

## **Smt. Sarita Devi vs Shri Ashok Kumar Singh on 5 February, 2018**

**Bench: Sudhir Agarwal, Shashi Kant**

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 34

Case :- FIRST APPEAL No. - 299 of 2007

Appellant :- Smt. Sarita Devi

Respondent :- Shri Ashok Kumar Singh

Counsel for Appellant :- Vatsal Srivastava, Sanjay Agrawal

Hon'ble Sudhir Agarwal, J.

Hon'ble Shashi Kant, J.

1. Heard Sri Sanjay Agrawal, learned counsel for appellant and perused the record. Service upon respondent has been affected by publication in daily newspaper-Hindustan, Meerut Edition, dated 19.02.2017. Service upon respondent is deemed sufficient. None appeared on his behalf though the case is called in revised. Hence, we proceed to hear and decide appeal ex parte after hearing learned counsel for appellant.

2. It is stated that matter is very short and can be decided on the basis of record of this appeal as well as lower Court record which has already been received. Therefore, looking to the financial scarcity of appellant, we dispense with filing of paper book and proceed to decide matter on the basis of record of appeal and that of Court below.

3. This is a plaintiff's appeal filed under Section 19 of Family Court Act, 1984 (hereinafter referred to as the "Act, 1984") arising from judgment and decree dated 18.07.2007 passed by Sri S.S. Yadav,

Principal Judge, Family Court, Meerut dismissing Divorce Petition No. 548 of 2006 filed by plaintiff-appellant under Section 13(1) of Hindu Marriage Act, 1955 (hereinafter referred to as the "Act, 1955").

4. Plaintiff instituted Divorce Petition No. 548 of 2006 in Family Court, Meerut under Section 13(1) of Act, 1955 vide plaint dated 26.05.2007 pleading therein that marriage between plaintiff and respondent was solemnized on 24.02.1995 at Meerut as per Hindu Customs and Rituals. Both parties are Hindu. Plaintiff was virgin girl at the time of marriage while respondent was a Vidhur having two children, one daughter and one son by first wife who died, thereafter he performed second marriage. Behaviour of respondent since beginning was very cruel. Immediately after marriage appellant was beaten, repeatedly, and many a times brutally, without any cogent reason. Cruelty increased so much so that on 12.04.2000 respondent physically assaulted plaintiff and ousted her from house. Thereafter she came to her parent's house to stay and since then residing separately. Divorce petition was filed after almost 6 years from the date she was ousted from husband's house.

5. Before Court below respondent did not contest the matter. Neither he appeared nor filed written statement disputing claim of appellant. Ex parte evidence was recorded by Court below but thereafter on the date of final hearing since appellant did not appear, Court below proceeded to decide petition on merits and rejected same vide judgment in question on the ground that details of "Cruelty" have not been given and what attempts were made for reconciliation between parties, also have not been disclosed by plaintiff-appellant in divorce petition.

6. Learned counsel for appellant vehemently contended that plaintiff-appellant was not present in Court, hence Court below had no justification to decide suit on merits. At the best, it could have dismissed suit for want of prosecution but instead it has dismissed suit on merits and, therefore, has proceeded illegally in doing so. He secondly contended that details of 'cruelty' were explained in plaint and in absence of any denial there was no justification on the part of Court below to non suit plaintiff-appellant on the ground that cruelty could not be proved as details were not given and also details for attempts for reconciliation were not given.

7. In our view, following two points for determination have arisen in this appeal:

(I) Whether Court below was justified in proceeding to decide suit on merits when admittedly plaintiff-appellant was not present and even defendant was not present.

(II) Whether Court below was justified in dismissing suit on the ground that details of cruelty was not given and hence ground for divorce, i.e., cruelty was not proved.

8. In our view judgment of Court below is manifestly illegal, erroneous and cannot be sustained. Both the questions deserve to be answered in favour of plaintiff and Court below has clearly erred in law in taking otherwise view. Our reasons are detailed hereinbelow.

9. In order to answer first point for determination, we may refer to Section 10 of Act, 1984 which provides procedure to be followed/ observed by a Family Court and it reads as under:

"10. Procedure generally.--(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)], before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other." (emphasis added)

10. A perusal of Section 10 would show that Family Court shall be deemed to be a Civil Court exercising all powers of such Court and for the purpose of procedure, unless there is otherwise provision prescribed under Act, 1984 and Rules framed thereunder, procedure prescribed under the provisions of C.P.C. will apply. Sub-section (3) would be attracted in a case where Family Court is proceeding to arrive at a settlement between parties or to find out truth of facts alleged by one party and denied by another and in such a case it may laid down its own procedure but not otherwise. Apparently in the present case, neither it was a case of settlement nor a case of finding out truth alleged by one party and denied by another since respondent-husband did not contest matter before Court below, therefore, sub-section (3) is not attracted. In the above facts it is clear that procedure prescribed under C.P.C. was to be applied and that is how Order IX rule 3 C.P.C. comes into picture.

11. Order IX Rule 3 C.P.C. provides, if neither party appears when suit is called for hearing, Court may make an order that suit be dismissed. Such a dismissal of suit is for absence of parties, i.e., for non prosecution. Such an order passed under Order IX Rule 3, has been held not to be a 'decree' as specified by Section 2(2) C.P.C. in *Firdous Omer (D) by LR. and Ors. vs. Bankim Chandra Daw (D) by LR. and Ors.* (2006) 6 SCC 569.

12. There is no provision which permits Court to decide a suit on merits if plaintiff has not appeared. In our view, it was not justified on the part of Court below in deciding suit and dismissing same on merits despite having clearly stated in the order that at the time of hearing when suit was called, plaintiff did not appear and in fact none of the parties appear since defendant had not contested case. It could have proceeded as per Order IX Rule 3 and ought not to have decided suit on merits. Therefore, first point for determination is answered in favour of appellant.

13. Now coming to second point, we have perused petition filed under Section 13 in Family Court by appellant. It has specifically said in paras 5, 6, 7 and 9 of petition, as under:

"5. That after some time from the marriage the cruelty towards the petitioner became increased day by day and in the month of 12 April 2000 the respondent turned out the petitioner from her matrimonial house. Since then the petitioner is living separately in Shastri Nagar Meerut and the respondent since that date even did not take care of the petitioner, while the petitioner made several efforts.

6. That this fact has also come to the knowledge of the petitioner after long time of marriage that the first wife of the respondent was also given cruel treatment by the respondent and she committed suicide as she could not bear the cruelty.

7. That the petitioner in the way described above, has been deserted continuously since 12th April 2000. The respondent also caused cruelty towards the petitioner. Now the petitioner has no other alternative with her but to file the petition for dissolution of marriage as the respondent has finally refused in the first week of July 2006 to reconcile the matter amicably.

9. That the cause of action for the petitioner arose on 24.2.1998 the date of marriage; on several other dates when the respondent caused cruelty towards the petitioner as in the month of 12th April 2000 when the respondent turned out the petitioner from the matrimonial house; on several other dates when the petitioner made efforts to reconcile the matter amicably; on 7.2.2005 when the respondent has finally refused to settle the matter amicably; within the territorial jurisdiction of this Hon'ble Court and this Hon'ble Court has jurisdiction to try the petition."

14. These facts were supported by an affidavit filed under Order 18 Rule 4 C.P.C. and remained uncontroverted. It cannot be said that physical assault by defendant-respondent would not constitute cruelty moreso it is a case of mental cruelty when appellant found that first wife of respondent committed suicide due to cruelty of respondent. In absence of any rebuttal there was no reason for Court below to disbelieve same when it was duly supported by an affidavit filed by plaintiff-appellant under Order 18 Rule 4 C.P.C.

15. Defendant-respondent did not participate in proceedings either before Court below or before this Court. Even this conduct of a party has been held as constituting "mental cruelty".

16. In Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

17. In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

18. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

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

19. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse. "

20. One of the earliest decision considering "mental cruelty" we find is, N.G. Dastane v. S. Dastane (1975) 2 SCC 326, wherein Court has said:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. "

21. In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr. (1981) 4 SCC 250 Court said that a concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is

unchaste are all factors which lead to mental or legal cruelty.

22. In *Shobha Rani v. Madhukar Reddi*, (1988) 1 SCC 105 Court observed that word 'cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases where conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, cruelty will be established if conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

23. In *V. Bhagat v. D. Bhagat (Mrs.)*, (1994) 1 SCC 337 considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard must be had to the social status, educational level of parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is thus has to be determined in each case having regard to the facts and circumstances of each case.

24. In *Chetan Dass v. Kamla Devi*, (2001) 4 SCC 250, Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.

25. In *Savitri Pandey v. Prem Chandra Panadey*, (2002) 2 SCC 73, Court held that mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.

26. In *A. Jayachandra v. Aneel Kaur*, (2005) 2 SCC 22, Court observed that conduct of spouse, if established, an inference can legitimately be drawn that treatment of spouse is such that it causes an apprehension in the mind of other spouse, about his or her mental welfare then this conduct amounts to cruelty. Court observed that when a petition for divorce on the ground of cruelty is considered, Court must bear in mind that the problems before it are those of human beings and psychological changes in a spouse's conduct have to be borne in mind before disposing of petition for divorce. Before a conduct can be called cruelty, it must touch a certain pitch of severity. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty.

27. In *Vinita Saxena v. Pankaj Pandit*, (2006) 3 SCC 778 Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as 'cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.

28. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to *Naveen Kohli v. Neelu Kohli*, (2006) 4 SCC 558 and *Rishikesh Sharma v. Saroj Sharma*, 2006(12) SCALE 282.

29. In *Samar Ghosh vs. Jaya Ghosh* (supra) Court said that though no uniform standard can be laid down but there are some instances which may constitute mental cruelty and the same are illustrated 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 behavior 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 behavior 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.

(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."

30. Further, having considered the fact that for the last 18 years parties are living separately, we are also of the view that marriage between two is irretrievable and has broken completely. The second point, therefore, is also answered in favour of appellant.



31. In view of above, appeal is allowed. Judgment and award dated 18.07.2007 is set aside. Decree of divorce is granted.

32. Appellant shall bear her own cost.

Order Date :- 5.2.2018 AK