IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 14.7.2010

MAT APP 44/2005

SUBHASH CHANDER SHARMA ……Appellant Through: Mr.Rajiv Dewan, Advocate.

Versus
ANJALI SHARMA ……Respondent Through: None.

CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

KAILASH GAMBHIR, J.

1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 the appellant seeks to challenge the impugned judgment and decree dated 12.05.2003 passed by the learned ADJ, Delhi thereby dismissing the divorce petition filed by the appellant under Section 13(1) (ia) & (ib) of the Hindu Marriage Act.

2. Brief facts of the case relevant for deciding the present appeal are that the marriage between the appellant and the respondent was solemnized on 29.11.1984 at Mathura, U.P according to Hindu rites and ceremonies. From this wedlock, two children were born i.e. on 10.02.1988 and 12.09.1992. Both the parties lived together as husband and wife for 14 years i.e. upto 15.02.1998. The acts of cruelty based on which the appellant-husband has sought decree of divorce under Section 13(1) (ia) of the Hindu Marriage Act mainly are that after the death of the father of the appellant the mother of the respondent started living with them and due to her presence the atmosphere in the house got so surcharged that even the children started avoiding the appellant; the appellant though lived in the same house, but had to cook his own food and do all his personal work himself; he felt neglected and depressed on account of the behaviour of the respondent and her mother and ultimately on 15.02.1998 the appellant started living separately; the appellant made all efforts for rapprochement but the respondent foiled all his attempts; the respondent gave instructions to the school authorities that the appellant should not be allowed to meet the children; the respondent avoided to come to official telephone so as to talk with the appellant; the appellant was insulted by the respondent and her mother when he went to contact the respondent; the appellant was not even allowed to enter in the house; the respondent shifted her residence from housing society to some other place and she had also given instructions to her office not to disclose her new address to her husband; the appellant also wrote various letters to the respondent, but

she did not respond to the same. The appellant has also averred that he has not condoned the acts of cruelty complained of against the respondent.

3. So far the ground of desertion is concerned, the appellant averred that the respondent had deserted him without any reasonable cause and against his wishes. The appellant has also averred that there has not been any willful neglect on his part and for no fault of the appellant the respondent deserted him.

4. The respondent did not choose to appear after having been duly served with the notice. She, however,sent reply by post, making certain allegations against the appellant. Accordingly, the respondent was proceeded ex parte by the Court vide orders dated 28.01.2003.

5. In the evidence, the appellant examined himself as PW-1 and except his own evidence he did not adduce any further evidence. In his evidence, the appellant deposed that he got married to the respondent on 29.11.1984 at Mathura, U.P and since thereafter they were living together as husband and wife. He also deposed that out of the said wedlock, two children i.e. one daughter and one son were born on 10.02.1988 and 12.09.1992 respectively. He further deposed that he was forced to leave the house on 15.02.1998 due to the circumstances created by the respondent and her mother, when she had joined them after the death of the father of the appellant in the year 1996. It would be relevant to reproduce the entire evidence of the appellant as under:-

"PW1 Subhash Chander Sharma, petitioner.

On S.A.:- I got married on 22nd of Nov. 1985 with the respondent. Marriage took place at Mathura, U.P. Reception was held in Delhi. Since then we were living together as husband and wife upto 15th February, 1998. On 15.02.1998 I was forced to leave the house due to the circumstances created by respondent and her mother who joined us on the death of my father in 1996. The relation was unbearable facing lot of depression and continuous failure in life. I faced lot of embarrassment in the relations. I faced mental agony by continuing in the circumstances. Out of the wedlock we had two children, daughter named Anupriya date of birth 10/2/88, son Chinmay Sharma date of birth 12 Sept. 1992. After the separation she issued instructions to the school authorities not to allow me to meet the children. My every effort for reapproachment was foiled by her. She did not attend even the phone calls I made at her official telephone. Even my letters which were of personal nature were not responded at all. My friends and relatives whosoever tried for the reapproachment faced humiliation and insult which closed the door at me for reapproachment. The respondent deserted me without any major cause and reasonable cause. I have not condoned the acts of cruelties and the petition has not been filed in collusion with the respondent. My petition is correct.

sd/-

RO& AC ADJ/Delhi

6/3/2003"

6. The appellant was not cross-examined by the respondent as she was proceeded ex parte by the Court. Based on the case set up by the appellant in his divorce petition and the said ex parte evidence adduced by him, the learned trial court came to the conclusion that theallegations of cruelty leveled by the appellant do not constitute cruelty as envisaged under Section 13(1) (ia) of the Hindu Marriage Act, 1955. So far as the ground of desertion is concerned, the learned trial court found that it is the appellant himself who left the matrimonial home on 15.02.1998, therefore, no evidence on record has been adduced by the appellant to prove that the respondent had any intention to bring the cohabitation permanently to an end. The learned trial court thus found that the appellant failed to establish any „animus deserendi" on the part of the respondent and in the absence of the same, the ground of desertion was also found to be not available to the appellant.

7. Assailing the said judgment and decree of the learned trial court, the appellant preferred the present appeal. Counsel appearing for the appellant strongly contended that the respondent has neither contested the petition before the learned trial court nor she is contesting the present appeal and, therefore, such conduct on the part of the respondent would be manifest of the fact that the marriage between the parties has irretrievably broken down. Counsel thus submitted that this Court may direct dissolution of the marriage of the parties on the said ground itself. Counsel for the appellant further contended that the appellant fully established both the grounds of divorce i.e. cruelty as well as desertion beyond any shadow of doubt, but still the learned trial court dismissed the petition filed by the appellant. Counsel further contended that the learned trial court committed grave error by not appreciating the fact that the divorce proceedings were not contested by the respondent and, therefore, the evidence of the appellant remained unrebutted.

8. In support of his arguments, counsel for the appellant placed reliance on the judgment of the Apex Court in Naveen Kohli Vs. Neelu Kohli (2006) 4 SCC 558 and the judgment of this Court in the case of Gauri Shankar Dhanwaria Vs. Maya Devi, 2003(107) DLT 583.

9. I have heard counsel for the appellant at considerable length and have given my anxious consideration to the pleas raised by him.

10. By way of the Marriage Laws (Amendment) Act, 1976, cruelty was introduced as a ground of divorce as prior thereto the same was only a ground for claiming a decree of judicial separation under Section 10(1) (b) of the Hindu Marriage Act. The ground of cruelty was added with the omission of the expression "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" from Section 10 (1) (b). After the 1976 amendment, now Section 13(1) (ia) entitles the petitioner to claim decree of divorce, if after the solemnization of the marriage, he has been treated by the spouse with cruelty. The term cruelty has not been defined in the

Hindu Marriage Act and the legislature has left it to the courts to determine in the facts and circumstances of each case whether the conduct amounts to cruelty or not. In a plethora of judgments, the Apex Court and various High Courts of the country have discussed the scope of the concept of cruelty.

11. In the case of Shobha Rani v. Madhukar Reddi (1988) 1 SCC 105, the Apex Court with regard to cruelty observed as under:

"The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behavior in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. 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. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. 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 ill-treatment.

It will be necessary to bear in mind that there has been marked changed 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 stigmatized 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.

Lord Denning said in Sheldon v. Sheldon [1966] 2 All E.R. 257 (CA) 'the categories of cruelty are not closed'. Each case may be different. We deal with the conduct of human beings who are no generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behavior, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.

12. In the case of V.Bhagat v. D.Bhagat (1994) 1 SCC 337, the Apex Court while explaining the concept of mental cruelty, observed as under:-

"16. Mental cruelty in Section 13(1)(ia) 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 decided 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.

13. The Apex Court in the case of Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558 relied on the case of A.Jayachandra Vs. Aneel Kaur (2005) 2 SCC 22 where it was observed that :-

"55. The expression 'cruelty' has been used in relation to human conduct or human behavior. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

56. 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 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.

57. 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."

14. As would be evident from the aforesaid observations of the Apex Court, it is not the ordinary wear and tear of the married life which would cause any sort of mental pain or cruelty to the petitioner. The conduct complained of must be proved to be grave and weighty due to which the petitioner cannot be reasonably expected to live with his spouse. The Apex Court has also held that it is difficult to lay down any precise definition or to give exhaustive description of the circumstances which would constitute cruelty. Therefore, in the facts of each case the conscience of the Court should be satisfied that the relationship between the parties had reached to such an extent that it has become impossible or unbearable for them to stay together. Under the Rules of Hindu Marriage Act, framed by this Court, the petitioner approaching the Court is required to plead specific acts of cruelty and the occasions when and where such acts were committed by the other spouse.

15. Rule 7(g) (iv) of the Hindu Marriage Rules, 1979 of this court states as under:- "R.7. Contents of petition.-In addition to the particulars required to be given under Order VII, Rule 1 of the Code and Section 20(1) of the Act, all petitions under Sections 9 to 13 shall state:

(g) the matrimonial offence or offences alleged or other grounds, upon which the relief is sought, setting out with sufficient particularity the time and places of the acts alleged and

other facts relied upon, but not the evidence by which they are intended to be proved, e.g.:……..
"(iv) in the case of alleged desertion, the date and the circumstances in which it began; in the case of cruelty the specific acts of cruelty and the occasion when and the place where such acts were committed".

16. In the facts of the present case, the allegations of cruelty leveled by the appellant against the respondent are so vague, indefinite, unspecific and uncertain, not only in the petition but in his evidence as well. Without spelling out any specific acts of cruelty either on the part of the respondent or her mother, it is difficult to assume as to under what circumstances the appellant left his own house on 15.02.1998. Merely to say that the appellant started cooking his own food and his mother-in-law used to create scenes in the house or the appellant felt neglected or depressed on account of behaviour of the respondent and her mother would not suffice to prove mental cruelty on the part of the respondent in the absence of any specific dates or the period when the alleged acts were committed. Similarly, vaguely the appellant has alleged that he was not allowed to meet his own children due to some instructions given by the respondent to the school authorities and he was insulted by the respondent and her mother when the appellant went to meet the respondent at her house in the housing society. The appellant has referred to some letters alleged to have been written by him to the respondent, but no such letters were proved on record by the appellant.

17. The appellant has also failed to establish the ground of desertion, as it is the own case of the appellant that he himself left the matrimonial house. A bare perusal of the lone deposition of the appellant, as already reproduced above, would show that the appellant failed to establish either of the grounds.

18. It is a settled legal position that even in an ex parte case, the petitioner is required to lead cogent and convincing evidence to prove and substantiate the averments made in the petition and the petitioner cannot derive any special advantage just on account of the fact that the respondent did not choose to contest the case or the testimony of the appellant remained unchallenged or unrebutted.

19. In the present case, the appellant has failed to establish with specific details any act or acts, whether mental or physical, due to which it became impossible or unbearable for him to live with the respondent. Similarly in the evidence as well, the appellant (PW1), in his sole testimony does not succeed to establish either the ground of cruelty or desertion on the part of the respondent.

20. The counsel for the appellant also submitted that this court should dissolve the marriage of the appellant on the ground of irretrievable breakdown of marriage. It would be important to bring forth that the High Court in the exercise of it inherent powers cannot grant divorce on the ground of irretrievable breakdown of marriage as it is yet not a ground of divorce under the Hindu Marriage Act. Here, it would be pertinent to refer to

the recent judgment of the Apex Court in the case of Vishnu Dutt Sharma vs. Manju Sharma (2009) 6 SCC 379 where it was held that :

"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. 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. 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". Also recently, the Apex Court in the case of Neelam Kumar vs. Dayarani, Civil Appeal No. 1957/2006 placed reliance on the judgment of Vishnu Dutt Sharma (supra) and reiterated the same view and held that irretrievable breakdown of marriage is not a ground for divorce as it is not contemplated under Section 13 of the Hindu Marriage Act.

21. However, it would be befitting to mention here that the Apex Court in the case of Naveen Kohli vs. Neelu Kohli (supra) recommended to the legislature to make „irretrievable breakdown of marriage" as a ground for divorce. The Apex Court in the said judgment was confronted with a situation where the parties were living separately for a period of more than 10 years. Based on the said recommendation made by the Apex Court in the said case, as also in various earlier decisions, the Law Commission of India in its 217th report has recently again recommended to the Parliament to introduce an amendment in the Hindu Marriage Act, 1955 and the Special Marriage Act 1954 to include "irretrievable breakdown of marriage as another ground for divorce".

23. The relationship between husband and wife is one of the most delicate emotional bonds and needs constant nurturing, tolerance and understanding. This relationship once which was of love and mutual trust when starts to leave a bitter aftertaste bedeviling this bond that it is no more bearable to stay under one roof is when they seek to legally put an end to such a marriage. Divorce on the ground of irretrievable breakdown of marriage might be contrary to common perception and the idea of marriage being a holy union for seven births, but in the bid to preserve the unworkable marriage which has long ceased to be alive is abound to be a source of greater misery for the parties than the divorce itself.

24. However it is a catch 22 situation as this ground can ease the way for many who are under the burden of a doomed relationship to a breather but at the same time it may give an opportunity to the ones trying to maneuver the alleys of law for their self conceited motives.

25. There has been a lot of brainstorming with regard to the efficacy and societal impact that this ground would have if it is made as a ground for divorce. On the recommendations of the Law Commission of India, the Legislature in its wisdom would amend the Hindu Marriage Act to bring within its fold the ground of irretrievable breakdown of marriage. However it is expected that watertight safeguards are introduced so as not to send the message that now divorce has become a cakewalk.

26. Henceforth, there are some key areas that need to be pondered upon. The ground of irretrievable breakdown of marriage cannot be resorted to as a strait jacket formula leading to the institution of marriage becoming so fragile that the wrong doer abuses it for his selfish ends leaving the other party in lurch. But it is only when the court is satisfied that the marriage has been wrecked beyond the hope of salvage and there is no chance of their coming together should the court open the deadlock of wedlock.

27. It is an open secret that getting a decree of divorce takes an invariably long time and with the existing grounds available, it leads the parties to level acrimonious allegations antagonizing each other. Consequently, when the decree of divorce is granted then the other party appeals to the High Court, and if unsuccessful, reaches the Supreme Court in the hope for relief, therefore prolonging the already gruesome legal battle. It happens in a lot of cases that in the end during this vicious legal voyage, whatever little hope there is of reconciliation is anyway diminished leading the parties pitiful and penniless.

28. Adding to the woes, if there are children born out of the wedlock, then they suffer immensely; emotionally, psychologically and even financially, depriving them of proper upbringing and education due to meager means of one of the spouses. A divorce from a spouse is not a divorce from the children and they should not be punished for the act of their parents. Hence if this ground is added it has to be taken care of that the children do not bear the brunt between two warring adults and that a proper mechanism is in place for taking care of all their needs. The child‟s well being, who is but a mute spectator and officially not a party to the lawsuit, should be the eye of the resolution.

29. Also in cases where the wife is the respondent, and the husband orchestrates a breakdown and unilaterally wants to terminate the marriage on this ground, it has to be taken care of that to achieve his ulterior motive the husband on the premise of a deadlock does not leave the wife impoverished or at the mercy of her parents.

30. Hence, succinctly, this court is of the opinion that there should be adequate provisions with regard to the following:

There should be a minimum period before which this ground cannot be invoked as a ground for divorce.

In the case where this ground has been invoked by the husband, then the grant of divorce should only be subject to the provision of adequate financial provisions for the wife In case where there are children born out of the wedlock then adequate provision for the

grant of maintenance, education and upbringing of the children should be in place before grant of divorce

The issue of custody of the children and visitation rights should also be decided at the very stage of divorce itself

This ground should be an independent provision and not a complimentary or supplementary provision along with any other ground under section 13 of the Act The goal in the end to add this ground of irretrievable breakdown of marriage should be with aim of providing a solution to a lethal problem and not to defame the Hindu Marriage Act for breaking more families than it has united.

31. However, in view of the aforesaid observations, the contention of the appellant that this Court should grant divorce on the ground of irretrievable breakdown of marriage does not hold good.

32. Hence in the light of the above discussion this Court does not find any illegality or perversity in the impugned judgment and decree dated 12.05.2003 passed by the learned trial court.

32. There is no merit in the present appeal and the same is accordingly dismissed.

July 14, 2010

KAILASH GAMBHIR, J.