

THE HON'BLE SRI JUSTICE K.LAKSHMAN

AND

THE HON'BLE SMT JUSTICE P.SREE SUDHA

FAMILY COURT APPEAL Nos.231 and 239 of 2013

COMMON JUDGMENT: *(Per the Hon'ble Sri Justice K.Lakshman)*

Heard Sri G.Narender Raj, learned counsel for the appellant in F.C.A.No.231 of 2013 and learned counsel for the respondent in F.C.A.No.239 of 2013 and Sri V.R.Machavaram, learned counsel for the appellant in F.C.A.No.239 of 2013 and learned counsel for the respondent in F.C.A.No.231 of 2013.

2. The parties hereinafter are referred to as they are arrayed in F.C.A.No.231 of 2013.

3. Respondent-wife had filed a petition *vide* F.C.O.P.No.585 of 2011 under Section 13(1)(ia) of the Hindu Marriage Act, 1956 against the appellant-husband seeking dissolution of marriage on the ground of cruelty. According to the respondent-wife;

(i) her marriage with the appellant-husband was performed on 30.01.1999 at Hyderabad as per Hindu rites and customs.

(ii) It is an arranged marriage.

(iii) The parents of the respondent-wife also gave dowry to the appellant-husband.

(iv) On the night of nuptials, the appellant-husband did not perform intercourse saying that he is in tense and he will do it next time.

(v) After the marriage, appellant and respondent went to Kodaikanal as honeymoon trip. Even there also, he did not perform anything and when the same was questioned by the respondent-wife, he said that the sensitive parts of his body are little small and as such, he could not perform intercourse.

(vi) Thereafter she tried number of times, but the appellant did not co-operate with her and as such she came to know that appellant-husband is an impotent and not fit for conjugal life.

(vii) From 1999 to 2002, both stayed in her in-laws place in Mumbai.

(viii) Her in-laws did not allow them to go out and used to restrict to stay at home even during the week ends also.

(ix) The appellant did not bother to take care of the respondent.

(x) He neither took her out nor looked after her welfare.

(xi) The respondent-wife used to do job at the time of marriage. Thereafter she has resigned.

(xii) Even appellant-husband was not interested to do job. After resigning job, appellant-husband, his parents, sister and brother started harassing respondent-wife demanding additional dowry.

(xiii) They have also tortured her mentally. Every day is a worst day to her.

(xiv) In the year 2001, appellant alone went to Dr.Bhandarkar for consultation on his own without informing the respondent-wife.

(xv) On enquiry, he has informed her that on the pressure of his parents to have children, he has consulted the said doctor.

(xvi) He has informed the respondent that he cannot have children, the reports say so and his parents also knew the said fact before the marriage itself.

(xvii) Even the parents of the appellant advised him not to reveal the said fact to the respondent-wife so that the marriage will break and the girl's life will be ruined. He used to take some steroid injections.

(xviii) In the year 2001, the appellant and respondent came to Hyderabad and consulted some doctors in Hyderabad since the appellant is not able to perform his matrimonial duties and all his reports reveal that he has 'Klinefelter Karyotype XXY' and his sperm count reading as 'Nil'. After the said reports, his parents advised both the appellant and respondent to adopt a child or to go for a test tube baby.

(xix) Immediately on the advice of the appellant and his parents, the respondent went to 'Malpani Infertility

Clinic' wherein she undergone treatment of IUI with donor's sperm. (xx) Subsequently, with the advice and consent of the appellant, the respondent has conceived and blessed with a female child on 26.04.2003. Her name is 'Samyukta'.

4. Every night the appellant used to argue on small matters with the respondent.

(i) He used to come home in a drunken condition, that too late night.

(ii) In the weekends, all the time, he used to sleep and never wants to listen whatever she speak.

(iii) On one night, he informed her that someone has done black magic to him. It is a girl from office and he feels she lives in her. He always used to imagine her in the respondent and want to have sexual favours. He used to say that the respondent should do this for him.

(iv) If the respondent normally put her hand on him, he used to throw her hand away, but imagines that girl, says her name and wants sexual favours.

(v) Despite best of her efforts, there is no change in the attitude of the appellant. Moreover, he was harsh.

(vi) He always needs sexual favours imagining the other girl.

(vii) Initially she co-operated but thereafter she has refused. Therefore, he started harassing her.

(viii) On 23.06.2011, her daughter went down to play and there was no one in the house and main door (double door) was closed. The respondent went to toilet and she was stuck in bathroom as automatic lock did not open.

(ix) The respondent shouted out for help and all her neighbours heard and took the appellant's cell phone number and called him.

(x) Even after receiving the call from the neighbours, the appellant deliberately did not open the door and the respondent was forced to stay in the bathroom till 9.00 P.M.

(xi) The appellant and respondent jointly purchased a flat consisting of two bedroom, hall, kitchen, situated at

Gundecha Hills, behind S.M.Shetty School, Powai, Mumbai.

(xii) The appellant was working as Software consultant and earning a sum of Rs.14 lakhs per annum.

(xiii) The respondent has submitted resignation after marriage.

5. Thus, according to the respondent-wife, the appellant-husband subjected her to cruelty and he is an impotent. With the said contentions, the respondent-wife sought decree of divorce and also an amount of Rs.25 lakhs towards permanent alimony.

6. The appellant-husband filed counter denying the said allegations. According to the appellant;

(i) the respondent is under confusion and she is not in a position to draw a distinction between impotency and not having children.

(ii) The appellant has admitted about purchasing of a flat, but according to him, it is with his earnings.

(iii) He has taken the respondent to movies, malls, outstation trips, Kashid resort, etc.

7. Thus, according to the appellant-husband, respondent-wife filed the aforesaid O.P. only to obtain decree of divorce by making false allegations against him.

8. To prove the said allegations, respondent-wife examined herself as P.W.1 and her mother as P.W.2. She has filed Exs.A1 to A16. To disprove the said allegations, appellant-husband examined himself as R.W.1 and he did not file any document.

9. On consideration of entire evidence, both oral and documentary, learned Family Court allowed the said O.P. and granted decree of divorce dissolving the marriage performed between the parties on 30.01.1999 and awarded an amount of Rs.9,00,000/- towards permanent alimony. Learned Family Court directed the appellant-husband to pay the said amount within three months.

10. Feeling aggrieved by the said order granting decree of divorce, the appellant-husband preferred an appeal *vide* F.C.A.No.231 of 2013. Seeking enhancement of permanent alimony, the respondent-wife preferred F.C.A.No.239 of 2013.

11. The respondent-wife had filed the aforesaid O.P. against the appellant-husband seeking dissolution of marriage on the ground of cruelty. According to her;

(i) the appellant is an impotent and he has not participated in the intercourse on the first night of the wedding and also during honeymoon at Kodaikanal.

(ii) According to the appellant, he is not in a position to perform intercourse since his private parts of the body are little small.

(iii) He had informed the said fact to the respondent-wife.

(iv) The appellant visited Dr.Bhandarkar in the year 2001 and all his reports reveal that the appellant-husband is an impotent and he is suffering with a rare disease

namely 'Klinefelter Karyotype XXY' wherein the patients have an extra X chromosome usually with female qualities and manifestations.

(v) The sperm count is also diagnosed as 'Nil'.

(vi) After due considerations of the family, the respondent decided to go for a test tube baby.

(vii) Accordingly, she has approached 'Malpani Infertility Clinic' at Mumbai and she underwent IUI treatment with donor's sperm.

(vii) She gave birth to a baby girl namely 'Samyuktha' on 26.04.2003.

(viii) The appellant was habituated to alcohol and would never spare time to engage in any conversations with respondent.

(ix) He has not opened the bathroom lock and she was compelled to stay in the bathroom upto 9.00 P.M.

(x) He informed that he was a target of black magic, but he failed to prove the same.

(xi) However, he denied the said facts in his counter.

12. As discussed above, to prove the cruelty of the appellant, respondent-wife examined herself as P.W.1. She deposed in the same lines as per her petition. The marriage of appellant and respondent was performed on 30.01.1999.

13. During cross-examination, she has admitted that there was dowry related harassment continuously after the marriage and the same was continued for last 12 years. She has filed dowry harassment case against appellant-husband in a Court in Nampally, Hyderabad.

14. The appellant was doing Software job in Mumbai by the date of marriage. The marriage between the appellant and respondent is an arranged marriage. Her marriage was not consummated. She knows the meaning of impotency, which means not able to perform sexual act and unable to bear children. On 26.04.2003, she had a girl child by 'Intra Uterine Insemination' by donor's sperm through 'Malpani Infertility Institute', Bombay.

15. The appellant demands her to have oral sexual act even without making her undressed. He was forcing her to have it. She could not come out of the problem till 12 years after marriage as she felt it a social stigma. Thereafter due to the support of her friends and other family members and change in the society, she has filed the present case. The appellant never cared her and her daughter. He never used to take care of them financially. She has contributed about 50% of Rs.1,00,000/- which is the marginal money for taking loan to purchase 1BHK flat (one bed room, hall, kitchen) for Rs.13,00,000/-. The appellant paid EMIs for the flat and he is continuing to pay the same for the 2BHK flat purchased after disposing of the said 1BHK flat. The respondent is now staying in 2BHK flat along with her daughter.

16. P.W.2 is mother of the respondent. She also spoke in the same lines as deposed by P.W.1. However, during cross-examination, she has admitted that her daughter informed her that there was no physical relation

between herself and her husband at any time and she informed the same for the first time after returning from honeymoon in the year 1999 itself. She has not suggested P.W.1 to have divorce. The appellant-husband informed her that he got habit of drinking and he stopped it later.

17. It is contended by the respondent-wife (P.W.1) and her mother (P.W.2) that they gave an amount of Rs.2,00,000/- towards dowry and 150 grams of gold. They also spent an amount of Rs.5,00,000/- towards marriage expenses. For purchasing a flat in Mumbai, her parents were constrained to contribute some amount besides her self-earnings. She used to work prior to her marriage and sometime after the marriage. She might have contributed an amount of around Rs.15 lakhs to appellant-husband in all. The appellant is a Software consultant earning an amount of Rs.14 lakhs per annum.

18. To disprove the said allegations, appellant-husband examined himself as R.W.1. During cross-examination, he has admitted that he will have his shave

every day but not once in a month, that too by taking medicines as his beard won't grow. However, he has denied a suggestion that P.W.1 was never happy with him as he had no capacity to perform intercourse, but she has not conveyed the same to him. R.W.1 and P.W.1 went to Kashid and Lonewala in 2002. Respondent-wife left her ICICI job after the birth of female child. By mistake he administered broken milk to his daughter, which resulted in her admission in Joy Hospital, Mumbai. P.W.1 was blessed with a baby in 2003 through test tube. However, he has denied a suggestion that his parents commented that the said baby does not belong to him and subjected P.W.1 to character assassination.

19. He has further admitted that he came to Hyderabad for second opinion on his own accord. His sperm is low, but not nil as suggested. Ex.A12 is issued by Apollo Hospital after examining him. His sperm count can be increased. As his sperm count is not sufficient to procreate children, they opted for test tube baby. The

present house in which his parents are staying is in joint names of both the parties and the names of both the parties were mentioned as borrowers for the loan obtained to purchase that house. He is not capable for paying the permanent alimony of Rs.25 lakhs.

20. The sum and substance of the allegation made by respondent-wife against the appellant-husband is that he is impotent and he is not in a position to perform sexual intercourse. He is suffering with 'Klinefelter Karyotype XXY' disease. Though she has waited for long time, there was no change in the attitude of appellant-husband. To prove the said allegation, she has examined herself and her mother as P.W.1 and P.W.2 and filed Ex.A9-Laboratory report dated 26.08.2001, Exs.A10 and A11-Medical prescriptions dated 29.08.2001 and 20.10.2001, Ex.A12-Pathology report, Ex.A13-Cytogenesis report dated 06.11.2001, Ex.A14-medical report dated 26.02.2002. Therefore, according to respondent-wife, appellant-husband subjected her to cruelty.

21. Ex.A8 is the certificate dated 28.10.2002 issued by Malpani Infertility Clinic. Perusal of Ex.A9-Laboratory report dated 26.08.2001 would reveal that a significantly low finding for a serum testosterone test. Ex.A12 is Pathology Report for semen analysis dated 26.08.2001 which recorded nil active motile and the same was admitted by the appellant during cross-examination. Ex.A13 is the Cytogenesis report dated 06.11.2001 conducted on the appellant-husband *viz.*, Giesma Staining – GTG banding study concluded the karyotype of the appellant's blood was consistent with Klinefelter syndrome.

22. It is also relevant to note that Ex.A3 is the e-mail dated 20.07.2011 sent by Ms. Indira Unninayar, Advocate of Supreme Court and Delhi High Court to the appellant-husband. He has also sent a reply to her saying that his brother Mr. Ramgopal had spoken to her and he has also stated that he was engaged to his wife Priya in October, 1998. He was diagnosed with a medical condition which revealed he would have low Sperm count a day before

marriage and that he cannot father a child. His parents advised him to keep the matter under wraps due to fear of a possible failure of marriage.

23. Nevertheless, got married on 30.01.1999. His wife got to know of his medical condition on the first night after his marriage and felt hugely cheated by him and his family. Her in-laws cut-off relations with his family and he had to separate from his parents and stay at a rented accommodation at that time. His wife Priya gave birth to a baby girl in 2003 through IVF using a donor. It is further stated that from 2004 to 2008, they had routine problems of his in-laws coming and staying with him for 3 to 6 months at his house and his relations with his parents were cut-off. He used to have problems with his wife such as:

- (i) Daughter not allowed to meet his parents.
- (ii) No communication with his parents by his wife and in-laws.

(iii) No sex life as he cannot give her ultimate satisfaction. Hence, no bonding.

It is further mentioned that from 2009 till date, his wife went through depression (Thyroid problems, improper periods). They would not communicate with each other for long spells. This led to his work in office getting affected. Out of frustration, he started to like a girl, a colleague in his office and would regularly chat with her. In one of the many fights with his wife, he told her that he liked a girl in his office. The purpose of his telling her was to threaten her and marriage with her was never on his mind so that she may mend her attitude and stop fighting with him out of fear of being separated. The said incident led to the following:

- (i) She undressed herself by telling him that he is an incapable person and challenged him that nobody would be ready to marry him.
- (ii) She spit at him and beat him.

- (iii) She attempted to commit suicide by harming herself with a knife.
- (iv) She tutored her daughter that he was a bad person.
- (v) Subsequently one day, she was about to jump out from the car, out of rage.

Thus, *vide* Ex.A3, the appellant sought opinion of his lawyer.

24. Sri G.Narender Raj, learned counsel for the appellant-husband placed reliance on the principle laid down in the following judgments:

1. **Neelam Kumar v. Dayarani**¹ to contend that the respondent has to prove her case for granting divorce on the count of cruelty. Failure of the same, she is not entitled for any relief. The material fact not stated in the pleadings could not be taken into consideration.

¹ (2010) 13 SCC 298

2. **A.Asha Latha v. Abisetti Venkata Rao**² to contend that Family Court cannot grant divorce without there being pleading and cogent evidence.
3. **A v. B**³ to contend that unproved allegations of impotency amounts to cruelty.
4. **Prakash Kumar Bachlaus v. Smt. Chanchal @ Jaya**⁴ to contend that on the ground of fraud or on the ground of mental disorder, decree of annulment cannot be granted.
5. **Lakshmi Ammal v. Alagiriswami Chettiar**⁵ to contend that unnecessary delay disentitle the party seeking relief in view of Section 23 of the Hindu Marriage Act.
6. **A.R.Indira v. N.Kadappan**⁶ to contend that improper delay - divorce O.P. is not maintainable in view of Section 23(1)(d) of the Hindu Marriage Act.

² Decision of Division Bench of this Court in F.C.A.No.103 of 2016

³ Decision of Delhi High Court in MAT.APP.(F.C.) 178/2016 & CM APPL.9333/2017

⁴ 2007 LawSuit(Raj) 813

⁵ 1975 AIR (Mad) 211

⁶ Decision of Madras High Court in C.M.S.A.(MD) No.61 of 2011

7. **Mangal Singh v. Saroj Bala**⁷ to contend that despite having knowledge, no proceedings initiated within one year, no medical evidence produced.
8. **Sait Tarajee Khimchand v. Yelamarti Satyam**⁸ to contend that mere marking of an exhibit does not dispense with the proof of documents.
9. **LIC of India v. Ram Pal Singh Bisen**⁹ to contend that absence of putting their own defence during cross-examination does not amount to admission in accordance with Order XII of C.P.C. Mere admission of a document in evidence does not amount to proof.

But the facts of the present case are altogether different.

25. In the light of the aforesaid discussion, it is relevant to note that the Apex Court in **Sirajmohmedkhan**

⁷ 2017 (Suppl.) Civil Court Cases 0789 (Decision of Punjab and Harayana High Court)

⁸ (1972) 4 SCC 562

⁹ (2010) 4 SCC 491

Janmohamadkhan v. Hafizunnisa Yasinkhan¹⁰ held that, where it is proved to the satisfaction of the court that a husband is impotent and is unable to discharge his marital obligations, this would amount to both legal and mental cruelty which would undoubtedly be a just ground as contemplated by the aforesaid proviso for the wife's refusal to live with her husband.

26. The Apex Court in **Parveen Mehta v. Inderjit Mehta**¹¹, the Supreme Court observed as under:

“Cruelty for the purpose of Section 13(1)(ia) is to be taken as a behaviour by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending

¹⁰ (1981) 4 SCC 250

¹¹ (2002) 5 SCC 706

facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.”

27. As discussed supra, the appellant-husband has subjected the wife to mental cruelty towards her wife by claiming that he sees his office girl in her and would request sexual favours from his wife whilst under the fit of imagination purportedly motivated by black magic. This instance in our view would be a flagrant behaviour towards a wife who entered into a marital union. Another instance was evidenced when the respondent got locked out in a washroom when the child went out to play and the appellant being unresponsive to any calls, respondent

stayed in the washroom for an extended period of time until 21:00 Hours that night.

28. The Apex Court in the case of **Dr. N.G. Dastane v. Mrs. S. Dastane**¹² observed in paragraph 57 as under:

“Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment.”

29. In **Rita Nijhawan v. Balakishan Nijhawan**¹³, the Delhi High Court while dealing with a case of annulment of marriage under the Hindu Marriage Act on the ground of impotency very poignantly and pithily observed as follows:

“21. Thus the law is well settled that if either of the parties to a marriage being a healthy physical capacity refuses to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any wilful refusal by the respondent; this is because in either

¹² AIR 1975 SC 1534

¹³ AIR 1973 DELHI 200

case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty.

22. ... Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body, the result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse."

30. In **Bharat Prasad Gupta v. Asha Devi**¹⁴, a Division Bench of Patna High Court while discussing **Rita Nijhawan** (supra 13) opined that if either of the parties to a marriage being a healthy physical capacity refuses to have sexual intercourse, the same would amount to cruelty entitling the other party to a decree. It would not make any difference in law whether denial of sexual weakness of the respondent disabling him from having a sexual union with

¹⁴ Miscellaneous Appeal No.978 of 2018 (Decision of Patna High Court)

the appellant or it is because of any willful refusal by the respondent.

31. In **Srikant Rangacharya Adya vs Anuradha**¹⁵, the Karnataka High Court held as under:

“10. ... There may be cruelty without an intention to injure. Failure to comply with one of the essential obligations of the marital life by the husband would amount to subjecting the wife to cruelty it is one of the essential and principal obligations on the part of the husband to satisfy the sexual urge of his wife which is a natural instinct. Married life without a sexual life will be a curse to the wife thus failure to or inability to or refusal to effectuate the sexual intercourse by the husband without any reason on the part of the wife, would amount to subjecting the wife to cruelty. Although the term “cruelty” is not defined by the Act and to define the said expression is to limit its application which is not advisable inasmuch as it is not at all possible to comprehend the human conduct and behaviour for all time to come; but it may safely be stated that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty..... Against the respondent affecting her womanhood, but as per the evidence on record, which establishes beyond doubt that the appellant has not been able to effectuate sexual intercourse because of his inability and incapacity to do so

¹⁵ AIR 1980 KARNATAKA 8

and as a result of this, the marriage has not been consummated so far. There is no remedy to this malady. If the marital tie is to continue, the wife has to suffer this throughout her life. This is nothing but subjecting her to a constant mental torture, thereby affecting her health. The appellant has failed to discharge the essential marital obligation of providing a sexual union which is a foundation of the marriage.”

32. In **Samar Ghosh v. Jaya Ghosh**¹⁶, the Apex Court observed that there cannot be any comprehensive definition of the concept of mental cruelty within which all kinds of cases of mental cruelty can be covered. The Hon’ble Court in paragraph 100 has further observed that the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate

¹⁶ (2007) 4 SCC 511

the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

33. In the realm of matrimonial law, the concept of cruelty transcends mere intentional harm inflicted by one spouse upon the other. It encompasses any conduct deemed so intolerable that it renders the continuation of the marriage untenable for the aggrieved party. This standard of cruelty is not contingent upon the presence of overt malicious intent on the part of the offending spouse. Even in cases where both spouses exhibit sound physical and mental health, if the conduct of one proves egregious enough to render the marriage unendurable for the other, it constitutes cruelty.

34. Moreover, once acts of cruelty are substantiated through evidence and examination, the mindset or intentions of the offending spouse become immaterial. Whether the conduct was purposefully aimed at causing harm or arose from a state of indifference, the impact on

the aggrieved spouse remains of paramount importance. Consequently, in adjudicating cases of cruelty, the focal point lies squarely on the effect of the behavior upon the victimized spouse, rather than the underlying motives driving such behavior.

35. In **Golline v. Gollines**¹⁷, it was found that the husband did little or nothing to help the wife and though he was incorrigibly and inexcusable lazy. The evidence did not show any which on his part to harm the wife nor was he aggressively unkind to her and yet the house of Lords held that the wife was entitled to a decree on the ground of cruelty even if the husband may not have intended to be cruel.

36. Same proposition was reiterated in another case of House of Lords in **Williams v. Williams**¹⁸. In that case Lord Pearce observed as follows:

¹⁷ (1963) 2 All ER 966

¹⁸ (1963) 2 All ER 994

“The dissolution or permanent interruption of a union which is in theory life-long and indissoluble, cannot be justified by any way logic but the frailties of humanity produce various situations which demand practical relief and the Divorce Acts owe their origin to a merciful appreciation of that demand. Any extension of the area of relief has always been advocated on the ground that there are situations of hardship that must be alleviated. But in the Divorce Acts there is nothing that suggests an intention to punish.”

37. To coerce the respondent into a marital relationship devoid of sexual intimacy constitutes an act of cruelty. The respondent has been deprived of the sexual life, which is one of the essential requirements to lead a happy married life. From the pleadings it is evidenced that the respondent tried many a time to have sexual union and the appellant, though tried many a times, could not effectuate the sexual union and thereafter, through sequence of events it was concluded that the appellant was subjected to fate's misfortune as being diagnosed of Klinefelter's syndrome. Therefore, it is established in this case that the failure to lead a sexual life was due to the inability and incapacity and the sexual weakness of the

appellant. Whether it is by sexual weakness or by refusal on the part of the appellant to have sexual intercourse with the respondent, would not make any difference in law inasmuch as the result is that the respondent is deprived of the sexual life due to inability on the part of the appellant to effectuate the sexual union. The result is that there is nothing but frustration to the respondent and thus she has to suffer throughout her life if the marital tie is to continue. This is nothing but subjecting the respondent to disgrace and it will have adverse effect upon her mental condition and thereby it will adversely affect her health.

38. In the light of above discussion, we are of the opinion that the evidence in this case establishes that the appellant has treated the respondent after solemnization of the marriage, with cruelty.

39. Respondent-wife sought enhancement of permanent alimony to Rs.25,00,000/-. It is pertinent to

note that in a recent judgment in **Rajnish v. Neha**¹⁹, the Apex Court has discussed about the determinants of maintenance allowance payable to wife and children. In this regard, the following observations have been made by the Apex Court:

“III Criteria for determining quantum of maintenance

(i) The objective of granting interim/permanent alimony is to ensure that the dependant spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.

The factors which would weigh with the Court inter alia are the status of the parties; reasonable needs of the wife and dependant children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife.

¹⁹ 2020 SCC OnLine SC 903

In **Manish Jain v. Akanksha Jain**²⁰ this Court held that the financial position of the parents of the applicant-wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the Court should mould the claim for maintenance based on various factors brought before it.

On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependant family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income *ipso facto* does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications.

(ii) A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of

²⁰ (2017) 15 SCC 801

living that the applicant was accustomed to in her matrimonial home.

The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

(iii) Section 23 of HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Sub-section (2) of Section 23 of HAMA provides the following factors which may be taken into consideration: (i) position and status of the parties, (ii) reasonable wants of the claimant, (iii) if the petitioner/claimant is living separately, the justification for the same, (iv) value of the claimant's property and any income derived from such property, (v) income from claimant's own earning or from any other source.

(iv) Section 20(2) of the D.V. Act provides that the monetary relief granted to the aggrieved woman and/or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.

(v) The Delhi High Court in **Bharat Hedge v Smt. Saroj Hegde**²¹ laid down the following factors to be considered for determining maintenance:

"1. Status of the parties.

²¹ (2007) 140 DLT 16

2. Reasonable wants of the claimant.
3. The independent income and property of the claimant.
4. The number of persons, the non-applicant has to maintain.
5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.
6. Non-applicant's liabilities, if any.
7. Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.
8. Payment capacity of the non-applicant.
9. Some guess work is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.
10. The non-applicant to defray the cost of litigation.
11. The amount awarded u/s 125 Cr.PC is adjustable against the amount awarded u/s 24 of the Act. 17.”

(vi) Apart from the aforesaid factors enumerated hereinabove, certain additional factors would also be relevant for determining the quantum of maintenance payable.”

40. According to respondent-wife, appellant-husband is impotent and he did not participate in sexual intercourse on the first night of the wedding and also during honeymoon. Ultimately, on the advice of friends and well-wishers, she blessed with a baby girl through IVF test tube.

The said fact was also admitted by appellant-husband during cross-examination. It is also the specific contention of respondent that appellant never used to spend time with her and her daughter. He neglected her daughter saying that she is a test tube baby and she is not his daughter. She has narrated the aforesaid facts. Even then, nothing was elicited from her and also from her mother P.W.2. Therefore, on consideration of the said aspects only, learned Family Court granted decree of divorce.

41. On consideration of entire evidence, both oral and documentary, learned Family Court has awarded an amount of Rs.9,00,000/- to the respondent-wife towards permanent alimony.

42. We are of the considered opinion that the said amount is reasonable and justified.

43. In the light of the aforesaid discussion, the appellant-husband failed to make out any case to interfere

with the impugned order granting dissolution of marriage.
F.C.A.No.231 of 2013 is liable to be dismissed.

44. As discussed supra, learned Family Court awarded an amount of Rs.9,00,000/- to the respondent-wife towards permanent alimony and is reasonable. Therefore, respondent-wife is not entitled for enhancement. The F.C.A.No.239 of 2013 is liable to be dismissed.

45. Accordingly, F.C.A.Nos.231 of 2013 and 239 of 2013 are dismissed.

Miscellaneous petitions, if any, pending, shall stand closed. There shall be no order as to costs.

K. LAKSHMAN, J

P.SREE SUDHA, J

Date: 07.06.2024
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