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

% ***Judgment reserved on: 20.03.2019***
Judgment pronounced on: 03 .05.2019

\+ **MAT.APP(F.C.) 12/2018**

N V ..... Appellant

Through: Ms. Deepali Gupta, Advocate

versus

A V ..... Respondent

Through: In person

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present appeal has been filed challenging the judgment dated 5.10.2017 passed by the Family Court in HMA No. 950/2014 whereby the petition under Section 13(1)(ia), (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'HMA') filed by the appellant/wife for dissolution of marriage has been dismissed.
2. The relevant facts necessary for the present appeal are that the parties got married on 02.07.2003 as per Hindu rites and ceremonies at Delhi. After the marriage both the parties resided together at Delhi. Marriage was consummated and one son named Harshit was born from the wedlock on 05.04.2004.

3. Disputes and differences having arisen between the parties, the appellant/wife filed a petition under Section 13(1)(ia), (ib) of the HMA seeking dissolution of the marriage by passing a decree of divorce on the grounds of 'cruelty' and 'desertion'. One of the grounds alleged in the divorce petition was that at the time of solemnization of marriage, dowry was given by the parents of the appellant which included household articles, one motorcycle, gold and silver ornaments besides several other articles. Along with this, cash amounting to Rs. 51,000/- was given at the time of Kanyadan and Rs.50,000/- was given on different functions of the marriage. Her parents had thus spent far more than their financial capacity on the wedding ceremonies itself. Despite so much having been given at the time of marriage, the respondent and his family members were not happy and when the appellant joined the matrimonial home, they expressed their disappointment over the quantum of articles received. It was pleaded by the appellant that the respondent and his family members demanded a car and a further sum of Rs. 1 lakh and pressurized the appellant to meet such demands. She was never given any love, affection and respect by the respondent or his family members. It was also alleged that the parents of the respondent taunted the appellant that good proposals with handsome dowry were available for their son and that the marriage with the appellant caused a loss to them, in every way.
4. It was alleged that after a few days of marriage, the brother of the appellant visited her matrimonial home to take her back. She narrated her suffering to him, and when he tried to talk to the respondent

regarding this, he was insulted and asked to leave. Appellant's brother brought her back to the parental home. After one month, the respondent and his father visited her parental home and assured the appellant that they will not misbehave with her. However, after she returned to the matrimonial home, she found no change in the behaviour of the respondent or his family members. She alleged that the respondent would often rebuke her, that she was not beautiful and was a "fatty lady". The parents of the respondent would fight with her on petty issues and the respondent would often beat her up and even threatened to kill her, on many occasions. In fact, he even tried to actually press her neck on one occasion, with an intent to kill. She filed a number of complaints before the concerned authorities, but no action was taken.

5. As per further pleadings, in the year 2010, the appellant's father-in-law retired and the government quarter at Minto Road was to be vacated. The father-in-law refused to take her with them and respondent took a separate quarter, without any kitchen, for her at Minto Road. It was alleged that the husband did not stay with her and their child. He only had food with her and stayed in the night at his parents' house. The appellant claims that she was looking after the small child and did not find time to do any tailoring work. She claims that the respondent did not provide her with maintenance and when she was on the verge of starvation, the respondent started beating her and asked her to bring money from her parents. On 18.06.2012, she was thrown out of the rented accommodation, along with her minor

son. She returned to her parents' house, while all her istridhan and jewellery items were retained by the respondent.

6. The respondent/husband had contested the petition, and in his written statement, he made preliminary objections that pleadings in the proceedings before the Family Court were contradictory to the pleadings in the case filed under the Domestic Violence Act as well as in the Guardianship Petition.

7. On merits, the respondent/husband denied all allegations in the petition against him and his family members. It was stated that no harassment was caused to the appellant. He instead alleged that the appellant used to beat up the respondent and his old grandmother and would then lodge false police complaints. It was pleaded that on 16.12.2009, she was the one who had beaten the respondent, but lodged a false complaint against him, with the police. He referred to two MLCs dated 26.03.2008 and 16.12.2009 in order to indicate that he had suffered injuries on 2 occasions on account of the beating given by the appellant. In the written statement, it was further pleaded that the appellant and her family members continuously threatened, harassed and terrorized the respondent so as to implicate him in false criminal cases. He denied that he had thrown the appellant out of the matrimonial home and stated that she lived separately as per her own wish. He denied that the appellant was thrown out of the rented accommodation and stated that in fact on 20.06.2012, the sister of the appellant had visited the matrimonial home and the appellant left on her own accord along with her sister and the child, with all her jewellery, valuables and other istridhan articles. He pleaded that he

was always interested in saving the marriage and tried his best to bring her back and in fact did not even file any litigation against the appellant.

8. It was stated in the written statement that the respondent had been falsely implicated in a case under Section 107/151 Cr.P.C. He was arrested on 26.03.2008 and kept in police custody for 13 hours. The proceedings continued before the SEM for 5 months and yet another complaint was filed by the appellant on 16.12.2009 at PS Kamla Market, which was totally false. It was alleged that the appellant had got her son admitted to Navjivan Adarsh Public School, without the consent of the respondent and the school was neither recognized by the Directorate of Education nor affiliated with the CBSE. The written statement refers to about 25 dates, on which dates, it was alleged by the respondent that the appellant had been leaving the matrimonial home on her own accord and thus it was the appellant who was guilty of desertion.

9. The appellant had examined herself as PW-1. She filed her evidence by way of affidavit which was Exhibit PW-1/1. In the affidavit, she deposed on the lines of the averments in the Divorce Petition. The respondent after filing the written statement stopped appearing and was proceeded ex-parte on 14.01.2016. The Family Court passed an ex-parte judgment on 30.08.2017, dismissing the divorce petition on both grounds i.e. cruelty and desertion.

10. The Family Court dismissed the petition on the ground of desertion by holding that for seeking divorce on the ground of desertion, there must be a separation for a period of two years on the date of presentation of

the petition, as per the requirement of Section 13(1)(i-b) of the HMA. The Family Court relied on the averment in the petition that the appellant was thrown out from the matrimonial home on 18.06.2012 and since the Divorce Petition was filed on 28.05.2014, the period of two years was short by 20 days.

11. Insofar as the ground of cruelty was concerned, the Family Court did not find favour with the grounds set out by the appellant and dismissed the petition. The respondent had, along with his written statement filed copies of the pleadings in the earlier litigations between the parties i.e. a Guardianship Petition by the husband and a petition under the Domestic Violence Act by the appellant. After comparing the said pleadings, the Family Court observed that there were material contradictions in the pleadings of the divorce petition vis a vis the stand taken by the appellant in the pleadings in the earlier litigations, more particularly, on the point of the financial status of the parties. The Family Court also did not give credence to the testimony of the appellant regarding the demand of a car and Rs. 1 Lakh on the ground that the allegations were too general and no date, time, month or year of the demand was mentioned. Likewise, the allegations of taunting by the respondent and his family members was also found to be unsubstantiated and without any specific details. As regards the allegations of throwing her out of the rental accommodation in 2010, the Family Court observed that if the parents in law of the appellant refused to keep her in their home, this would not amount to cruelty by the respondent. The allegations of physical beating and not providing financial support were also found to be general, vague and without any

specific details. On the issue of the orders passed in proceedings under Sections 107/151 Code of Criminal Procedure, 1976, the Family Court found that at best this could only prove that the marital relations between the parties were not cordial, but could not be taken as a proof to show that the appellant was a sufferer in the matrimonial home.

12. Having gone through the evidence, the Family Court was of the view that under Section 101 of the Indian Evidence Act, 1872, the appellant had to prove her case and though the testimony of the appellant in the affidavit was unrebutted, in the absence of a cross-examination, yet the same was not reliable and could not be the basis to grant a decree of divorce.

13. We have heard the learned counsel for the appellant and the respondent in person, who expressed his desire to argue his case himself and not hire a counsel. We have also examined the rival contentions of the parties and perused the pleadings as well as the Trial Court record.

14. Learned counsel for the appellant contends that the Family Court failed to appreciate that the action of the respondent as pleaded in the Divorce Petition and testified in the affidavit, amounted to physical and mental cruelty towards the wife. Demand and receipt of dowry, constant beatings, threats to kill and repeated taunting qua the physical appearance of the wife, did cause a lot of mental and physical harassment to the appellant. Despite a small child, the respondent refused to lend any financial support to her and the child. The respondent was happy living with his parents and took no steps to retrieve the matrimonial bonds. It was argued that it is not necessary

that every minute incident in the matrimonial home should be narrated as it was not possible to memorize all the details. It was enough if the general conduct of the parties was shown to reflect cruelty inflicted by one spouse on the other. Learned counsel further argued that the complaints filed by the appellant were not false and only when the cruel acts of the respondent surpassed all boundaries, the appellant resorted to taking police help for her safety and protection. It was further contended that apart from the 'cruelty' alleged, in any case, the marriage had broken down irretrievably and there was no chance that the differences would be resolved. It was further argued that the Family Court erred in holding that the appellant had not been able to prove the allegations. She submitted that an affidavit was filed by the appellant to lead evidence and the respondent had chosen not to cross-examine the appellant and even failed to file an affidavit leading his evidence. In the absence of the cross-examination, the testimony of the appellant in the affidavit was unimpeached and the appellant had thereby discharged her onus by proving the averments in the Divorce Petition. She further submitted that the Family Court had no reason to hold that it was not safe to rely on the sole testimony of the appellant as more often than not in marital disputes, facts are known to the husband and wife alone. Learned counsel for the appellant further argued that the Family Court has erred in holding that there were material contradictions in the pleadings of the Divorce Petition and the pleadings in the earlier litigations. Even assuming that there were some minor contradictions on the financial status of the parties, this could not be reason enough to dismiss the Divorce Petition.

15. *Per contra* the respondent has argued that he had never treated the appellant with cruelty and vehemently denied all allegations levelled by the appellant against him. He argued that it was the appellant who never behaved like a good wife and did not even take proper care of the child, who is in the custody of the respondent. He submitted that he was presently taking good care of the child and the child was doing well at school under his guardianship. He submitted that although he had not cross-examined the appellant before the Family Court but in his written statement, he had denied the allegations of the Divorce Petition. He submitted that he wanted to rely on the averments in the written statement in order to show that it was the appellant who always ill-treated him and his family members and would often beat his grandmother. He also submitted that the appellant was also guilty of deserting him and depriving him of the love and the care that was expected of her as a wife. According to him, the appellant was neither a good wife nor a good mother and least of all a dutiful daughter-in-law. He vehemently submitted that insofar as he was concerned, it was a dead marriage and the differences between the parties were beyond resolution.

16. We have carefully examined the rival submissions of the parties. As regards the ground of demand of dowry, we find that in the present case, in the petition as well as in the affidavit filed, there are repeated assertions by the appellant that dowry was taken at the time of marriage and post marriage, there were further demands. Details of articles given and those further demanded were spelt out. The pleadings of the Divorce Petition filed by the appellant indicate that

she had averred that at the time of solemnization of marriage, her parents had given dowry far in excess of their financial capacity. Despite this, there were repeated demands of various articles including a car and cash of Rs. 1 Lakh. This testimony of the appellant is unimpeached as the respondent had chosen not to cross-examine her on this aspect. In our view, this by itself is a ground to dissolve the marriage on the ground of cruelty.

17. In the case of ***Shobha Rani vs. Madhukar Reddy*** reported as 1988 (1) SCC 105, the Hon'ble Apex Court has while dealing with a petition under Section 13(1)(i-a) of the HMA on grounds of cruelty, has held that repeated and continuous demands of dowry made from the wife in the matrimonial home, with the connivance of the husband constitutes cruelty. Demand of dowry is prohibited under law and its mere asking is bad enough, entitling the wife to a decree of divorce. The evidence of harassment to the wife to meet an unlawful demand of dowry is necessary to constitute cruelty in criminal law but not under Section 13(1)(i-a) of the HMA. The evidence of the wife that her in-laws demanded money cannot be brushed aside merely because the in-laws had not been examined. The Apex Court further held that it was not proper to discredit the wife only because there could be some exaggeration on the quantum of the demand. The proof required under the matrimonial law is on the threshold of preponderance of probability and not beyond reasonable doubt as in the criminal case.

18. Appellant had further pleaded and testified that she was taunted for being fat and not beautiful in her appearance. Her brother was insulted by her in-laws and the respondent when he visited the matrimonial

home. Her father-in-law after retirement took a house on rent but she was left to fend for herself in a rental accommodation, without a kitchen. No financial support was given by the respondent for her or the child. She was often beaten and threatened and had to therefore resort to filing police complaint. The respondent did not give any love affection or respect to her, as per the averments in the petition. The appellant filed her evidence by way of an affidavit and testified on the lines of the pleadings in the Divorce Petition. Whilst it is a matter of record that the respondent had filed a written statement not only denying the allegations against him but also levelling various allegations against the appellant, but he chose to remain absent thereafter. The consequence was that neither was the appellant cross-examined, so as to demolish her testimony and nor was any evidence led by the respondent to prove his stand in the written statement. In the absence of cross-examination, the testimony of the appellant remains unimpeached and unrebutted. We may also point out that the appellant had also exhibited the complaints filed by her, the notice issued by the SEM as well as the ordersheet of the said proceedings, the copy of the Kalandra as well as the statement of the concerned ASI. None of this has been impeached by the respondent.

19. In the case of ***Gannon Dunkerlay & Co. Ltd. vs. Their Workmen*** *1972 (3) SCC 443*, the Hon'ble Apex Court has held that the credibility and authenticity of the evidence produced by one party can be challenged by the other party by cross-examining the party. However, if a witness deposes a particular fact and no suggestion is given to the contrary during the cross-examination, the party against

whom the deposition is made is deemed to have admitted that part of the deposition, which thereby remains unimpeached. As we have mentioned above, the entire testimony of the appellant remained unimpeached and hence all the allegations would be deemed to be admitted by the respondent. In our view, therefore, the Family Court has erred in coming to a conclusion that the testimony was unreliable or that the appellant had not proved cruelty. In fact, from the perusal of the impugned judgment, we find that the Family Court has not even given its reasoning to conclude that the sole testimony of the appellant was not worthy of credence. There is no doubt that beating, threatening, attempt to kill which remains unrebutted, would be a conduct that would amount to both mental and physical cruelty and even on this score, the appellant is entitled to a decree of divorce.

20. The Family Court has emphasized on the material contradictions in the pleadings in the different litigations between the parties so as to doubt the credibility of the version of the appellant. A perusal of the pleadings indicates that there were some contradictions on the financial capacity of the appellant inasmuch as while in the guardianship petition, she had mentioned that she was earning and taking care of her child, while in the divorce petition she had denied that she was working. It is not uncommon that parties take different stands in different litigations depending on the context and the relief sought. Undoubtedly, this practice needs to be seriously deprecated but, in our view, the financial capacity of the parties is not a factor which is very material while dealing with the divorce petition. While the appellant had urged that her husband did not support her and this

was one of the grounds of cruelty in the present petition, but there were several other grounds to seek divorce in the same petition. Thus, in our view this contradiction in the pleadings is not a reason enough which would disentitle the appellant to a decree of divorce, in view of our findings given above.

21. In so far as observations of the Family Court of lack of details is concerned, it is a matter of record that the Divorce Petition did not have very miniscule details about all the incidences averred therein, but the fact of the matter is that several incidences had been pointed out and the years were also mentioned. During a long span of marriage, it can hardly be expected that the spouse would keep a written record of the date, time or month of each of the incidences illustrated to show cruelty with mathematical precision. The law requires that the petition should not have 'vague' and 'too general' allegations, but it does not require that every incident should be narrated with the minutest detail possible. We find that the appellant had given sufficient details of the incidents alleged.

22. The law of cruelty was well summarized by the Apex Court in the case of ***Shobha Rani*** (supra). It was held that cruelty is a course of conduct of one party which adversely effects the other. If it is physical it is a question fact and degree. If it is mental the enquiry must begin as to the nature of the treatment and then its impact on the mind of the spouse. If the conduct is per se unlawful then the impact on the other spouse need not be seen and the cruelty is established if the conduct itself is proved. The Court further observed that there has been a sea change in the life style over the years and the cruelty

alleged may largely depend on the type of life the parties are accustomed to and their economic and social conditions as well as their cultural and human values. We quote a relevant para of the said judgment hereunder:

> *"5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents."*

23. In the case of ***V. Bhagat vs. D. Bhagat*** reported as *(1994) 1 SCC 337*, the Apex Court held that the cruelty complained of must be of such a nature that parties cannot reasonably be expected to live together. To prove mental cruelty, regard must be had to the social status, educational level and the society of the parties apart from the possibility of the parties coming together in case they have been living apart for a long time. We quote the relevant para 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."

24. As regards the grounds of desertion, the Family Court in our view, rightly dismissed the petition on that count, as the statutory period of separation was not complete at the time of filing the petition. In fact, the learned counsel for the appellant had submitted at the outset that she did not want to press the ground of desertion.

25. The counsel for the appellant has also rightly pointed out that apart from cruelty, even otherwise nothing remained in this marriage and therefore, in view of the judgments of the Apex Court in ***V. Bhagat*** (supra) and ***Naveen Kohli vs. Neelu Kohli*** reported as *(2006) 4 SCC 558*, followed by the judgment in MAT. APP. (F.C.) 36/214 titled as ***Sandhya Kumari vs. Manish Kumar*** and ***Rajiv Chhikara vs. Sandhya Mathur*** reported as *2017 (161) DRJ 80 [DB]* by a coordinate Bench of this Court, the marriage should be dissolved on grounds of irretrievable breakdown.

26. The marriage between the parties was solemnized in the year 2003 and the parties have been living separately since 2012. As per the

unrebutted assertion of the appellant, there were marital discords between the parties right from the day of the marriage. It seems that the parties never enjoyed the bliss of a marital life. The foundation of a sound marriage is love and affection, tolerance, adjustments and respect for each other. While petty quibbles and disagreements on small issues are a normal wear and tear of every marriage, but if there is continuous ill-treatment of one spouse by the other and it is a dead marriage, the victimized party can be well justified in seeking dissolution of such a marriage.

27. In fact, in this case of ***Naveen Kohli*** (supra), the Apex Court had examined the aspect of irretrievable breakdown of marriage, though it is not a ground of divorce under the HMA. The Apex Court held that while scrutinizing the evidence on other grounds of divorce pleaded, the circumstance of irretrievable breakdown of marriage can certainly be borne in mind. This unusual step can be taken where the courts find when the parties are in insoluble mess. The Apex Court looked into the 71st report of the Law Commission of India wherein a recommendation was made to include irretrievable breakdown of marriage as a ground for divorce as it was felt that in case the marital bond has broken then it is in the best interest of the parties that they go apart. The Apex Court observed that once the marriage had broken down beyond repair it would be unrealistic for the law not to take notice of that fact and it would be rather harmful to the society and injurious to the parties to keep the marriage going. By refusing to severe that tie, the law would be showing scanned regard for the feelings of the parties. Public interest demands not only that the

married status should as far as possible be maintained, but where the marriage has wrecked beyond the hope of salvage, public interest lies in recognition of that fact. We quote the relevant paras of ***Naveen Kohli*** *(supra)* hereinunder:

> *"73. 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 they bring the institution of marriage into disrepute."*
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> *74. We have been principally impressed by the consideration that 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 interests 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.*
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> *75. Public interest demands not only that the married status should, as far as possible, 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.*
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> *76. 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 forever to a marriage that in fact has ceased to exist.*

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

> *21. Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter-allegations, a decree of divorce cannot follow. Nor*

is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the court finds it in the interest of both the parties."

29. We thus find that while irretrievable breakdown of marriage is not a ground for divorce in the Statute, but the courts have been taking this as an important circumstance and blending the same with the statutory grounds of divorce such as 'cruelty' and have been dissolving the marriage. We also find that this view has also been taken by the Apex Court in several other cases such as ***Durga P Tripathi vs. Arundhati Tripathi*** *2005 (7) SCC 353* and ***Lalitha vs. Manikswamy*** *2001 DMC 679 SC.*

30. Having traversed the law on the subject and analysed the facts of this case, we are in agreement with the learned counsel for the appellant that the marriage has broken down irretrievably. The parties have been living apart since 2012. There does not seem to be any possibility of the parties resolving their differences. Through her examination-in-chief, the appellant has made serious allegations of cruelty against the respondent, which are unrebutted. As mentioned above, the respondent had submitted that the marriage held no value for him anymore. Thus, blending the fact of the marriage having broken

down irretrievably with the ground of cruelty, we feel this is a fit case where the marriage between the parties deserves to be dissolved.

31. The appeal is accordingly allowed and the judgment dated 30.08.2017 of the Family Court is set aside. The marriage between the parties is hereby dissolved. Let a decree of divorce be drawn up accordingly.

JYOTI SINGH, J.

G.S.SISTANI, J.

MAY 3rd , 2019
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