2023:DHC:6803-DB

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

% Judgment delivered on: 19th September, 2023

\+ **MAT. APP (F.C.) 290/2018**

DEEPTI ……Appellant

Versus

ANIL KUMAR ..... Respondent

AND

\+ **MAT. APP (F.C.) 291/2018**

DEEPTI ……Appellant

Versus

ANIL KUMAR ..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr. Lohit Ganguly, Mr. Ajay Kumar and Mr. Mohit Khatri, Advocates

For the Respondent: Mr. D.K. Pandey and Mr. Vikram Panwar, Advocates

CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA
HON'BLE MR JUSTICE VIKAS MAHAJAN

JUDGMENT

SANJEEV SACHDEVA, J.

MAT. APP (F.C.) 290/2018

1. Appellant/wife impugns common order and judgement dated

18.09.2018 passed by the Family Court, Dwarka, New Delhi whereby the Petition filed by the Respondent/husband under section 13(1)(ia) & (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) seeking divorce on the ground of cruelty and desertion has been allowed and the Counter Claim filed by the Appellant seeking restitution of conjugal rights has been dismissed.

2. Parties were married on 17.02.2002 according to Hindu rites and customs and were blessed with a daughter, born on 07.01.2007. As per the Respondent they have been living separately since January 2007 and as per the Appellant since May 2007.

3. Respondent had filed the Petition seeking divorce on 26.05.2011 alleging that the Appellant used to exert pressure upon him to separate himself from his family members and live at the parental home of the Appellant. She is also alleged to have neglected the presence of other members in his family and would not even wish any guests and elders in the family. It is alleged that she used to misbehave with him and her behaviour towards his family members was disrespectful. He alleged that she used to stay at her parents' house on one pretext or the other. She would not do the household chores.

4. The Respondent also alleged that from the very first day of marriage, Appellant created scenes at night hours and most of the times did not allow him to enjoy his conjugal rights. She refused him to have access to her and inflicted cruelty upon him. He further alleged that he was allowed by the Appellant only 30-35 times (approximately) to enjoy conjugal relations since their marriage.

5. He also alleged that 20 days after the birth of the daughter, the Appellant left with her father for her parental house and has not returned to her matrimonial home despite repeated requests and visits by the Respondent.

6. The family court after considering the evidence led by the parties held that it clearly reflected that the Appellant/wife was interested to stay with her husband at the matrimonial house but it was the Respondent/husband who was not interested to keep his wife along with him. The Family Court has also referred to the statement of the father of the Respondent/husband that his son was not ready to reside with the Appellant. The Family Court thus held that the Respondent/husband had failed to establish the ground of Desertion.

7. In respect of the ground of cruelty, the Family Court has held

that "*there was no normal and healthy sexual relationships between (Respondent) and his wife (Appellant) and same has resulted in striking at the very foundation of their marriage. It has been well settled that normal and healthy sexual Relationships between both spouse is one of the basic ingredients for happy and harmonious marriage as the marriage without sex is an anathema. Sex is foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue.*"

8. The Family Court after holding that there was denial of conjugal relations, noticed that parties had been living separately for more than 11 years and held that the marriage had broken down beyond repair and thus held that the Respondent had successfully established cruelty and thus granted a decree of divorce against the Appellant.

9. With regard to the Counter Claim of the Appellant seeking restitution of conjugal rights, the Family Court has held that as the court had held that the Respondent/husband was entitled to grant of divorce on the ground of cruelty, Appellant was not entitled to restitution of conjugal rights.

10. It may be noticed that the allegation of denial of conjugal relations made by the Respondent is vague and mere bald allegations without any specifics. Appellant had filed a complaint with the Crime Against Women Cell of the Delhi Police on 23.06.2011 alleging that she had been thrown out and deserted by the Respondent and requesting that she be taken back. Respondent appeared before the Crime Against Women Cell and refused to take back the Appellant and their daughter. Even during examination, Respondent refused the suggestion to take back the Appellant. Even the father of the Respondent, during cross examination, also categorically refused to take back the Appellant into their home.

11. It may further be noticed that in her deposition, Appellant deposed that Respondent had told her that if she withdrew her complaint with the CAW cell, he would take her back. But after she withdrew the complaint, he reneged and refused to take her back.

12. The Family Court has also held that the allegation of desertion has not been proved by the Respondent/husband. The judgement clearly holds that it was the Respondent who abandoned the Appellant and their daughter, in January 2007. Respondent has not filed any cross appeal impugning the said finding.

13. Divorce has been granted primarily on the ground that there was denial of conjugal relationship by the Appellant/wife and that since they have been living separately for 11 years marriage has broken down irreparably.

14. 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 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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> ***** ***** *****
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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."*
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> *(underlining supplied)*

15. Reference may also be had to the decision of the Supreme Court in *Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511* wherein the Supreme Court has laid down the factors relevant for dealing with cases of mental cruelty as under:

> *"101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:*
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> *(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 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 sterilisation 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.

(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."

16. In the instant case, the Family Court has held that the cruelty as alleged has not been proved by the Respondent. However divorce has been granted on the ground of denial of conjugal relationship.

17. Said ground is clearly not available to the Respondent and the Family Court has erred in returning a finding that there is denial of conjugal relationship by the Appellant. The allegations of the Respondent of denial of conjugal relationship are vague and without any specifics. He has alleged that he was allowed by the Appellant only 30-35 times (approximately) to enjoy conjugal relations since their marriage. This clearly shows that there was never any complete denial.

18. Further it may be noticed that a girl child has been born to the parties on 07.01.2017 and as per the Respondent she left her matrimonial home on 28.01.2017. The fact that a girl child has been born to the parties clearly shows that the allegation that Respondent had been denied conjugal relations is incorrect. He in his cross examination has also admitted that they last had physical relationship in 2006. As noticed hereinabove, the allegation of denial of conjugal relationship is vague.

19. The Supreme Court in *N.G. Dastane (Dr) v. S. Dastane, (1975) 2 SCC 326* examined the principle of condonation as envisaged in Section 23 (1)(b) of the Act held as under:

> *"55. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and restoration. [The Law and Practice of Divorce and Matrimonial Causes by D. Tolstoy, 6th Edn., p. 75] The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued cohabitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws.*
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> *56. The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during cohabitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied*

> *by the nobler graces of marital life. One might then as well imagine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness, and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.*
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> *(Underlining supplied)*

20. Applying the ratio of the law as laid down by the Supreme Court in *Dastane versus Dastane (supra)* it is found that the parties cohabited as husband and wife and even indulged in conjugal relationship leading to the birth of a girl child on 07.01.2007 and then they separated in 20 days. As per the Appellant she was turned out of the house and as per the Respondent she left on her own accord.

21. The allegations of the Respondent of desertion have been held to be not proved. Divorce has been granted solely on the ground of denial of conjugal relationship. Same stands falsified on account of

birth of a girl child. Further, as held in *Dastane versus Dastane (supra)* conception of a child cannot be termed to be a single act of conjugal relationship. It would in fact amount to condoning the earlier actions of denial of conjugal relationship, even if one were to assume that such a relationship was denied by her.

22. As per the impugned judgement, it was the Respondent who deserted the Appellant. Appellant has consistently maintained that she wanted to live with the Respondent but he has repeatedly declined to live with her. Appellant had lodged a complaint with the Crime Against Women Cell contending that she wanted to stay with him, however he refused. Respondent and his father in their deposition clearly deposed that Respondent was not ready to take the Appellant back into his home.

23. 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. He is the one who is found to have deserted his wife and then taken the plea of desertion on her part. He cannot be permitted to walk out

of the matrimonial alliance on the ground that the marriage has broken down.

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

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 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 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."

25. In terms of the Judgment of the Constitution Bench of the

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

26. In the instant case, the Family Court has merely considered the fact that the parties have lived separately for 11 years and granted divorce on the ground of breakdown of marriage. Such an exercise of powers is not conferred on the Family Court. Family Courts have to restrict their considerations to the parameters of the provision of grant of divorce strictly in accordance with the Act. Irretrievable breakdown of marriage is not a ground in the Act.

27. Even the Supreme Court while considering exercise of discretionary powers under Article 142 of the Constitution of India takes into account several factors and longevity of period is only one of them. Reference may be had to Para 41 of *Shilpa Sailesh (supra)* extracted hereinabove. Supreme Court has placed a word of caution 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 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."

28. In the present case, the Family Court has erred in travelling beyond the scope of its powers to grant divorce.

29. In view of the above, the impugned judgment dated 18.09.2018 granting divorce on the ground of cruelty and breakdown of marriage is not sustainable and is accordingly set aside. The Divorce Petition filed by the Respondent is dismissed. MAT APP. (F.C.) No. 290/2018 is allowed.

MAT. APP (F.C.) 291/2018

30. Learned counsel for the Appellant submits in view of the judgment of the Supreme Court in *Dharmendra Kumar versus Usha Kumar (1977) 4 SCC 12*, wherein the Supreme Court has held that the expression "the petitioner is not, in any way, taking advantage of his

or her own wrong" occurring in Section 23 (1)(a) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred by Section 13(1A) of the Act, Appellant does not wish to press the appeal (MAT APP. (F.C.) No. 291/2018) challenging the decree dismissing her petition for restitution of conjugal rights.

31. In view of the above, the Appeal is dismissed as not pressed.

32. Order *Dasti* under the signatures of Court Master.

SANJEEV SACHDEVA, J

VIKAS MAHAJAN, J

SEPTEMBER 19, 2023/*HJ*