

Neutral Citation No. - 2024:AHC:4946-DB

AFR

Court No. - 29

Case :- FIRST APPEAL No. - 177 of 2017

Appellant :- ***** Alias *****

Respondent :- *****

Counsel for Appellant :- Vinay Kumar Mishra, Vishesh Rajvanshi

Hon'ble Vivek Kumar Birla, J.

Hon'ble Donadi Ramesh, J

- 1.** Heard Sri Vishesh Rajvanshi, learned counsel for the appellant-defendant (wife) and perused the record.
- 2.** Vide order dated 9.3.2017 present appeal was admitted and notices were issued to the sole respondent-plaintiff (husband) by registered post/speed post. As per office report dated 15.12.2017, 'unserved notice returned due to unclaimed'. Subsequently, the appeal was dismissed for want of prosecution on 17.10.2022 and on a restoration application, the same was restored on 22.5.2023. In view of the fact that the appeal had been dismissed for want of prosecution, fresh notices were issued on 1.11.2023. According to the office report dated 9.3.2023 in respect of ordinary process, it is reported that notice not received back after service and in respect of speed post, it is reported that undelivered notice received with remark. In such circumstances, notice of service on sole respondent is deemed to be sufficient.
- 3.** No one has turned up on behalf of the sole respondent (plaintiff-husband), therefore, we proceed to hear the counsel for the appellant on merits.
- 4.** Present appeal has been filed challenging the impugned judgement and order dated 21.1.2017 passed by the Principal Judge, Family Court, Meerut in Divorce Petition No. 643 of 2013 (***** vs. *****) filed under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act.

5. Submission of learned counsel for the appellant is that respondent-plaintiff (husband) has himself deserted the appellant-defendant (wife) as he wanted to perform re-marriage with another lady. It is submitted that the Court below failed to record any finding that the alleged desertion/separation by the appellant was unreasonable, unexplained and has not recorded any finding regarding relation between the parties having become irretrievable. It is further submitted that appellant-defendant clearly pleaded her willingness to live with her husband to lead a peaceful and successful matrimonial life, which has not been considered by the Court below. It was next submitted that cruelty under Section 13 (1)(ia) and (ib) of the Hindu Marriage Act has to be proved beyond all reasonable doubt on the basis of cogent evidence, but in the present case the requirement of provisions have not been fulfilled and therefore, the judgement impugned herein is bad in the eye of law. It is also submitted that the issue of cruelty has been decided in a superficial manner without discussing the evidence on record. Attention was drawn to the stand taken by the appellant in her written statement and the statement of respondent no. 1 recorded as PW-1 as well as statement of PW-2. Specific attention was drawn to the cross-examination of DW-1 in support of the arguments to show that cruelty was committed on the appellant and not on the respondent-plaintiff (husband). It is also submitted that the Court below did not initiate conciliation proceedings between the parties as per Section 9 of the Family Court Act, 1984.

6. We have considered the submissions of leaned counsel for the appellant and have gone through the judgement of the Court below impugned herein.

7. Admitted facts of the case as reflected from the judgement are that the marriage between the plaintiff (respondent-husband) and the defendant (appellant-wife) was performed on 15.4.2002 as per hindu rites and rituals after the

offer having been accepted through matrimonial advertisement in a newspaper in the year 2001. It is also admitted that after marriage they had gone to Dalhousie (Himachal Pradesh) for honeymoon and after return from honeymoon, the husband (respondent) had gone to Bhopal to join his services. It is alleged that the appellant (wife) had gone to Meerut to her parental house. Subsequently, she came to Bhopal. In September, 2002 she had returned to her parents and the husband was informed by his mother-in-law that she had a miscarriage in November, 2002. In July, 2003 the appellant got a job in Bhopal and joined the services. Subsequently, she had joined the services at different places, admittedly, away from the place of employment of her husband. Thereafter, the husband was transferred to Mumbai in February, 2004 where she had also come after leaving her job and remained with her husband for a short period till 2005. It is also not in dispute that right ovary of the appellant (wife) was operated before marriage in the year 1999 and was removed. Another admitted fact remains that out of the said wedlock, the couple is not having any child.

8. In the divorce petition, it was stated that on the unfortunate incident of death of father of the husband (respondent) on 17.2.2010, she came to Pune at matrimonial house and remained there for two days where according to the husband, she was requested to remain with him but she did not stay and go back. In April, 2010 the husband was transferred to Mumbai again and she was requested to accompany him but she did not agree and therefore, these facts as reflected from the judgement impugned herein are not in dispute. It was also asserted that the husband was subjected to mental and physical cruelty and torture and he was deserted by her and now it is not possible for them to live under one roof as no physical or matrimonial relationship is left and it is a case of cruelty as well as irretrievable breakdown and divorce was

prayed for.

9. We may also place on record this fact that although written statement was filed stating several facts, however, these specific facts noticing the details are not in dispute and this fact is clearly reflected that after marriage, they lived together for a short period only and they never lived together continuously for a long period. Apart from this admitted fact, the stand taken by the appellant (wife) in her written statement that on 27.11.2003 she was subjected to beating and torture and her head was smashed on the wall and retina of left eye was hemorrhaged and there was a demand of dowry of Rs. 20,00,000/- as well. She had also taken a stand that the husband was having an intimate relationship with one female friend ***** and she had come to know about this during honeymoon itself in the year 2002.

10. Insofar as the ground regarding conciliation proceedings is concerned, we find that in the impugned judgement, it has been clearly noticed that on 31.3.2018 both the parties were present in the Court and they talked each other for conciliation and shared their problems and asked for next date for further hearing whereon 7.4.2014 was fixed as the next date. It has been further noticed that on 7.4.2014 the husband was present, however, the wife (appellant) was not present and therefore, it was recorded that she is not interested in conciliation proceedings or any compromise in the matter, therefore, the Court below proceeded further wherein the statement of the plaintiff (husband) was recorded as PW-1 and was cross-examined and PW-2 Pradeep Kumar was also cross-examined. Certain documents were filed by the plaintiff (respondent-husband), that is, photographs of marriage, original wedding card, two photos, copy of degree of Ph.D., copy letter of Radharaman Institute of Technology, copy of medical prescription of eye operation, copy of appointment letter dated 3.1.2004 and certain other documents.

11. Two issues were framed by the Court below: (i) whether defendant has deserted the husband two years before from the date of filing of the petition; (ii) whether the defendant has committed any cruelty with the plaintiff; and (iii) to what relief the plaintiff is entitled to.

12. While discussing the issue no. (ii) first, it was found that the appellant never lived continuously with the husband throughout the period after filing of the divorce petition and this fact was admitted by her. Insofar as the demand of dowry is concerned, it was found that the allegations levelled against the husband were false and no evidence whatsoever was produced in this regard; no complaint or FIR was lodged in this respect with any authority or concerned police officer. Insofar as the injury caused to the appellant is concerned, it was found that she was having eye-problem even before marriage, which was admitted and no report etc. in respect of the injury having been caused was placed on record and even no complaint or FIR in respect of alleged beating or smashing head of the appellant on wall was ever reported to anyone. Therefore, it was found that it was a case of false allegations and thus, mental cruelty was committed. Insofar as intimate relationship of husband with one female friend ***** is concerned, she had admitted in her cross-examination that the documents being paper no. 9Ga/1 upto 9Ga/7 are concerned, messages allegedly sent may contain forwarded messages and may not be the message in original. On a pointed query in respect of paper no. 96Ga/6, which was to the effect that ***** had written that she had a boyfriend and therefore, he (*****) should not remain attracted to her and that she is not fit for ***** and she had even called him 'Pagal'. In that reply, she had admitted this fact and therefore, even e-mail communication copy whereof were filed by the appellant clearly reflects that the allegation levelled against the husband having extra-marital relationship with ***** was false

and is not reflected or corroborated from the evidence. The Court below recorded a finding that she had clearly failed to prove such allegations of extra-marital affair. On that ground, it was found that mental cruelty was caused to the husband.

13. Insofar as the desertion is concerned, it was recorded that the petition was filed on 3.5.2012 whereas the finding has been recorded that the period for desertion would be counted from June, 2011 and therefore, issue no. (i) in respect of desertion was decided against the husband and decree of divorce was granted on the ground of cruelty. Insofar as the cruelty is concerned, the law is very well settled that it need not be physical in nature only and that there may be mental cruelty as well to the extent that it becomes impossible for the other spouse to continue in the marital relationship. We find that the issue no. 2 has been decided by the Court below by giving cogent reasons. It is a case of mental cruelty where false allegations of serious nature having intimate relationship with a female friend ***** and causing physical injury to the appellant were found to be false. Apart from this, the admitted facts as reflected from the cross-examination annexed as Annexure 5 of the typed copy of the paper book that since 2012 after marriage the appellant was not living continuously with the husband. She had worked at different places in different States, that is, Vanasthali (Rajasthan), Gurgaon, Bombay, Bhopal and at present she is working

as Associate Professor. She had also admitted that from 2008 she had been visiting the husband off and on, but she does not remember the dates or the period or the duration of such living with her husband.

14. We, therefore, find that apart from issue no. 2 of cruelty the Court below appreciated that it is a case of irretrievable breakdown even if the desertion is not proved as per definition of Section 13 (1)(ia) and (ib). Admittedly at least 13 years have passed since both are living separately, which by itself

amounts to cruelty under Section 13 (1)(ia) of the Act.

15. A reference may be made to the judgement of Hon'ble Apex Court in Rakesh Raman vs. Smt. Kavita, AIR 2023 Supreme Court 2144, paragraphs 12 to 18 whereof are quoted as under:

"12. Other aspect which we must consider is the fact that for the last 25 years the appellant and respondent, are living separately, and have not cohabited. There is absolutely no scope of reconciliation between the parties. There is in fact no bond between the two and as the Law Commission in its 71st report said about such a marriage, which is a marriage which has de facto broken down, and only needs a de jure recognition by the law. The same was reiterated by the Law Commission in its 217th report.

13. Under similar circumstances, this Court in R. Srinivas Kumar v. R. Shametha (2019) 9 SCC 409, Munish Kakkar v. Nidhi Kakkar, (2020) 14 SCC 657 and Neha Tyagi v. Lieutenant Colonel Deepak Tyagi, (2022) 3 SCC 86 has held that an irretrievable marriage is a marriage where husband and wife have been living separately for a considerable period and there is absolutely no chance of their living together again. In all the above cited three cases, this Court in exercise of its power under Article 142 of the Constitution of India has dissolved the marriage on the ground of irretrievable breakdown as a ground, which otherwise does not exist under the Hindu Marriage Act.

14. In Naveen Kohli: (AIR 2006 SC 1675)(supra), a strong recommendation has been made by this Court to the Union of India to consider adding irretrievable breakdown down of a marriage as a ground for divorce under the Hindu Marriage Act.

15. The multiple Court battles between them and the repeated failures in mediation and conciliation is at least testimony of this fact that no bond now survive between the couple, it is indeed a marriage which has broken down irretrievably.

16. Matrimonial cases before the Courts pose a different challenge, quite unlike any other, as we are dealing with human relationships with its bundle of emotions, with all its faults and frailties. It is not possible in every case to pin point to an act of "cruelty" or blameworthy conduct of the spouse. The nature of relationship, the general behaviour of the parties towards each other, or long separation between the two are relevant factors which a Court must take into consideration. In Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511 a three judge Bench of

this Court had dealt in detail as to what would constitute cruelty under Section 13 (1) (ia) of the Act. An important guideline in the above decision is on the approach of a Court in determining cruelty. What has to be examined here is the entire matrimonial relationship, as cruelty may not be in a violent act or acts but in a given case has to be gathered from injurious reproaches, complaints, accusations, taunts, etc. The Court relied on the definition of cruelty in matrimonial relationships in Halsbury's Laws of England (Vol 13, 4th Edn, Para 1269, Pg 602) which must be reproduced here:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists."

The view taken by the Delhi High Court in the present case that mere filing of criminal cases by the wife does not constitute cruelty as what has also to be seen are the circumstances under which cases were filed, is a finding we do not wish to disregard totally, in fact as a pure proposition of law it may be correct, but then we must also closely examine the entire facts of the case which are now before us. When we take into consideration the facts as they exist today, we are convinced that continuation of this marriage would mean continuation of cruelty, which each now inflicts on the other. Irretrievable breakdown of a marriage may not be a ground for dissolution of marriage, under the Hindu Marriage Act, but cruelty is. A marriage can be dissolved by a decree of divorce, inter alia, on the ground when the other party

"has, after the solemnization of the marriage treated the petitioner with cruelty". In our considered opinion, a marital relationship which has only become more bitter and acrimonious over the years, does nothing but inflicts cruelty on both the sides. To keep the facade of this broken marriage alive would be doing injustice to both the parties. A marriage which has broken down irretrievably, in our opinion spells cruelty to both the parties, as in such a relationship each party is treating the other with cruelty. It is therefore a ground for dissolution of marriage under Section 13 (1) (ia) of the Act.

17. *Cruelty has not been defined under the Act. All the same, the context where it has been used, which is as a ground for dissolution of a marriage would show that it has to be seen as a 'human conduct' and 'behavior' in a matrimonial relationship. While dealing in the case of Samar Ghosh: (AIROnline 2007 SC 377) (supra) this Court opined that cruelty can be physical as well as mental:*

"46..... If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. Cruelty can be even unintentional:

.....The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful illtreatment."

This Court though did ultimately give certain illustrations of mental cruelty. Some of these are as follows:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may

amount to cruelty.

(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 supplied)

18. *We have a married couple before us who have barely stayed together as a 12. Other aspect which we must consider is the fact that for the last 25 years the appellant and respondent, are living separately, and have not cohabited. There is absolutely no scope of reconciliation between the parties. There is in fact no bond between the two and as the Law Commission in its 71st report said about such a marriage, which is a marriage which has de facto broken down, and only needs a de jure recognition by the law. The same was reiterated by the Law Commission in its 217th report.*

16. Another reference may also be made to the judgement of Hon'ble Apex Court in Rajib Kumar Roy vs. Sushmita Saha, 2023 SCC Online SC 1221, paragraphs 7 to 11 whereof are quoted as under:

"7. *We have heard the learned counsel for the petitioner as well as the learned counsel for the respondent (wife) at length. Today, the parties are also before us through virtual mode, and we had a chance to interact with both. Considering the entire gamut of facts which are there before us, we have absolutely no doubt in our mind that this is a case of irretrievable breakdown of marriage.*

8. *The husband and wife have been living separately, the wife is at Udaipur (district Gomati), Tripura and husband at Agartala, Tripura for the last 12 years. Nothing would give us more satisfaction if the two could work out their differences and decide to live together, if only for the sake of their child. But under the circumstances, with the rigid attitude of both the parties, who have failed to appreciate the beauty of compromise, we have been forced to convince ourselves, albeit regrettably, that the two cannot now live together. Twelve years of separation, is a sufficiently long period of time to have sapped all emotions which the two perhaps may have had once for each other. We therefore cannot take the*

same hopeful view as that of the High Court, which still believes that the matrimonial bond between the two has not ruptured beyond repair or that the two cannot still give a new lease of life to their relation. Frankly, no matter how much we would have liked this to happen but in reality, this is a possibility, which under the facts and circumstances of the case, can only be called wishful.

9. *Continued bitterness, dead emotions and long separation, in the given facts and circumstances of a case, can be construed as a case of "irretrievable breakdown of marriage", which is also a facet of "cruelty". In Rakesh Raman v. Kavita reported in 2023 SCC OnLine SC 497, this is precisely what was held, that though in a given case cruelty as a fault, may not be attributable to one party alone and hence despite irretrievable breakdown of marriage keeping the parties together amounts to cruelty on both sides. Which is precisely the case at hand.*

10. *Whatever may be the justification for the two living separately, with so much of time gone by, any marital love or affection, which may have been between the parties, seems to have dried up. This is a classic case of irretrievable breakdown of marriage. In view of the Constitution Bench Judgment of this court in Shilpa Sailesh v. Varun Sreenivasan, 2023 SCC OnLine SC 544 which has held that in such cases where there is irretrievable breakdown of marriage then dissolution of marriage is the only solution and this Court can grant a decree of divorce in exercise of its power under Article 142 of the Constitution of India.*

11. *We therefore declare the marriage to have broken down irretrievably and therefore in exercise of our jurisdiction under Article 142 of the Constitution of India we are of the considered opinion that this being a case of irretrievable breakdown of marriage must now be dissolved by grant of decree of divorce."*

17. Hon'ble Apex Court in Joydeep Majumdar vs. Bharti Jaiswal Majumdar, 2021 (1) ARC 505 (SC) making reference to the Hon'ble Apex Court in the case of Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511 has granted divorce on the ground mental cruelty. In the present case, undue harassment and thus, mental cruelty has been clearly established, therefore, the husband was rightly granted divorce by the Court below.

18. In view of the discussion made hereinabove, we do not

find any good ground to set aside the judgement impugned herein.

19. Present appeal lacks merit and is accordingly dismissed.

Order Date :- 10.01.2024

Abhishek