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

% Judgment delivered on: 30.10.2023

\+ MAT.APP.(F.C.) 264/2019 & CM APPL. 45187/2019 & CM APPL. 45189/2019 & CM APPL. 8382/2021 & CM APPL. 272/2022 & CM APPL. 21001/2022 & CM APPL. 23421/2022

BHAWANA SHARMA ..... Appellant

versus

SHYAM SUNDER SHARMA ..... Respondent

Advocates who appeared in this case:

For the Appellant: Appellant in person
For the Respondent: Mr. Sunil Malhotra, Learned Advocate

CORAM:-
HON'BLE MR. JUSTICE SANJEEV SACHDEVA
HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. Appellant-wife is aggrieved by judgment dated 07.09.2019 passed by the Court of Ld. Judge, Family Court (West), Tis Hazari Courts, Delhi whereby petition filed by her husband (respondent herein) seeking divorce has been allowed and the marriage has been directed to be dissolved under Section 13(1)(i-a) of Hindu Marriage Act, 1955.

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2. For the sake of convenience, the appellant herein would be referred to as 'wife' and the respondent as 'husband' in the present judgment.

3. Marriage between the parties was solemnized on 20.04.1996 as per Hindu rites and customs. They were blessed with a baby girl on 06.02.1998.

4. As per the husband, within a few months of their marriage, his wife started creating troubles on petty issues. She used to demand ouster of her mother-in-law from the flat where they were residing. She also used to go to her parental home, without any intimation or without any valid reason.

5. According to the husband, his wife, even after their marriage, kept on running a coaching centre, namely, *Mohini Shiksha Kendra* situated at Palam Road, New Delhi, of which she was the backbone and, therefore, only she frequently used to go to her parental home. She used to claim that she was educated and self-sufficient respectable lady and was not willing to live as a slave of her mother-in-law. She took away all her jewellery and clothes in the last week of September, 1998. She put a condition that they would live together only if her husband takes a rented accommodation near her parental home and would also leave his mother. Thus, she wanted him to live as *ghar-jamai* which was not acceptable to him.

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6. As per the husband, he was able to find out a flat in Gole Market area and took the same on rent. Though they started residing together but, according to husband, there was no change in her behavior and she eventually left said house also. He claimed that his wife had deserted him many times out of her lust for money, status, personal ego and petty domestic arguments with her mother-in-law.

7. As per the husband, he even filed a petition under Section 9 of Hindu Marriage Act on 29.07.1999 seeking restoration of conjugal rights which was withdrawn by him on 18.04.2000 as his wife and her father had assured that there would not be any further problems from their side. He took another house on rent in Rohini but such arrangement also did not work out as his wife refused to have any sex with him and kept on avoiding his advances and to frustrate his any such move, she used to call her younger brother to sleep in their room.

8. In his divorce petition, the husband made reference about incidents dated 02.04.2001 and 03.04.2001. According to him, on 02.04.2001, when he returned from office, his wife did not open the door and when he shouted, she came out with a hammer in her hand and threatened and tried to hit him for which he had to report the matter to the police. On 03.04.2001, he was, mercilessly, beaten up by his wife and her brother for which he had to take treatment in a private hospital and eventually reported the matter to the police.

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9. It was averred by him that since July 1999, there was no relationship, physical or otherwise, between them and it was in the aforesaid factual backdrop that he prayed for divorce on the ground of cruelty as well as desertion.

10. It would not be out of place to mention here that the Divorce Petition was sought to be amended as the husband wanted to incorporate reference about the fact that a false case had been lodged with Crime Against Women Cell, Ashok Vihar, Delhi resulting in registration of FIR No. 230/2001 at PS Prashant Vihar under Section 498A/406/34 Indian Penal Code against him and his relatives for which they had to rush to Court for seeking interim protection. Such amendment was permitted to be incorporated.

11. The allegations, made in the divorce petition, were controverted by the appellant-wife. While asserting that she was always willing to join the company of her husband and had never deserted him, she also divulged that she had rather been thrown out of her matrimonial home. According to her, her husband had committed numerous acts of cruelty and, therefore, he could not be permitted to take advantage of his own wrongs.

12. She denied all the allegations and contended that she had no concern with any coaching centre and never made any demand of any separate accommodation. She also denied that she had willfully left

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the company of her husband when they were residing at Rohini flat. She also denied the aforesaid incidents dated 02.04.2001 and 03.04.2001.

13. In order to prove his case, husband entered into witness box as PW2 and also examined his mother (PW1 Smt. Shakuntala Sharma) and his sister-in-law (PW3 Smt. Usha Sharma).

14. The Appellant- wife entered into witness box as RW1 and examined fourteen other witnesses, namely, RW2 Sh. Robin Charan (Record clerk from St. Stephen's Hospital, Delhi), RW3 Sh. Tek Chand Rana (Clerk-cum-Cashier), Punjab National Bank, Parliament Street Branch, New Delhi, RW3A Sh. A.S. Dungriyal, Deputy Manager, PNB, Sansad Marg Branch, New Delhi; RW4 Sh. Raghuvir Singh, (Assistant Manager, Central Bank of India, Gole Market, New Delhi; RW5 Sh. Ravinder Kumar Sharma, Clerk, Ghaziabad, Development Authority, U.P.; RW6 Sh. Shailender Kumar Gautam (her father), RW7 Dr. Rajesh Uppal (regarding check-up of respondent during pregnancy in 1998), RW8 Sh. J.R. Pokhriyal, Manager, Central Bank of India, Gole Market Branch, New Delhi and RW8A Sh. P.K. Dhabhvla, Assistant Manager, Central Bank of India, Gole Market, New Central Bank of India, Gole Market; RW8B Sh. Rajeev Kumar Mishra, Assistant Manager; RW9 Sh. Madhur Gautam (her brother); RW10 Sh. Ashutosh Tandon, Branch Manager, ICICI Bank; RWll Sh. Anil Bhatnagar, Senior Manager, Central Bank of

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India and RW12 Dr. Rama Sharma, Sharma Medical Centre, Subhadra Colony, Delhi.

15. It needs to be highlighted that Ld. Family Court culled out the instances of cruelty on which the husband was seeking divorce. Reference be made to Para-10 of impugned judgement. These instances read as under: -

> *"(i) That respondent was not interested in living in the matrimonial home and used to desert the petitioner on one pretext or the other without intimation or consent of the petitioner.*
>
> *(ii) That respondent was more interested in running a coaching centre maintained by her parental family and therefore, used to neglect the matrimonial duties and the petitioner and wanted him to become a "Ghar Jawai".*
>
> *(iii) That respondent had committed acts of cruelties by asking petitioner to live separately from old aged mother-in-law. In September 1998 left the matrimonial home and when petitioner went to her parental home, she did not even open the door and humiliated the petitioner*
>
> *(iv) Petitioner was very much attached with the respondent and therefore, filed a petition U/s 9 HMA which was settled and both started living together but from19.04.2000 till April 2001, respondent did not allow any physical relations with the petitioner and even called her younger brother to sleep in the room for preventing petitioner to develop any intimacy with the respondent. On 02.04.2001, when petitioner went to his own house, respondent did not open the door and when he insisted, she came with a hammer and threatened petitioner that she would kill him, if he entered the house. On the next day, petitioner went to take his articles but she and her brother gave beating to him.*

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(v) Respondent filed a false and frivolous case U/s498A/406/34 IPC against the petitioner and his family members.

16. Ld. Family Court, vide impugned judgment dated 07.09.2019, though held that ground of desertion was not made out, the marriage was dissolved on the ground of cruelty while specifically holding that *the allegations of cruelty in the form of denying companionship and physical relations and lodging false criminal case stood substantiated.*

17. Wife has assailed such findings before us. Her broad contentions can be summarized as under:-

(i) The decree has been passed on unsustainable and misconceived grounds.

(ii) The evidence led during the trial has not been appreciated in the right perspective as the inculpatory part of the evidence, going against her husband, has been ignored.

(iii) Learned trial court has chosen to exhaustively elaborate the evidence led by her and seems to have discarded the same whereas the endeavour of the Court should have been to find out whether her husband, who was the petitioner before the Court and who was desirous of seeking divorce on the ground of cruelty, was able to prove the alleged instances of cruelty or not.

(iv) Her husband has failed to prove any act or instance which may constitute cruelty. Whatsapp conversation between her daughter and her husband was not even referred to as which would have also clearly established that she was not involved with running of any coaching centre. Moreover, the same Court had already allowed the petition seeking maintenance under Section 125 Cr.P.C. which clearly indicated that she had sufficient reason to live separately. Her husband had also moved application seeking appointment of

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local commissioner to show that she was running coaching centre but since he knew the falsity in his such stand, he never pressed his such application.

(v) *Her husband cannot be permitted to take any advantage of his own wrongs. She endured persistently despite the cruelty and harassment meted out to her with the expectation that good sense would prevail upon him. She did her best to adjust with her husband and even shifted to tenanted accommodation twice but there was no change in the attitude of her husband and his mother and, therefore, she had no option to seek redressal of her grievance by reporting the matter to the police. Merely because she had launched prosecution under Section 498A/406/34 IPC, the cruelty could not have been assumed even if such case had resulted in acquittal. According to her, such acquittal was, even otherwise, technical as her evidence was not complete and the concerned magisterial court never came to any conclusion on merits and also did not hold that her complaint was false or actuated by any malice.*

(vi) *The alleged incidents dated 02.04.2001 and 03.04.2022 are false and concocted as her husband wanted to abandon her as well as her daughter, once and for all and these were never proved either.*

(vii) *Learned trial court did not consider that there were written assurances given by her husband which clearly indicated that he and his mother used to maltreat and beat her and despite such impeccable piece of evidence, learned trial court believed the version of her husband.*

18. All such contentions have been refuted by Mr. Sunil Malhotra, learned counsel for respondent/husband. It is contended by him that appellant had destroyed the sacramental vows as she decided to file false criminal cases containing allegations of dowry demands and thereby, she misused the stringent provision of Section 498A IPC. Her mere endeavour was to put her husband and all his relatives

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behind the bars and since it was a false and tutored prosecution, they all were acquitted and said order of acquittal has attained finality as the revision petition was also dismissed by this Court on 09.09.2016.

19. Learned counsel further contends that appellant was always interested in living separately and wanted her husband to abandon his aged mother. She always forced him to stay in her parental home as *ghar-jawai* which resulted in matrimonial discord between them as her husband was never wanted to abandon his mother who required his support in her old age. It is contended that trial court has very meticulously analyzed the evidence led by the parties and rightly concluded that husband was entitled to divorce on the ground of cruelty. It is argued that husband had suffered enough mental agony and torture for over last two decades and his family was entangled into a false prosecution case and he was made to leave his aged mother.

20. It is also supplemented that matrimonial bond has completely broken down and is presently beyond repair and, therefore, also when the marriage has broken down irretrievably, the husband has become entitled to divorce. Reliance has been placed on *Rakesh Raman vs Smt. Kavita 2023 SCC OnLine SC 497 and N. Rajendran vs S Valli 2022 SCC OnLine SC 157.*

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21. We may note that though the husband had sought divorce on the ground of cruelty as well as desertion. He, however, could not prove the ground of desertion and has not filed any cross-objection in this regard in the present appeal either. Therefore, the scope of the present appeal is limited and it needs to be determined as to whether the wife had committed cruelty of such nature and extent, entitling her husband to seek dissolution of marriage.

22. The word "cruelty" given under Section 13(1)(ia) of Hindu Marriage Act, 1955 has not been defined and resultantly the task of the Court becomes much more onerous. Of course, cruelty can be physical or mental or both. While it may, at times, be easy to decipher the aspect of physical cruelty with the help of some corroborative evidence, there is no standard yardstick to assess the mental cruelty. There are bound to be several interwoven circumstances which need to be carefully factored in to assess the element of mental cruelty.

23. In *Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511,* the Supreme Court has held that what might be cruelty in one case may not amount to cruelty in the other case as the concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

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24. In Samar Ghosh (supra), the Supreme Court held that no uniform standard could ever be laid down for guidance, it examined several decisions on the subject of matrimonial cruelty and certain instances of human behavior were enumerated which might be relevant in dealing with cases of 'mental cruelty' and concluded as under:

> *"(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.*
>
> *(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.*
>
> *(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.*
>
> *(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.*
>
> *(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.*
>
> *(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant*

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danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to 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.

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> *(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."*

25. In *Ravi Kumar v. Julmidevi (2010) 4 SCC 476,* the Supreme Court has held that *cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula.*

26. In *Raj Talreja v. Kavita Talreja (2017)14 SCC 194,* the Supreme Court held that cruelty can never be defined with exactitude. What is cruelty will depend upon the facts and circumstances of each case.

27. In the background of aforesaid legal position, it needs to be assessed whether husband had been able to establish that his wife had treated him with cruelty.

28. We have already taken note of the instances of cruelty as culled out from the pleadings and the reasons which weighed with the court.

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According to the husband, his wife was not interested in living with him in the matrimonial home and she used to desert him on one pretext or the other and was rather interested in running a coaching centre and wanted him to live with her at her parental home as *ghar-jawai*.

29. Parties got married on 20.04.1996 and were blessed with a baby girl on 06.02.1998. It is also quite obvious that the parties tried their best to stay united. Initially, they stayed at official accommodation allotted to the husband at Gandhi Sadan, Mandir Marg, Delhi Husband at the relevant time, was employed as Junior Engineer (Civil), New Delhi Municipal Committee.

30. The Husband appeared as PW2 and filed his evidence affidavit. In his affidavit, he reiterated the averments made by him in his petition and claimed that there used to be arguments between them over some petty issues and his wife used to go to her parental home. He deposed that the main reason of his wife in irritably visiting her parental home was that she was running a coaching centre. According to him, she was trained graduate and such coaching centre could not have been run without her.

31. There are two things which need to be noted here. Firstly, during the trial, he had moved an application seeking appointment of local commissioner so as to establish that she was running a coaching

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centre, which, he never pressed. He has not examined anyone to establish said fact either, except by making oral averment. Secondly, even if it is assumed for a moment that she was visiting and supervising any such centre, he has not bothered to explain and elucidate as to how such fact, in itself, would amount to cruelty. There is no elaboration of any kind in this regard.

32. Court cannot assume any cruelty merely from her alleged involvement with the centre. Further, said allegation did not find favour with the learned trial court either.

33. It is worthwhile to mention that the husband had filed a petition under Section 9 of Hindu Marriage Act seeking restitution of conjugal rights. He claimed to have withdrawn the same on assurance of his wife. However, the things are other way round. He himself had withdrawn said petition, assuring his wife that she would not face any complaint from him in future and there would not be attribution of false allegation upon her.

34. Application seeking withdrawal of Section 9 HMA petition, which is proved as Ex. P-8, clearly indicates the same. This shows that the averment made by him in his petition and affidavit were false. Said fact should have been taken into consideration by the learned family court.

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35. The husband further claimed in his affidavit that his wife left for her parental home in the last week of September 1998 and he was told that she would stay with him only if he would take a separate rented accommodation. It also needs to be mentioned that in his affidavit, husband had also claimed that his mother had lodged complaint with CAW Cell on 27.02.1999. However, a compromise took place and pursuant to the same, his wife returned to her matrimonial home on 05.04.1999.

36. In this regard, the husband himself relied upon the statements made before the police on 05.04.1999 which were exhibited as Ex. P-4 & Ex. P-5. In his own statement Ex. P-5, he stated that his wife would not face any trouble and also assured that she should not have any fear that she would be beaten up in future. He claimed that complaint had been lodged out of misunderstanding and he took responsibility of safety of his wife and child.

37. His wife, in her statement Ex. P-4, claimed that his mother-in-law had withdrawn the police complaint which she had lodged with CAW Cell and she was going back with her husband as her husband had assured about her safety. Thus, the aforesaid withdrawal of the complaint and the assurances given by the husband portrays a different picture and rather indicates that the wife was living under some fear and apprehension.

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38. From the evidence led by the parties, it also seems that the discord was between the wife and her mother-in-law. The husband wanted to save his marriage and, therefore, he took up separate rented accommodation where he and his wife stayed together. The aspect of asking him to live as *ghar jamai* does not stand proved. Moreover, it did not mean anything as he did not agree to such proposal and the parties lived together at rented accommodation. It is also not his case that he was ever forced to live at her parental home as *ghar jamai*.

39. Be that as it may, the complaint lodged by the mother of the husband was withdrawn on the premise that it had been filed on account of some misunderstanding and similarly, petition under Section 9 HMA Act had also been withdrawn by the husband assuring his wife not to have any apprehension about her safety.

40. In his affidavit, husband also claimed that his wife was under the control of her father and had deserted him without any reason and for lust of money, status and personal ego. However, there is only allegation to that effect and he has not been able to substantiate the same in any manner. He has not even described and elaborated as to what was the alleged lust of money for which she had deserted him.

41. Admittedly, they both stayed together at rented accommodation in Rohini. According to husband, when she joined him in said Rohini flat after separation of nine months, she refused to have physical

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relation on the ground that she was not feeling well and whenever he tried to have sex with her, she used to call her younger brother and used to ask him to sleep in their room so that he could not come to her room for sexual intercourse. According to him, such sexual intercourse was denied to him from July 1999 till 02.04.2001 and, therefore, he felt mental and physical sufferings as well as depression. According to him, he contacted one NGO, namely, "KNOCK" but respondent/wife refused to accompany him to such NGO for counseling.

42. The aforesaid allegation of denial of conjugal relation does not carry any real significance. Reasons are manifold. It is not a case where the marriage was not consummated. There is no denying the fact that earlier the wife had undergone two abortions. We also cannot be unmindful of the fact that they both were blessed with a child in the year 1998. Though such allegation, regarding denial of sex, has been refuted by the wife during the trial, we may hasten to add here that such wild, unspecific and unsubstantiated allegation could not have been assumed to be true, in the manner it has been.

43. The husband should also have been mindful of the fact that there were repeated instances of misunderstandings between the parties and there were efforts from both the sides to somehow stay together and in such a situation, the first endeavour should have been to ensure the *revival of mutual trust instead of straightway going for*

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physical relationship. Once trust creeps in, certain things are bound to happen, naturally. Right here, we may also point out that even the learned family court in the impugned judgment observed that the nature of such allegation regarding denial of sex was such that it was difficult to have any corroborative evidence and only attendant circumstances and the conduct of the parties could throw some light on said issue. However, there was no instance, lending any kind of corroboration.

44. Learned trial court also observed that such allegation regarding denial of sex had been disputed by wife but she did not mention anything about any specific event, date or time and there was nothing in the cross-examination except for general suggestions. Thus, the burden had rather been shifted on her.

45. On one hand, learned trial court observed that it was difficult to have any kind of corroborative evidence and on the other hand, it expected the wife to give some specific event, date or time in this regard. The primary onus was on the husband to have proved the aforesaid aspect in the desired manner, as he had sought divorce on said ground.

46. Mere two-line deposition, particularly keeping in mind the factual matrix of the present case, does not serve the requisite purpose and does not have any potential to substantiate that such denial

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resulted in cruelty to him more so when, admittedly, it is not a case where the marriage was not consummated.

47. Additionally, when the wife entered into witness box and was cross examined, the husband, for reasons best known to him, did not put his essential case to her and did not ask even a single question or suggestion regarding denial of conjugal relation. This is also a major lapse on his part.

48. Even otherwise, denial of sex can be considered a form of mental cruelty where it is found to be persistent, intentional and for a considerable period of time and keeping in mind the nature of such allegation, the court needs to be over-circumspect while adjudicating such sensitive and delicate issue, while remaining alive to the broad conspectus of the case.

49. Be that as it may, in the instant matter, such allegation could not have been held as proved merely on the basis of vague and unspecific averment, particularly, when the marriage was also duly consummated.

50. The other aspect which weighed with the learned trial court was lodging of a false criminal case.

51. Admittedly, when the divorce petition was initially filed by the husband on 23.04.2001, no such case had been registered. The amendment was sought as the husband had contended that

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subsequently, his wife had filed a false and malicious complaint with the police which resulted in lodging of FIR against him and his family members and incorporation of such subsequent event was necessary for appropriate adjudication of the controversy. Learned trial court, vide order dated 28.09.2005, allowed the application moved under Order VI Rule 17 CPC and resultantly the amended petition was taken on record.

52. According to the husband, his wife had lodged a false and malicious FIR against him and such registration of FIR *per se* amounted to cruelty. He contended that falsity in the FIR stood further proved as such criminal case resulted in acquittal, which has also attained finality.

53. In his affidavit Ex. P-1/A, he did mention about registration of FIR. Copy of FIR was also exhibited by him as Ex. P-27. He also deposed in his affidavit that he and his relatives applied for grant of anticipatory bail and proved the copy of relevant orders as Ex. P-28 & Ex. P-29. He also made reference of filing of charge-sheet and issuance of summons by the concerned magisterial court. He claimed that he was involved in false police case. His affidavit is dated 29.03.2007 and his cross-examination was concluded on 05.04.2008.

54. Learned trial court observed in the impugned order that the husband had raised issue that he and his family members had been

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implicated in a false criminal case and since he had been acquitted, it stood proved that they all were falsely implicated in a false criminal case, which amounted to cruelty.

55. Learned family court, however, did not appreciate one important fact. Admittedly, the wife being complainant, was the most material witness in such criminal case but she did not appear during the trial for completion of her evidence, which eventually resulted in acquittal. The concerned magisterial court came to the conclusion that reading incomplete cross-examination for proving the case against the accused would result in denial of principle of natural justice and, therefore, the incomplete testimony was not read in evidence which resulted in acquittal. Thus, the acquittal was on technical reason and not, *stricto sensu*, on merits.

56. Undoubtedly, since wife had lodged a complaint against her husband and his family members and had made reference to various instances of cruelty in her such complaint, she should have entered into the witness box and made herself available for cross examination. At the same time, merely because she did not enter into the witness box and her testimony remained incomplete would not automatically mean that her complaint was bundle of lies or that she had launched a false and vexatious prosecution.

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57. Thus, merely because she had approached the police for seeking redressal of her grievances and on the basis of her complaint, FIR was registered in which accused were eventually granted benefit of doubt would not tantamount to hold that registration of such case amounted to cruelty. It also needs to be noticed that she did not sit merrily after the order of acquittal and not only did she file appeal before the Court of Sessions, she also filed a revision before this Court, albeit, her such endeavours did not prove to be fruitful.

58. Thus, the picture which emerges out is very clear. There was loss of trust, faith and affection between the parties but despite that, they both were trying hard to save the family. The husband even withdrew his case seeking restitution of conjugal rights. His mother also withdrew her one complaint.

59. Parties stayed together at rented accommodation but there was no revival of mutual trust. In such a situation, it was simply a case of normal wear and tear of matrimonial bond. There was nothing to affirmatively suggest that the conduct of the wife was of such a nature that it was no longer possible for her husband to stay with her. The trivial irritations and loss of trust cannot be confused with mental cruelty.

60. Merely because, the wife had knocked the doors of the court for redressal of her grievance, just like her husband also did, cannot

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tantamount to infliction of cruelty. The evidence led by the husband, when tested on the yardstick of preponderance of probabilities, does not seem compelling enough to prove cruelty on the part of his wife.

61. The electronic evidence and transcription of recording also does not also take us anywhere as it fails to pinpoint any cruelty attributable to wife. She, indeed, made reference to one cassette in her affidavit but when the same was tendered in evidence, it was not played. It seems to have been played during the recording of testimony of her father but such fact is reflected in order-sheet only and is not part of the evidence of father of the wife, who, unfortunately, died before his cross examination could be concluded.

62. The incidents dated 02.04.2001 and 03.04.2001 remain in the realm of allegations and have not been proved in the desired manner. Moreover, it is not even apprised as to what was the final outcome of said complaints lodged with the police.

63. On careful consideration of the entire evidence, we feel persuaded to hold that there is nothing to demonstrate that the conduct of the wife was of such a degree that it was impracticable and unfeasible for her husband to live with her. Apprehension in the mind of the husband seemed not only unsubstantiated but overstretched too.

64. As a last-ditch effort, Sh. Malhotra, learned counsel for husband contended that on account of prolonged separation, the

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marriage has become totally unworkable and thus it's a clear-cut case of 'irretrievable breakdown of marriage' and, therefore, divorce is inevitable even otherwise and the findings of family court should not be disturbed for said reason.

65. We do not find any substance in such contention for the simple reason that no such power is vested with this court.

66. Power to grant divorce on the ground of irretrievable breakdown of marriage is exercised by the Supreme Court under Article 142 of the Constitution of India to do complete justice to both the parties. Such a power is not vested in the High Courts leave alone the Family Courts.

67. Reference may be had to the decision of the Supreme Court in *Chetan Dass v. Kamla Devi, (2001) 4 SCC 250* wherein the Supreme Court has held as under:

> *"14. Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably*

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broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case.

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19. In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under Section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile easily to be broken which may serve the purpose most welcome to the wrongdoer who, by heart, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point."

(underlining supplied)

68. Coming to the theory of breakdown of marriage. First of all that is not a ground for grant of divorce under the Act. Secondly, Appellant is clearly not at fault and it is the respondent who is at fault. Thirdly, as held by the Supreme Court in *Chetan Dass (supra)* respondent should not be allowed to take advantage of his own wrong.

69. With regard to the powers of the Supreme Court under Article 142 of the Constitution of India, the Constitution Bench of the

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Supreme Court in *Shilpa Sailesh Versus Varun Sreenivasan 2023 SCC OnLine SC 544* has held as under:

> *"24. Exercise of jurisdiction under Article 142(1) of the Constitution of India by this Court in such cases is clearly permissible to do 'complete justice' to a 'cause or matter'. We should accept that this Court can pass an order or decree which a family court, trial court or High Court can pass. As per Article 142(1) of the Constitution of India, a decree passed or an order made by this Court is executable throughout the territory of India. Power of this Court under Articles 136 and 142(1) of the Constitution of India will certainly embrace and enswathe this power to do 'complete justice', even when the main case/proceeding is pending before the family court, the trial court or another judicial forum. A question or issue of lack of subject- matter jurisdiction does not arise. Settlements in matrimonial matters invariably end multiple legal proceedings, including criminal proceedings in different courts and at diverse locations. Necessarily, in such cases, the parties have to move separate applications in multiple courts, including the jurisdictional High Court, for appropriate relief and closure, and disposal and/or dismissal of cases. This puts burden on the courts in the form of listing, paper work, compliance with formalities, verification etc. Parallelly, parties have to bear the cost, appear before several forums/courts and the final orders get delayed causing anxiety and apprehension. In this sense, when this Court exercises the power under Article 142(1) of the Constitution of India, it assists and aids the cause of justice.*
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> *25. However, there is a difference between existence of a power, and exercise of that power in a given case. Existence of power is generally a matter of law, whereas exercise of power is a mixed question of law and facts. Even when the power to pass a decree of divorce by mutual consent exists and can be exercised by this Court under Article 142(1) of the Constitution of India, when and in which of the cases the*

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power should be exercised to do 'complete justice' in a 'cause or matter' is an issue that has to be determined independent of existence of the power. This discretion has to be exercised on the basis of the factual matrix in the particular case, evaluated on objective criteria and factors, without ignoring the objective of the statutory provisions. In Amit Kumar v. Suman Beniwal (2021 SCC OnLine SC 1270), this Court has held that reading of sub-sections (1) and (2) to Section 13-B of the Hindu Marriage Act envisages a total waiting period/gap of one and a half years from the date of separation for the grant of decree of divorce by mutual consent. Once the condition for waiting period/gap of one and a half year from the date of separation is fulfilled, it can be safely said that the parties had time to ponder, reflect and take a conscious decision on whether they should really put the marriage to end for all times to come. This period of separation prevents impulsive and heedless dissolution of marriage, allows tempers to cool down, anger to dissipate, and gives the spouses time to forgive and forget. At the same time, when there is complete separation over a long period and the parties have moved apart and have mutually agreed to separate, it would be incoherent to perpetuate the litigation by asking the parties to move the trial court. This Court in Amit Kumar (supra) has observed that, in addition to referring to the six factors/questions in Amardeep Singh v. Harveen Kaur (2017) 8 SCC 746, this Court should ascertain whether the parties have freely, on their own accord, and without any coercion or pressure arrived at a genuine settlement which took care of the alimony, if any, maintenance and custody of children, etc.

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41. Having said so, we wish to clearly state that grant of divorce on the ground of irretrievable breakdown of marriage by this Court is not a matter of right, but a discretion which is to be exercised with great care and caution, keeping in mind several factors ensuring that 'complete justice' is done to both parties. It is obvious that this Court should be fully convinced

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and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward. That the marriage has irretrievably broken down is to be factually determined and firmly established. For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc. The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor. But these facts have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children. Question of custody and welfare of minor children, provision for fair and adequate alimony for the wife, and economic rights of the children and other pending matters, if any, are relevant considerations. We would not like to codify the factors so as to curtail exercise of jurisdiction under Article 142(1) of the Constitution of India, which is situation specific. Some of the factors mentioned can be taken as illustrative, and worthy of consideration."

70. In terms of the Judgment of the Constitution Bench of Supreme Court in *Shilpa Sailesh (supra)*, the power to grant divorce on the ground of irretrievable breakdown of marriage is exercised by the Supreme Court under Article 142 of the Constitution of India to do

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complete justice to both the parties. Such a power is not vested in the High Courts leave alone the Family Courts.

71. Reliance placed by the learned counsel for the Husband on the various judgments is misplaced.

72. In *N. Rajendran (supra)*, the marriage between the parties had become dead with point of no return. Finding that the tie between the parties had broken beyond repair and having regard to the facts of said case, while refusing to grant a decree of dissolution on the ground of cruelty, the Supreme Court, in exercise of its power under Article 142 of the Constitution, declared the marriage as dissolved.

73. In *Rakesh Raman (supra)*, the parties had stayed together as a couple for four years and thereafter were living separately for the last 25 years. Finding that the matrimonial bond was completely broken and was beyond repair, it was held that such relationship must end as its continuation was causing cruelty on both the sides. The marriage was dissolved by the Supreme Court as the marital relationship had broken down irretrievably as there was a long separation and absence of cohabitation for the last 25 years, with multiple Court cases between the parties while observing that the continuation of such a 'marriage' would only mean giving sanction to cruelty which each is inflicting on the other.

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74. No parallel can be drawn from said judgment by the respondent in view of distinguishing facts of the present case. Moreover, as already noted, the power to dissolve marriage on account of 'irretrievable breakdown' vests with the Supreme Court only, which also cannot be sought by any of the parties as a matter of right.

75. As an upshot of our foregoing discussion, we hold that the impugned judgment dated 07.09.2019 is not sustainable. The Appeal is, resultantly, allowed and as a necessary corollary, the divorce petition filed by the husband stands dismissed.

76. No order as to costs.

MANOJ JAIN, J

SANJEEV SACHDEVA, J

October 30, 2023/*dr*