

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE**

**DB :- HON'BLE SHRI ANAND PATHAK &
HON'BLE SHRI HIRDESH, JJ**

ON THE 7th OF NOVEMBER, 2024

FIRST APPEAL No. 1821 of 2018

Versus

Appearance:

Shri Girija Shankar Sharma- learned counsel for the appellant-husband.

None for respondent- wife even though after service of notice.

JUDGEMENT

Per Shri Hirdesh, J:-

The instant first appeal has been preferred by appellant-husband under Section 19 of the Family Courts Act read with Section 28 of the Hindu Marriage Act, 1955 [in short " HM Act"] assailing the judgment and decree dated 26/04/2018 passed by Principal Judge, Family Court, Gwalior in Case No.793-A/2017(HMA), whereby application filed by appellant-husband under Section 13 of the HM Act seeking a decree of divorce on the ground of "cruelty suppressing fact of unsound mind of respondent and desertion" has been rejected.

(2) It is the case of appellant- husband that that his marriage was solemnized with respondent-wife on 20/02/2008 as per Hindu rites and rituals without any dowry. When for the first time respondent came at her in-laws house, she lived normally only for 3-4 days. Appellant and his family members noticed that respondent used to behave like an unsound mind. He and his family members were unable to understand crazy behaviour of respondent. During her crazy behaviour, she used to say that someone was following her, spying on her, she heard screams, someone was calling her, she saw a woman's body, while in reality nothing happened with her. Due to such strange and crazy behaviour, respondent did not sleep at night, kept roaming around

and kept talking. Sometimes, she became unconscious of her clothes, she used to pick up and throw away things. She also lost the ability to think, remember and reason things out. Thus, she troubled, saddened and harassed appellant a lot with her above mental state.

(3) It is further averred that parents of respondent were called and they apologized and told that for the last three years, respondent is under influence of some ghost. On humanitarian grounds, appellant tolerated said trouble and kept her with him. Thereafter, from their wedlock, two children i.e. daughter Priyanshi and son Sammer were born. But even after that, there was no improvement in mental state of respondent and there was no possibility of improving of her mental state in future too. Family members of respondent were called again. Then, leaving two children the parents of respondent took respondent with them on 27th of June, 2012 and since then, she is living at her parent's home.

(4) After passage of a period of long five years, there had been no improvement in her mental state. It is further averred that hiding bad mental state of respondent, her marriage was performed with the appellant. Due to incurably bad mental state of respondent, mental disorder of respondent means mental illness and she has a split mentality, as a result of which appellant felt humiliated and insulted in the society and suffered such mental agony. In such a situation, despite many efforts, it is not possible to live with respondent as husband and wife. Respondent is no longer in a position to provide the marital happiness to appellant. On these grounds, he prayed to obtain a decree of divorce in his favour on the ground of "cruelty suppressing fact of unsound mind of respondent and desertion".

(5) Despite of service of notice, neither respondent nor her advocate had appeared before the Family Court. Appellant in support of his case examined himself as AW1 and examined his neighbour Nandram as AW2 before the Family Court. After hearing counsel of the appellant and documents available on record *vide* order dated 29/01/2018, learned Family Court proceeded *ex parte* against the respondent and dismissed the petition filed by the appellant-husband under Section 13 of the HM Act for grant of decree of divorce on the ground of "cruelty suppressing fact of unsound mind of respondent and desertion". Therefore, appellant cannot be entitled to get benefit of decree of divorce in the light of Section 23(1) of the HM Act. Hence, this

appeal.

(6) Being aggrieved by the impugned judgment and decree, it is submitted by learned Counsel for the appellant- husband that the judgment and decree passed by the Family Court is contrary to law. The Family Court has not appreciated the evidence as produced by appellant. The Family Court has not considered the fact that there is no rebuttal of evidence of the appellant which is on record but in some apprehension, recorded a finding which is contrary to record. Findings recorded by the Trial Court in Para No. 10,11 and 12 are contrary to the evidence available on record. Appellant and respondent are living separately since 2012 and respondent deserted him without any justifiable reason. In the last five years, appellant has not made any cohabitation with respondent. Respondent is not in a position to provide marital happiness to the appellant and maintain marital relationship. Appellant has been deprived of happiness of marital relationship. Parents of respondent solemnized marriage of respondent with appellant by suppressing the fact in regard to unsoundness of mind of respondent. Therefore, impugned judgment and decree deserves to be set aside and a decree of divorce be passed in his favour.

(7) No one appeared on behalf of respondent even after service of notice.

(8) Heard counsel for the appellant and perused the record.

(9) It is not in dispute that respondent was living separately from appellant since 2012. Appellant (AW-1) in his evidence before the Family Court has specifically deposed that behaviour of respondent was not normal after her marriage. She stayed at her matrimonial home for sometime but she was doing activities as unsound mind. During her crazy behaviour, she used to say that someone is following her, spying on her, she heard screams, someone was calling her, she saw a woman's body, while in reality nothing happened with her. Due to such strange and crazy behaviour, respondent did not sleep at night, kept roaming around and kept talking. Sometimes, she became unaware of her clothes and used to pick up and throw away things. She also lost her ability of thinking, recollecting and reasoning things out. Thus, she troubled, saddened and harassed the appellant a lot with her above mental state. Even parents of respondent were called and they apologized and told that for the last three years, respondent is under influence of some ghost. Her parents had also shown respondent an Occultist due to which the respondent improved a bit. On humanitarian

grounds, the appellant tolerated the said trouble and kept her with him. Thereafter, parents of respondent took respondent on 27/06/2012 with them and since then, respondent is residing in her parental home. This evidence was not rebutted by respondent, so evidence of Mukesh Sahu (A.W.1) and Nandram (AW.2) are unrebutted evidence, therefore, there is no reason to disbelieve evidence of appellant.

(10) The legal principle with regard to “**desertion**” is concerned, the Hon'ble Apex Court in the matter of **Bipinchandra Jaisinghbhai Shah Vs. Prabhavati AIR 1957 SC 176** has explained as under:-

" For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there., namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce; under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi* "

(11) Regarding “**irretrievable marriage** ” the Hon'ble Supreme Court in the cases of **R. Srinivas Kumar V. R. Shametha, 2019 (4) SCC 409, Munish Kakkar Vs Nidhi Kakkar, AIR 2020 SC 111 and Neha Tyagi Vs Lieutenant Colonel Deepak Tyagi (2022) 3 SCC 86**, it has held that an irretrievable marriage is a marriage where husband and wife have been living separately for a considerable period and there is absolutely no chance of their living together again. Similarly, in the case of **Samar Ghosh Vs Jaya Gosh, 2007 (4)SCC 511**, the Hon'ble Apex Court has held that

cruelty can be physical as well as mental :

"46...If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the 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 the conduct and its effect on the complaining spouse.

Cruelty can be even unintentional: ...

....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. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful illtreatment."

This Court though did ultimately give certain illustrations of mental cruelty. Some of these are as follows:

(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.(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.

(12) In the present case, marriage of appellant and respondent was solemnized in year 2008 and they are living separately since 2012 i.e. around 12 years. The matrimonial bond is completely broken and is beyond repair. So, this Court has no doubt that this relationship must end as its continuation is causing cruelty on both sides. The long separation, absence of cohabitation, the complete breakdown of all meaningful bonds and the existing bitterness between the two, has to be read cruelty under Section 13(1)(ia) of the 1955 Act. Where the marital relationship has broken down irretrievably, where there is a long separation and absence of cohabitation (as in the present case for the last 12 years), then continuation of such marriage would

only mean giving sanction to cruelty with each is inflicting on the other.

(13) Under these circumstances, it is found that Family Court has committed an error in rejecting divorce petition filed by the appellant overlooking un rebutted evidence. So, this Court set-aside the impugned judgment and decree passed by the Family Court, Gwalior. Accordingly, this appeal stands allowed and petition of divorce filed by the appellant is allowed and marriage of appellant and respondent is dissolved.

(14) However, considering the fact that appellant is a labour and economic condition of both the parties, this Court deems it fit and proper that appellant-husband shall give **Rs. Two Lacs** to the respondent-wife as permanent alimony. This amount shall be deposited in the name of respondent-wife within two months from today with the Registry of this Court. The decree of divorce shall be made effective only from the date of such a deposit. On the event of such deposit, the Registry after verifying the credentials of the respondent/wife shall disburse the amount to respondent/wife without further reference to this Court.

(15) With the aforesaid directions, the appeal stands **allowed**.

(16) Decree be drawn accordingly.

(17) A copy of this judgment be communicated to the Family Court concerned for necessary information.

(ANAND PATHAK)
JUDGE

(HIRDESH)
JUDGE

Prachi