



2024:DHC:5813-DB



\$~19

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

%

Date of decision: 30.07.2024+ **MAT.APP.(F.C.) 195/2023**

SMT SIMRAN BATRA @ LATA BATRAAppellant

Through: Mr Ikrant Sharma with Mr Mann
Sehgal, Mr Neeraj Sharma and Ms
Iva Arora, Advocates.

versus

SH. DAVINDER KUMAR KAPORRespondent

Through: None.

CORAM:**HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MR JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J.: (ORAL)**

1. This appeal is directed against the judgment and decree dated 17.03.2023 passed by Mr Vipin Kumar Rai, learned Judge, Family Courts, Dwarka, New Delhi.
2. *Via* the impugned judgment, the Family Court has dismissed the appellant's petition preferred under Sections 13(1)(ia) and 13(1)(ib) of the Hindu Marriage Act, 1955 [in short, "HMA"].
3. Concededly, this is the second attempt made by the appellant to seek divorce from the respondent. The impugned judgment and decree arises out of the petition filed on 07.06.2017.



3.1 As indicated above, the grounds for divorce were founded on allegations of cruelty and desertion.

4. The appellant had made the first attempt in 2004, seeking divorce on the grounds of cruelty, which was dismissed on 27.03.2009.

5. The record shows that the couple entered into the matrimony on 31.01.1996.

5.1 In and about 17.10.2003, the couple started living separately.

6. Almost twenty-one (21) years have passed since the couple cohabited as husband and wife.

7. The matrimonial journey of the disputants was disrupted within five (5) months of marriage with the appellant lodging a criminal complaint against the respondent and his family members with the Station House Office [SHO], Prasad Nagar, on 29.06.1996 and the Child and Women Cell [CAW] concerning a purported dowry demand made by the respondent and his family members. It appears that this matter was settled in and about September 1996.

8. The record discloses the couple does not have any children from wedlock. We are, however, told, that the respondent, from his first marriage, has two children, who have already reached the age of majority and are married.

9. To be noted, notice in this appeal was issued on 10.07.2023. The record shows that the respondent has refused to accept service of summons. This aspect is recorded in the order dated 03.11.2023 passed by the coordinate bench.



10. Since on the following date, i.e., 01.05.2024, the respondent was neither represented nor was he present in Court, he was proceeded *ex parte*.

11. Since then, there has been no attempt to seek recall of the order.

12. On cruelty, the Family Court held that the appellant's allegations of cruelty were vague.

12.1 It is required to be noticed that this observation by the Family Court has to be seen keeping in mind the affidavit-of-evidence filed by the appellant, her cross-examination, and the fact that although the respondent had filed his affidavit-of-evidence on 08.09.2021 he did not present himself for cross-examination.

13. The learned Family Court Judge seems to have been weighed down by the fact that the earlier divorce action preferred by the appellant had been dismissed. This is evident upon perusal of paragraph 28 of the impugned judgment. For convenience, the same is extracted hereafter:

*“In view of the aforesaid discussion, this much is clear that the allegations levelled are too vague qua the aspect of cruelty. **There is nothing new so far the aspect of cruelty is concerned after dismissal of the earlier petition** and the main aspect that was stressed upon during course of arguments was relating to the desertion by stating that the aspect of desertion was very much there on the part of respondent and as at the time of filing of the earlier divorce case, Section 13(i)(ib) HMA was not available therefore same was not prayed and pressed but as the same is available now, **the said aspects is to be taken note of and that the marriage is dead for all intent and purposes because the parties have not cohabited for almost 19-20 years and even there is no child born from this wedlock.**”*

[Emphasis is ours]



14. The observation made in paragraph 28 of the impugned judgment clearly suggests that the learned Family Court Judge was aware of the fact that the marriage was “*dead for all intent and purposes*”, given that the couple has not cohabited for, nearly, twenty (20) years, and there was no child born from the wedlock.

14.1 This aspect attains greater clarity if one were to peruse the observations made by the Family Court Judge in paragraph 29 of the impugned judgment. Once again, for convenience, paragraph 29 is extracted hereafter:

“So far the contention of petitioner is concerned that parties have not cohabited together for 19-20 years, this is correct but what is to be seen is as to who is at fault so far the aspect of desertion is concerned. And even the aspect of not cohabiting together for so long and for considering the said aspect under mental cruelty U/s. 13 (i) (ia) in the facts and circumstances of the case, the genesis being cruelty and the fault being of the respondent has to be primarily there which has not been the case here. From the discussion as noted above, it appears that petitioner is trying to take benefit of her own wrong and merely for the sake of filing the case, has made the averments that she had approached in September, 2009 for reconciling the differences and living together which aspect is not true as was very much clear when she deposed during cross-examination that she had not approached and was not willing to stay with him even if he wanted. She also admitted that it was respondent who had approached many times for reconciling the differences by approaching her brother, her sister and that he had tried to reconcile the differences on various occasions but she was not ready to live with him.”

[Emphasis is ours]

15. As is evident upon reading the two extracts, the learned Family Court Judge asked himself the wrong question and therefore, in our opinion arrived at the wrong conclusion. The learned Judge, after recognizing the



fact that the couple had not cohabited for twenty (20) years, posed the wrong question, i.e., who was at fault? Life experience shows that relationships are complex and involved and therefore, at times, it is not easy to determine who is at fault.

16. However, what has been rightly noticed is that if there has been continuous separation for a long period of time, one can fairly conclude that the marital bond is beyond repair.

16.1 Significantly, the learned Family Court Judge extracted, *in extenso*, the observations of the Supreme Court in *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511.

17. After extracting the observations made in *Samar Ghosh*, the Family Court lost sight of the following critical observations made in the judgement:

“(xiv) Where *there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.*”

[Emphasis is ours]

18. Had the learned Family Court Judge applied the tests enunciated above, i.e., continuous separation for a long period, to the facts of this case, it would have concluded that relief ought to be granted to the appellant.

19. In our view, the Family Court erroneously denied relief to the appellant as it failed to appreciate that long continuous separation is a facet of mental cruelty; severing ties, in the long run, may do more good than bad to the couple's psychosocial health.



2024:DHC:5813-DB



20. Given this position, we are inclined to allow the petition.
- 20.1 It is ordered accordingly.
- 20.2 The impugned judgment and decree is set aside.
21. The marriage between the appellant and the respondent shall stand dissolved.
22. The Registry will prepare a decree accordingly.
23. The appeal is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

AMIT BANSAL, J

JULY 30, 2024 / tr

Signature Not Verified

Digitally Signed By: TARUN
RANA

Signing Date: 06.08.2024
13:37:09

MAT.APP.(F.C.) 195/2023

Page 6 of 6