the appellant to be punished for his misdeeds, which also amounts to cruelty.

14. In support of his contention, the learned counsel relied upon the following decisions- (i) *Samar Ghosh vs. Jaya Ghosh* [(2007) 4 SCC 511], (ii) *Naveen Kohli vs Neelu Kohli* [(2006) 4 SCC 558], (iii) *Ritesh Babbar vs. Kiran Babbar* [(2022) SCC OnLine Del 726] and (iv) *Laxmi vs. Kanhaiya Lal* [(2021) SCC OnLine Del 5576].

15. *Per contra*, Mr. Raj Kumar Mittal, learned counsel for the respondent has argued that the appellant himself has committed cruelty towards the respondent and is trying to take advantage of his own wrong, which is not permissible in view of the provisions of Section 23(1)(a) of the Act. He pointed out various instances of cruelty stated to have been committed by the appellant/husband. He has placed reliance on (i) *D vs. P@ R*, [2017 SCC OnLine Del 12384] and (ii) *Neeraj Kumar vs. Pooja Verma* [2016 SCC OnLine Del 4625].

16. We have heard the learned counsel for the appellant, as well as, the learned counsel for the respondent and have perused the record.



17. The Family Court has noticed that the respondent during her cross-examination admitted that she does not want to live with the appellant, however, it observed that since the divorce petition has been filed on the ground of cruelty, said admission cannot be considered, inasmuch as, irretrievable breakdown of marriage is not a ground of divorce. We are of the view that the Ld. Trial Court was correct in adopting such a course, in as much as, ground of ‘*irretrievable breakdown of marriage*’ for dissolution of marriage is not available in the statutory provision under the Hindu Marriage Act, 1955. No doubt the Hon’ble Supreme Court in numerous cases has dissolved the marriage where it found that marriage was irretrievably broken down and could not be repaired, but this course was adopted by the Supreme Court by invoking Article 142 of the Constitution, which jurisdiction is not possessed by the Family Courts or even for that matter, by this Court. Reference in this regard may be had to the decisions of the Hon’ble Supreme Court in *Ashok Hurra v. Rupa Bipin Zaveri*, (1997) 4 SCC 226 and *Munish Kakkar v. Nidhi Kakkar*, (2020) 14 SCC 657.

18. We may also observe that the divorce has been sought by the appellant only on the ground of cruelty. The specific acts of cruelty alleged by the appellant were considered by the Family Court and a finding has been returned that none of the alleged incidents amounts to cruelty to the extent that the parties cannot be expected to live in their matrimonial relationship.



19. There is no challenge laid by Mr. Virendra Singh, the learned counsel for the appellant, to the findings of the Family Court on all the aspects of cruelty. Mr. Singh has articulated his submissions only on those facets of cruelty, as are noted in paragraph 12 above.

20. As regard the allegation that the respondent-wife was interested in maintaining her own identity and even called the house as her house and when the appellant referred the house as their house, she would object to the same. The Family Court has noted that this allegation was clearly denied by the respondent and there is no corroborative evidence led by either of the parties on this issue. In the absence of evidence to substantiate the allegation made by the appellant, we see no reason to take a different view than the one which has already been taken by the Family Court. We also see no element of cruelty if the respondent-wife who is an independent lady working as Lecturer, is interested in maintaining her own identity.

21. Likewise, in regard to the allegation that the respondent insisted that appellant should sever his relations with the family members, or respondent having maltreated appellant's mother and nephew, the Family Court has observed that the appellant supported his version orally but failed to lead any corroborative evidence. The appellant did not even examine his mother and nephew who were admittedly, witness to the said acts. The respondent, on the other hand, denied the allegations in the written statement as well as while deposing as RW1. The respondent's version has also been corroborated by her sister,



who was examined as RW2. We thus, find that the aforesaid instance of cruelty has not been proved and the view taken by the Family Court is well justified.

22. In so far as the allegation that the respondent did not allow the appellant to have sexual relations with her, is concerned, the Family Court has observed that there is no substance in the appellant's allegations in this regard. It is in the evidence of the respondent that the appellant was not feeling okay regarding making physical relation with the respondent, and she had conveyed this fact to the appellant's sister, who in turn informed appellant's mother and thereafter, appellant's mother took him to a doctor. No cross-examination of the respondent has been done on the said aspect and the same has remained unrebutted. The appellant in his cross-examination also admitted that he had gone to see the doctor and had taken medicines for some period. It is also evident from the cross-examination of both the appellant/PW1 as well as the respondent/RW1 that the parties had physical relations on three occasions but did not have relations after 28.06.2015 (the date of their admitted separation). The respondent's sister, who was examined as RW2, also stated in her testimony that the appellant had telephoned her and conveyed that the respondent had previous physical relations with other male persons and therefore, she came to know about his sexual weakness. It is in this factual background, that the Family Court has observed that both parties had tried for normal physical relations but there was some problem for



which appellant had taken medical advice, therefore, appellant's allegations in this regard appears to be an exaggeration. In light of the pleadings and the evidence on record, we don't find any infirmity in aforesaid finding of the Family Court.

23. The submission of Mr. Mittal, that the respondent by withholding her consent for mutual divorce in terms of the settlement arrived at before the mediation center, has caused mental cruelty upon the appellant, merits rejection for two reasons. Firstly, such a case was not set up by the appellant before the Family Court either in the amended petition or in the replication filed by the appellant, especially when the parties arrived at settlement before the mediation center on 22.08.2016 and an amended divorce petition came to be filed by appellant much later, on 27.05.2017. Secondly, it is trite that any party may withhold or withdraw consent for mutual divorce before the marriage is dissolved by a decree of divorce by mutual consent.

24. The Hon'ble Supreme Court in the case of *Smt. Sureshta Devi v. Om Prakash*, (1991) 2 SCC 25, on the question of whether one of the parties may withdraw the consent at any time before the actual decree of divorce is passed, held:

*"13. From the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and*



*seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under Sub-section (2). There is nothing in the section which prevents such course. The section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13B is clear on this point. It provides that on the motion of both the parties.... if the petition is not withdrawn in the meantime, the court shall...pass a decree of divorce.... **What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."***

*(emphasis supplied)*

25. Similar view was taken by the Supreme Court in *Smruti Pahariya v. Sanjay Pahariya*, (2009) 13 SCC 338. Again in *Hitesh Bhatnagar v. Deepa Bhatnagar*, (2011) 5 SCC 234, the Supreme



Court held as under:

*“.....from the language of the Section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, in our view, the expression `divorce by mutual consent' would be otiose.”*

*(emphasis supplied)*

26. In view of the above, we find no ground to interfere with the order of the Ld. Trial Court. Accordingly, the present appeal is dismissed, leaving the parties to bear their own costs.

**VIKAS MAHAJAN, J**

**SANJEEV SACHDEVA, J**

**November 30, 2023**

**N.S. ASWAL**