

Allahabad High Court

Smt. Monika Gupta vs Jitendra Gandhi on 6 August, 2019

Bench: Pradeep Kumar Baghel, Rohit Ranjan Agarwal

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Reserved

In Chamber

Case :- FIRST APPEAL No. - 60 of 2016

Appellant :- Smt. Monika Gupta

Respondent :- Jitendra Gandhi

Counsel for Appellant :- Rajesh Khare, Jitendra Kumar Chakraborty

Counsel for Respondent :- Gulab Chandra

with

Case :- FIRST APPEAL No. - 61 of 2016

Appellant :- Smt. Monika Gupta

Respondent :- Jitendra Gandhi

Counsel for Appellant :- Rajesh Khare

Counsel for Respondent :- Gulab Chandra

Hon'ble Pradeep Kumar Singh Baghel, J.

Hon'ble Rohit Ranjan Agarwal, J.

(Delivered by: Hon'ble Rohit Ranjan Agarwal, J.)

1. Both the appeals arise out of common order of Principal Judge, Family Court, Jhansi dated 18.1.2016 passed in Case No.205 of 2011 filed by the appellant (Smt. Monika Gupta Vs. Jitendra Gandhi), under Section 13 of the Hindu Marriage Act and Case No.94 of 2011 (Jitendra Gandhi Vs. Smt. Monika Gupta), under Section 9 of the Hindu Marriage Act.

2. Case No.205 of 2011 was filed by appellant, Smt. Monika Gupta against the defendant/respondent under Section 13 of the Hindu Marriage Act for annulling marriage on 15.4.2011 before the Principal Judge, Family Court, Jhansi. Case No.94 of 2011 was filed by respondent, Jitendra Gandhi under Section 9 of the Hindu Marriage Act for restitution of conjugal rights before the Court of Additional Senior Civil Judge at Gandhi Dham (Gujarat). The said case was transferred to the Court of Principal Judge, Family Court at Jhansi by orders of the Supreme Court of India dated, 23.4.2012 passed on Transfer Petition (C) No.166 of 2012. Both the cases were tried together by the Court below and was decided by common order.

3. Plaintiff/appellant filed Case No.205 of 2011 under Section 13 of the Hindu Marriage Act for annulling the marriage on the ground that she was married to the defendant/respondent on 12.12.2009 according to Hindu rites and custom at Dabra, District Gwalior (Madhya Pradesh). It was contended that when she was 7 years old, both her parents died, and she was brought up along with her two brothers by her maternal uncle and aunt (Mausa and mausi). It is they who had performed the ceremony of 'Kanyadan' and gave dowry as per their status. It was contended that after marriage, there was constant demand for dowry by the in-laws and appellant was not treated well. For three weeks, she stayed at her in-laws house and, thereafter came to her maternal home along with her brother and after living for 15 days, she again went back to her in-laws house from where her husband took her to Gandhi Dham, Gujarat.

4. In paragraph no.5 of the plaint, it has been specifically stated that at Gandhi Dham (Gujarat), the respondent started pressurising the appellant for sharing bed and having physical relation with his friends, on refusing to do so, she was beaten by her husband. In paragraph 6 of the plaint it is stated that appellant had intimated this to her in laws, but they were not helpful and scolded her saying wife has to obey her husband. It is further stated in paragraph no.8 that she lived at Gandhi Dham till 7.11.2010 and, thereafter, she returned with her brother to her maternal home at Jhansi.

5. The said case was contested by the defendant/respondent by filing his written statement and in the additional pleas, it was stated that the appellant did not want to live at Gandhi Dham and was forcing the respondent to live at Jhansi. It was further averred that appellant and her two brothers are not in control of her maternal uncle and aunt. It is further stated that appellant would quarrel and fight for petty things and she was not interested in doing domestic work and she did not want to live along with family members of the respondent and was always pressurizing him to live separately. It has also been contended that she had been pressurizing the respondent for claiming his share in the family property, consequence of which the parents of the respondent after, giving his share had snapped ties with the respondent and the appellant. It was further stated that the appellant was having extra marital relation with her brother-in-law (Jija).

6. The defendant/respondent filed Case No.94 of 2011 under Section 9 of the Hindu Marriage Act, for restitution of conjugal rights before the Additional Senior Civil Judge at Gandhi Dham. In the said case, he made the same allegation that appellant displayed strange behaviour after returning from her parental house. The said case, after being transferred from Gandhi Dham to the Court of Principal Judge, Family Court at Jhansi was contested by the appellant who filed her written statement denying the said facts and reiterated the case set up by her in her case under Section 13 of the Hindu Marriage Act in the additional pleas.

7. As in both the cases, the parties were same, as such the Principal Judge, Family Court proceeded to decide the same together and following issues were framed :-

"1& D;k ;kph Jherh eksfudk xqIrk dks foi{kh ftrsUnz xa/kh ls vyx jgus dk ;qfDr ;qDr ,oa vkSfpR;iw.kZ vk/kkj gS\ 2& D;k ;kph Jherh eksfudk xqIrk viuh ;kfpdk esa of.kZr rF;ksa ds vk/kkj ij foi{kh ftrsUnz xa/kh ls fookg foPNsn dh vkKfIr izkIr dh vf/kdkfj.kh gS\"

8. The Court below, thereafter considering the oral and documentary evidence proceeded to hold that appellant has failed to prove her case for cruelty, nor she could prove her case beyond doubt as far as the allegation of sharing bed and making physical relation with other men, the Court below dismissed the case of the appellant under Section 13 of the Hindu Marriage Act and allowed the application of the defendant/respondent under Section 9 for the restitution of conjugal rights. Against the order dated 18.1.2016 passed by the Principal Judge, Family Court, Jhansi two appeals, First Appeal No.60 2016 filed by the appellant against the order under Section 9 of the Hindu Marriage Act and First Appeal No.61 of 2016 has been preferred against the dismissal of the case under Section 13 of the Hindu Marriage Act.

9. Both the appeals are being heard and decided together as the same arises out of common order of the Court below. This Court before hearing the case on merits had made an effort for reconciliation between the parties on 25.4.2019, but the effort for reconciliation failed.

10. From the pleadings of the parties and from the perusal of the records of the Court below, the question which emerges for consideration is,

(i) whether the appellant is entitled to a decree of divorce on the ground of cruelty.

(ii) Whether there is an irretrievable break down of marriage between the parties.

11. It is contended by the appellant that court below while dealing with the issue failed to record just, cogent and reasonable finding disbelieving the fact of allegation made by the appellant as far as that she was pressurized by defendant/respondent to share bed with friends and colleagues. The Court below should have visualized that lady like appellant whose parents had passed away in her childhood and was brought up by her maternal uncle and aunt and she having no source of livelihood would not make such allegations against her husband which could land her in a dangerous zone unless and until the circumstances compelled her to do so and the Principal Judge, Family Court should not have taken her allegations made in the plaint so lightly and disbelieve for

want of any specific evidence. Further the allegations made by the respondent in the additional pleas of the written statement filed in proceedings under Section 13, as well as in petition under Section 9 of the Hindu Marriage Act that appellant was having an illicit relationship with her brother in law also amounted to mental as well as legal cruelty.

12. It has also been argued that the Court below had not recorded any finding in respect of specific pleadings as well as testimony put forward and the court below while coming to the conclusion that no mental cruelty has been established by the appellant, as such was not entitled to a decree of divorce.

13. Sri Gulab Chand, counsel appearing for the husband submitted that the appellant failed to prove cruelty, as alleged by her and the trial court was correct in dismissing her case for divorce. It was submitted that appellant was a highly qualified lady and she had ample opportunity to make complaint directly or through electronic process/message, but she did not availed the same and there was no evidence on record to establish the charge of cruelty. It was further contended that defendant (husband) had got examined the landlord before the court below who adduced that the appellant was never subjected to any cruelty at hands of the respondent-husband.

14. Sri Gulab Chand, counsel for the respondent vehemently argued that this Court has got no jurisdiction to grant a decree of divorce on the ground of irretrievable break down of marriage, as Section 13(1) of the Hindu Marriage Act does not mandate, as a ground for annulling the marriage. He relied upon two judgments of the Apex Court in the case of Vishnu Dutt Sharma vs. Manju Sharma, 2009(6) SCC 379 and Darshan Gupta vs. Radhika Gupta, 2013 (9) SCC 1 wherein the Apex Court has held that irretrievable break down of marriage is not a ground for divorce under the Hindu Marriage Act.

15. Further reliance was placed upon the provisions of sub-Section (1) (i-b) of Section 13 of the Hindu Marriage Act 1955 whereby petition for divorce could not be presented unless two years have passed since either of the parties has deserted.

16. We have heard Sri Jitendra Kumar Chakraborty and Sri Rajesh Khare, learned Counsel for the appellant and Sri Gulab Chandra, learned Counsel for respondents and have perused the records of the case.

17. In the present case, appellant had filed case under Section 13 of the Hindu Marriage Act for annulling the marriage on the ground of cruelty. The Apex Court in depth had examined the word "cruelty" in the case of Samar Ghosh Vs. Jaya Ghosh, 2007 (4) SCC 511 in Paragraph nos.38, 39, 40, 41, 42 and 43 which are as under:-

"38. Before we critically examine both the judgments in the light of settled law, it has become imperative to understand and comprehend the concept of cruelty.

39. The Shorter 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'.

40. The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

"Mental Cruelty - 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."

41. 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."

42. 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."

43. In the instant case, our main endeavour would be to define broad parameters of the concept of 'mental cruelty'. Thereafter, we would strive to determine whether the instances of mental cruelty enumerated in this case by the appellant would cumulatively be adequate to grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a number of cases of this Court and other Courts."

18. The concept of legal cruelty has been dealt with by the Supreme Court in case of Sirajmohmedkhan Janmohamadkhan Vs. Hafizunnisa Yasinkhan and another, (1981) 4 SCC 250, which is as under :-

"29. In *Sm. Pancho v. Ram Prasad, Roy, J.* while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946) expounded the concept of 'legal cruelty' and observed thus:

"In advancement of a remedial statute, everything is to be done that can be done consistently with a proper construction of it even though it may be necessary to extend enacting words beyond their natural import and effect.

Conception of legal cruelty undergoes changes according to the changes and advance of social concept and standards of living. With the advancement our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate 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 may undermine the health of a wife."

19. Supreme Court in case of *V. Bhagat Vs. D. Bhagat*, (1994) 1 SCC 337 in Para 16, while dealing with mental cruelty held as under :-

"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the 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 the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the 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 a matter to be Determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made. "

20. Further the Apex Court in case of *Dr. N.G. Dastane Vs. Mrs. S. Dastane*, (1975) 2 SCC 326 Para 30 has observed as under :-

"30. An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

"10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-

(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;"

The inquiry therefore has to be whether the conduct charged a,- 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. It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other."

21. In Savitri Pandey Vs. Prem Chandra Pandey, (2002) 2 SCC 73, the Apex Court while dealing with cruelty in Para 6 held as under :-

"6. Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly shows that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life."

22. In A. Jayachandra Vs. Aneel Kaur, (2005) 2 SCC 22 in Paragraph nos.10, 12 and 13, the Apex Court held as under :-

"10. The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes

mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

12. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

13. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."

23. Further the Apex Court in case of Samar Ghosh (supra) laid down the guidelines to enumerate some instances of human behaviour which may be relevant in dealing with the case of 'mental cruelty', paragraph no.101 of the judgment is extracted herein 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.

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

24. Section 13 of the Hindu Marriage Act, 1955 provides for grounds on which petition can be presented for divorce. Cruelty is one of the ground on which, a petition for divorce can be filed, but where there is irretrievable breakdown of marriage, no petition can be filed. The Law Commission of India in its 71st report titled "The Hindu Marriage Act, 1955 - Irretrievable Break Down Of Marriage as a Ground of Divorce" recommended amendments in the Hindu Marriage Act as a new ground for granting divorce among the Hindus. But the recommendation of the Law Commission of India was not accepted.

25. The Supreme Court in case of Naveen Kohli Vs. Neelu Kohli, 2006 (4) SCC 558, while considering the concept of irretrievable breakdown of marriage held as under:-

"80. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

81. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems than are sought to be solved.

82. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

88. Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.

89. The High Court ought to have appreciated that there is no acceptable way in which the parties can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

90. Undoubtedly, it is the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality. "

26. Earlier in case of Samar Ghosh (supra), the Supreme Court referred to 71st report of the Law Commission of India on "Irretrievable breakdown of marriage" with approval as follows:-

"90. We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71st report of the Law Commission of India on "Irretrievable Breakdown of Marriage".

91. The 71st Report of the Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. In this Report, it is mentioned that during last 20 years or so, and now it would be around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory. It would be relevant to recapitulate recommendation of the said Report.

92. In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included

for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case *Lodder v. Lodder Salmond, J.*, in a passage which has now become classic, enunciated the breakdown principle in these words:

"The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this court, as *prima facie* a good ground for divorce. When the matrimonial relation has for that period ceased to exist *de facto*, it should, unless there are special reasons to the contrary, cease to exist *de jure* also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."

93. In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bonds which are of the essence of marriage have disappeared.

94. It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

95. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties."

27. The Supreme Court in case of *Ms. Jorden Diengdeh Vs. S.S. Chopra*, AIR 1985 SC 935 held as under :-

"It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases..... We suggest that the time has come for the intervention of the

legislature in those matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves."

28. Further the Apex Court in case of V. Bhagat (supra) held as under :-

"Irretrievable breakdown of the marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind."

29. However, in case of Geeta Mullick v. Brojo Gopal Mullick, IR 2003 Calcutta 331, the High Court held as under :-

"In our considered opinion, the marriage between the parties can not be dissolved by the trial Court or even by the High Court only on the ground of marriage having been irretrievably broken down, in the absence of one or more grounds as contemplated under section 13(1) of the Hindu Marriage Act, 1955."

30. Similarly, in case of Tapan Kumar Chakraborty V.s Jyotsna Chakraborty, AIR 1997 Calcutta 134, the Calcutta High Court held that in a petition for divorce on a ground as mentioned in the Hindu Marriage Act or the Special Marriage Act, Court cannot grant divorce on the mere ground of irretrievable breakdown of marriage.

31. However, the Apex Court in case of Savitri Pandey (supra) held as under :-

"that marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of the Supreme Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses."

32. After the judgment of Supreme Court in Naveen Kohli (supra), the Law Commission of India in its Report No.217 submitted to the Government in March, 2009 regarding irretrievable breakdown of marriage-another ground for divorce, was of the view that:-

"The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hypersensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it.

33. The Law Commission was of the view that :-

"2.1 A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce Courts are presented with concrete instances of human behaviour as bring the institution of marriage into disrepute. Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interest of the parties. Where there has been a long period of continuous separation, it may fairly be surmised 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. Public interest demands not only that the married status should, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist. Human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom."

34. However, the Supreme Court in case of Darshan Gupta (supra), while considering the case of Vishnu Datt Sharma (supra) as to whether relief on the ground of irretrievable break down of marriage is available to the appellant, held as under:

"50. At the present juncture, it is questionable as to whether the relief sought by the learned counsel for the appellant, on the ground of irretrievable breakdown of marriage is available to him. The reason for us to say so, is based on a judgment rendered by this Court in Vishnu Dutt Sharma vs. Manju Sharma, (2009) 6 SCC 379, wherein this Court has held as under:-

"10. On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.

11. Learned Counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent.

12. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned Counsel for the appellant.

13. Had both parties been willing we could, of course, have granted a divorce by mutual consent as contemplated by Section 13-B of the Act, but in this case the respondent is not willing to agree to a divorce."

35. Thus, the Apex Court had constantly directed for the amendment in the Hindu Marriage Act, for introducing irretrievable break down of marriage, as one of the grounds for divorce. However, the Law Commission has twice in its 71st report and, thereafter, in report No.217 has recommended for the inclusion of irretrievable break down of marriage, as one of the grounds for divorce. The Apex Court, however, in those cases where it found that mental cruelty existed on the part of one of the spouses, it granted divorce taking into consideration that the marriage cannot continue as it has irretrievably broken down, while it refused to grant divorce in those cases, which were simply based on the ground of irretrievable break down of marriage.

36. In the present case, divorce has been sought on the ground of cruelty by appellant, making serious allegations against the respondent-husband for demand of dowry and sharing bed with his friends and colleagues. In the additional pleas of written statement, defendant-respondent had made counter allegations as regards the character of appellant, having illicit relationship with her brother-in-law (Jija). These allegations, so made, qualifies under the term mental as well as legal cruelty.

37. The appellant in her cross-examination before the court below had clearly stated that the respondent-husband was forcing her to share bed with his friends and colleagues. Her statement was also supported by PW-2, Ram Kumar Gupta, who also in his cross-examination had stated that the appellant had told her that the respondent was forcing her to share bed with other persons. The Court below wrongly repelled and discarded the oral testimony of the appellant and held that she failed to produce material to substantiate her claim.

38. The allegation made by the appellant against her husband are so grave in nature which cannot be proved by evidence nor it can be expected from a lady to make such allegation against her husband after such a short span of marriage, being fully aware of the fact that she has been brought up by her maternal uncle and aunt after her parents passed away at an early age, and she being not employed and earning any money.

39. The Court below completely lost sight of the fact that the respondent-husband had made wild allegations not only in the written statement filed by him in proceedings under Section 13, but also in proceedings under Section 9 of the Act. As there are allegations and counter allegations from both the sides, no decree under Section 9 could have been passed.

40. The Court below also lost sight of the fact that the appellant who was for the first time taken by her husband to Gandhi Dham, Gujarat was living in rented accommodation on the first floor, and it cannot be expected from the appellant who was not familiar with the new place to have reported the matter to landlord or neighbours or to have made complaint to police, except to have told her misery to her maternal uncle, aunt and her brothers, which she did.

41. Another aspect which required consideration was, as to why a newly wedded lady immediately after few months of her marriage will leave her husband's house and make such serious allegations and refuse to go back. Further effort made for reconciliation, also failed. Before passing the judgment impugned a thought should have been given to the misery of the lady who refused to return to her husband's home. Matrimonial proceedings cannot be simply decided on the basis of mere evidence on record, sometimes the Court while examining and scrutinizing the case has to decide on the circumstances which led to the filing of the case, as in the present case, the allegation made in matrimonial case cannot be proved by the wife by any evidence except her testimony.

42. It is true that in Section 13 of the Act, irretrievable breakdown of marriage is not a ground for dissolution of marriage, but the Apex Court has held the decree of divorce on the ground that the marriage has irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties cannot live together.

43. In the present case, the divorce claimed by the appellant is on the ground of cruelty, it is both mental and physical, the appellant has been subjected to mental cruelty by the respondent-husband pressurising and coercing her to do such act which cannot be justified and expected from any husband. Further the appellant and respondent are living separately since 7.11.2010 i.e. for about 9 years, while the married life existed for a brief period.

44. The Court below in most cryptic and arbitrary manner decided the divorce petition without recording any finding holding that appellant has failed to prove her case, as no evidence was adduced by her in support of the allegations made in the divorce petition, while by the same judgment petition under Section 9 of the husband was allowed. No finding has been recorded as to mental cruelty, suffered by the appellant, as the averment of the petition and testimony had been discarded.

45. In Samar Ghosh (supra), the Apex Court had laid guidelines to enumerate some instances of human behaviour, which may be relevant in dealing with the case of mental cruelty. As from reading of the claims and counter claims of the parties in their petition and written statement, one thing clearly emerges that both the parties have made serious charges against each other, especially in regard to the character. Considering the averments so made by the parties, it can safely be said that the action of the respondent-husband specially in forcing the appellant to share bed with his friends and colleagues, and also making allegation by husband against the appellant, having illicit relationship with her brother-in-law amounts to mental cruelty as enumerated in some of the instances in the guidelines.

46. It is not in dispute that both the parties are living separately for the last nine years and despite the efforts of the Trial Court as well as this Court reconciliation failed. Thus, as the appellant has been subjected to mental cruelty, which is one of the ground for divorce under Section 13 as well as keeping in mind the fact that the marriage between the parties has broken down. No useful purpose would be served to keep it alive, as observed by the Apex Court in case of Savitri Pandey (supra) "the sanctity of marriage cannot be lived at the whims one of the annoying spouses".

47. Argument of the counsel for respondent-husband, that this Court does not have any jurisdiction to grant decree of divorce on the ground of irretrievable break down of marriage under Section 13 has no force, as the appellant had filed petition for divorce on the ground of cruelty and the Apex Court while dealing in case of Vishnu Datt Sharma (supra) and Darshan Gupta (supra) had held that irretrievable break down of marriage is not a ground under Section 13, but the Apex Court in case of Samar Ghosh (supra) and Naveen Kohli (supra) while dealing with the similar situation in which divorce was sought on the ground of mental cruelty. The Court went further and held that where one of the parties, who was subjected to mental cruelty and the marriage cannot be sustained any more having been broken down, came up with the concept of irretrievable break down of marriage. In the present case also the appellant, who has been subjected to mental cruelty by the respondent-husband is also entitled for a decree of divorce as her marriage has completely broken down and no chance of survival remains.

48. As far as the second objection of the counsel for the respondent-husband, that sub-Section (1) (i-b) of Section 13 of the Act debars the parties from presenting petition within two years in case of desertion, but in the present case, the appellant had moved the petition seeking annulment of marriage on the ground of mental cruelty. The argument made has no force and the said provision is not applicable in the present case.

49. Thus there is no use of keeping the appellant and the respondent tied by matrimonial relationship when they cannot live peacefully, since parties are living separately after marriage, appellant has lived for a few months in her matrimonial house, she having made allegation of cruelty and desertion against husband and husband having made counter allegations against her the marriage has irretrievably broken down.

50. As, no application for permanent alimony has been filed by the appellant, nor any oral prayer was made during the course of argument, or at the time of reconciliation held in Chamber, the appellant is not granted any permanent alimony from the respondent.

51. In the interest of justice, the judgment dated 18.1.2016 and decree dated 30.1.2016 are set aside and Case No.205 of 2011 filed by appellant, under Section 13 of the Hindu Marriage Act is decreed and the marriage between the parties stand annulled, and Case No.94 of 2011 filed by the respondent under Section 9 of the Hindu Marriage Act for restitution of conjugal rights is dismissed.

52. Both the appeals stand allowed.

Order Date :-6.8.2019 S. Singh