

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

*Reserved on: 02.11.2020*

*Pronounced on: 20.11.2020*

+ **MAT.APP.(F.C.) 92/2020 & CM APPLs. 14842-14843/2020**

KIRTI NAGPAL

.....

Appellant

Through: Mr. Manish Sharma, Mr. Ninad  
Dogra and Ms. Jigyasa Sharma, Advocates

Versus

ROHIT GIRDHAR

.....

Respondent

Through: Mr. Prabhjit Jauhar, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE MANMOHAN**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

### **J U D G M E N T**

**SANJEEV NARULA, J.**

1. By way of the present appeal, the Appellant-wife has impugned the judgment dated 22<sup>nd</sup> February, 2020 (*hereinafter referred to as the 'Impugned Judgment'*) passed by the learned Principal Judge, Family Courts, South-East District, Saket Courts, New Delhi whereby the Court, while rejecting the relief sought under Section 12(1)(a) and (c), has allowed the petition of the respondent by granting divorce under Section 13(1)(ia), of the Hindu Marriage Act, 1955 (*hereinafter referred to as the 'HMA'*).

#### **Brief facts:**

2. The brief background of the case is that the marriage between the parties was solemnized on 24<sup>th</sup> June, 2012 at Delhi as per the Hindu rites and

ceremonies. At the time of solemnization of the marriage, the Respondent husband's marital status was that of a divorcee and Appellant wife was a bachelorette. After the marriage parties lived together in Singapore from 1<sup>st</sup> July, 2012 till 26<sup>th</sup> August, 2012. The marriage was also registered in Delhi on 31<sup>st</sup> August, 2012.

3. The Respondent initially preferred a petition seeking a decree of nullity of marriage under Section 12(1)(a) and (c) of the HMA, on two grounds, that the marriage could not be consummated due to Appellant's impotency and that his consent was obtained by concealing several material facts related to the psychological disposition of the Appellant, knowing which, he would not have consented for the marriage.

4. In the Written Statement filed before the Trial Court, the Appellant *inter-alia* pleaded that: (i) the Respondent was suffering from impotency (erectile dysfunction) which was the true cause of non-consummation of marriage, (ii) the parents of the Respondent had a quarrelsome nature, (iii) the first wife of the Respondent was also tortured by the parents of the Respondent, (iv) Respondent's parents demanded dowry, (v) cruelty and misappropriation of dowry articles, and (vi) the Respondent thrashed the Appellant badly in front of his parents on 30<sup>th</sup> June, 2012.

5. Placing reliance on Appellant's written statement, the Respondent amended his petition and additionally sought relief of divorce on the ground that the allegations made in the written statement were false and had caused

him mental cruelty. On the basis of amended pleadings, vide order dated 1<sup>st</sup> August, 2016, the Trial Court framed the following issues:

- (1) ***“Whether the marriage has not been consummated owing to the impotence of the respondent? OPP***
- (2) ***Whether the consent of the petitioner for marriage was obtained by force or fraud? OPP***
- (3) ***Whether the respondent after solemnization of marriage has treated the petitioner with cruelty? OPP***
- (4) ***Whether petitioner is entitled to decree of nullity against the respondent? OPP***
- (5) ***Whether the petitioner is entitled to a decree of divorce? OPP***
- (6) ***Relief.”***

6. To substantiate the case, the Respondent examined himself (PW1) and one Dr. Prof. Anant Kumar, (PW2), as expert witness, who was Chairman, Urology, Renal Transplant and Robotics of Max Hospital, Saket, New Delhi. On the other hand, the Appellant produced six witnesses in support of her case. After the conclusion of trial and on the basis of the evidence produced, the Trial Court concluded that the Respondent had failed to prove that the marriage had not been consummated owing to the impotency of the Appellant. Accordingly, Issue No. 1 enumerated above was decided against the Respondent. Next, the Learned Trial Court held that no material facts were concealed by the Appellant when the Respondent consented to the marriage and therefore, it could not be said that his consent had been obtained by fraud or force. Accordingly, the Issue No. 2 was also decided against the Respondent. Resultantly, the Court held that the Respondent was not entitled to decree of nullity against the Appellant, and Issue No. 4 was decided against the Respondent. However, as regards Issue No. 3, the Court held that the Appellant had made false allegations in her written statement

qua (a) the impotency of the Respondent, and (b) her harassment for dowry and ill treatment at the hands of the Respondent and his family. These unsubstantiated and unproved allegations were held to be the cause of mental suffering of the Respondent. The Learned Trial Court held that the Appellant had treated the Respondent with cruelty within the meaning of the section 13(1)(ia) of HMA and Issue No. 3 was thus decided in favour of the Respondent. Besides, the Court also observed that the relationship between the parties had deteriorated to such an extent that it became impossible for them to live together without mental agony, torture or distress. The court observed that the marriage is beyond repair and was a dead marriage as it is not possible for the parties to live together. Thus, Issue No. 5 was decided in favour of the Respondent and the Learned Trial Court allowed the petition to the extent of granting divorce under Section 13(1)(ia) of the HMA, with effect from 22<sup>nd</sup> February, 2020.

7. Aggrieved with the above order, the Appellant has approached this court praying for the stay and setting aside of the impugned judgment as well as seeking directions that her petition of restitution of conjugal rights, pending in the court of Sh. Sanjiv Jain, Judge, Family Courts, South-East District, Saket Courts, New Delhi, be heard and decided on merits.

**Appellant's Contentions:**

8. Mr. Manish Sharma, learned counsel for the Appellant argued that the Learned Trial Court's conclusion is not based on correct appreciation of the facts, the evidence, as well as the law. His arguments can be summarized as follows:

(a) Regarding claim of impotency of the Respondent:

9. Mr. Sharma emphasised that the Trial Court had erred and wholly misdirected itself by treating the averments made in the written statement out of context. It was insisted that the Appellant, in/through the written statement, was only responding to the allegations made in the petition, and give her version of facts by urging that Respondent's impotency was the real cause for the non-consummation of the marriage. However, it was contended that this stand of the Appellant was neither considered nor appreciated by the Learned Trial Court and the judgment was passed in an arbitrary manner, with a preconceived notion. Mr. Sharma further argued that reasoning of the Learned Trial Court is flawed, for the reason that, on the one hand it has been observed that Appellant's claim *viz.* Respondent's impotency stood negated owing to the fact that after about two months of marriage the parties went ahead for registration of marriage, whereas, on the other hand, the Trial Court without any justification or rationale failed to appreciate that the Respondent too had also participated in the registration of marriage after having lived with the Appellant during the above period. *Arguendo*, this conduct should have been considered as negation of Respondent's allegations qua Appellant's mental health and behaviour which were being countered in the original written statement.

(b) Regarding expert witness testimony:

10. Mr. Sharma laid considerable stress that the Learned Trial Court has erroneously relied upon the testimony of Dr. Prof. Anant Kumar to assume that the Respondent was not impotent and to further conclude that the

allegations of the Appellant were false and scandalous. The following reasons were put forth:

- i. The conclusion arrived at by Dr. Prof. Anant Kumar were based on assumptions and presumptions. In his cross examination, he had admitted that he had seen the Respondent only on 12.07.2015, and he “presumed” that the Respondent was not impotent in the year 2012.
- ii. The expert witness Dr. Prof. Anant Kumar admittedly did not subject the Respondent to any investigation and relied upon purported earlier reports which were not on record.
- iii. The problem of erectile dysfunction could also happen in an otherwise physically healthy person due to lack of physical and mental stimulus.
- iv. In response to a direct question, he admitted that if a person does not like his partner, then the person may not get aroused. In furtherance of this, reliance was placed on *Sucharitra Kalsie v. Rajinder Kishore Kalsie*, 11 (1975) DLT 92, to argue that an individual can be impotent towards his wife, but otherwise, may be able to have sexual intercourse. Therefore, the testimony of Dr. Anant Kumar cannot be given undue credence.

(c) Regarding claim of cruelty caused by Appellant to Respondent:

11. Mr. Sharma also argued that despite the Respondent’s false and untrue allegations against the Appellant, she has been ready and willing to live in the matrimonial alliance with him at all points in time. She has communicated her desire and willingness to continue the marriage during the pendency of the proceedings and in multiple mediations. Documents placed on record such as emails, pictures, messages, complaints are also indicative

of the same. It is thus argued that this conduct of the Appellant, is the very opposite of cruelty, and does not gel with the findings given by the Trial Court to the effect that Appellant has treated the Respondent with cruelty.

12. In this regard, Mr. Sharma further argued that the Court had to judge whether cruelty was in the nature of regular practise, for which the Appellant's conduct has to be seen as a whole rather than going by a specific instance, and if so, whether it was of the type or degree which merited the grant of divorce. He pointed out that there was no allegation of cruelty prior to Appellant's filing the written statement. Presumption has to be drawn in this regard in favour of the Appellant. He maintained that a stray pleading cannot be made a ground to grant divorce, pertinently, when the allegation was neither raised prior to the filing of the written statement, nor shown in the conduct of the Appellant throughout the pendency of the proceedings. The Appellant has been seeking restitution of conjugal rights since beginning and was ready and willing to save matrimonial alliance with the Respondent and therefore, the impugned judgment should be set aside.

**Respondent's Contentions:**

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13. Mr. Prabhjit Jauhar, learned counsel for the Respondent on the other hand strongly opposed the petition and argued that the findings of the Learned Trial Court were wholly justified on the basis of the pleadings and the evidence produced before the Court in the nature of oral testimonies and the documentary proof.

14. He argued that the Appellant had made grave allegations against the Respondent and his family, especially those concerning Respondent's



impotency. These allegations remained unsubstantiated despite Appellant producing five witnesses along with her own deposition. Particularly, she made no effort to produce any evidence to justify or prove her allegations. Mr. Jauhar asserted that, in the absence of any documentary or medical evidence that could suggest that the Respondent was unfit to consummate the marriage, the Learned Trial Court has rightly held such allegations in the Written Statement to be false and amounting to mental cruelty. Likewise, the allegations regarding Appellant being mistreated and tortured at the hands of the parents of the Respondent also remained unsubstantiated.

15. Further, Mr. Jauhar vehemently argued that aside from the above, the Appellant had made reckless and venomous allegations qua the Respondent, and no self-respecting person would like to continue in a matrimonial alliance with a partner who makes such allegations. Some of these have been presented to us as under:

- i. Appellant has alleged that the Respondent “*considers women to be as a part of disposable commodity and he specializes in disposing them off without any further thought till he preys upon his next hapless victim.*”
- ii. Even in the present appeal, the Appellant has not spared the Respondent and has called him a “*serial marrier*” in the pleadings, who “*marries and dumps young women without any reason as and when he pleases*” and who “*has a kink of marrying the girls for less than a couple of months and then divorcing him for no fault of theirs.*”.
- iii. In the present appeal, in another paragraph it is alleged that “*the respondent has a fixed pattern and style whereby he marries women*



*just for a couple of months and then when he gets fed up of them, he tries to get rid of them by making all sorts of false allegations and character assassinations.”*

16. Lastly, Mr. Jauhar submitted that since 3<sup>rd</sup> September, 2012, the parties have been living separately, due to which reconciliation is impossible and the marriage has irretrievably broken down and thus there is no reason to carry on with the marriage which is dead for all intents and purposes.

**Findings:**

17. We have given due consideration to the rival contentions urged before us and have carefully perused the record. The learned Trial Court has dissolved the marriage between the parties on the ground of cruelty within the meaning of Section 13(1)(ia) of the HMA. This finding is primarily premised on the allegations made by the Appellant in her Written Statement to the original petition filed by the Respondent under Section 12 of the HMA. Thus, the nature and the extent of allegations made by the Appellant is beyond any controversy. These allegations can be broadly categorised under two different compartments: (i) allegations pertaining to the impotency of the Respondent, and (ii) allegations with respect to mistreatment, torture and dowry demand against the Respondent and his parents. These allegations laid the foundation for the ground of cruelty. The Respondent brought in evidence to establish before the Court that he was not impotent, and that the false and untrue allegations were causing him mental stress and amounted to cruelty. In this endeavour, besides examining himself, the Respondent also produced Dr. Prof. Anant Kumar as an expert witness. The doctor proved the medical report dated 12<sup>th</sup> July, 2015 exhibit (PW1/1) and was extensively

cross-examined by the Appellant's counsel. He deposed that, on the basis of physical examination, the Respondent was found to be a normal male adult with fully developed secondary sexual character and organs, normal endocrine and sexual function, and had no problem of impotence. The Learned Trial Court concluded that the credibility of the witness could not be impeached, and since he had specifically examined the Respondent and found that the Respondent suffered no medical infirmity that could render him incapable of consummating the marriage, the allegation of impotency made by the Respondent was not proved. The witness is a very highly qualified medical expert with immaculate credentials. His testimony has thus been rightly relied upon by the Learned Trial Court to give a finding on this issue in favour of the Respondent and we find no reason for interference on this score. Further, we also agree with the observations of the learned trial court that, it was imperative for the Appellant to produce positive evidence to substantiate and prove the allegations made in the written statement (such as medical evidence) in order to counter the evidence and the expert witness testimony produced by the Respondent. After all, these accusations were levelled by the Appellant and the onus lay on her to establish the veracity of same. Concededly, the Appellant entirely failed to produce any medical or corroborated evidence that could remotely suggest that the Respondent was medically unfit to consummate the marriage. Therefore, in absence on any such evidence, Appellant's allegations remained unsubstantiated.

18. Now the next question is whether a false allegation of impotency amounts to cruelty within the meaning of Section 13(1)(ia) of the HMA. It is true that cruelty has not been defined in the HMA. It can be physical or

mental. It is primarily contextual, pertaining to human behaviour or conduct with respect to matrimonial duties and obligations. It is therefore, essential to see whether the conduct of the party is of such a nature, that a reasonable person would neither tolerate the same, nor be reasonably expected to live with the other party. The Supreme Court in the case of **V. Bhagat v. D. Bhagat**, AIR (1994) SC 710, observed as under:-

*“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 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.”*

19. As regards the allegations made in pleadings, Courts have considered this question time and again and it is now no longer *res integra* that false, baseless, scandalous, malicious and unproven allegations made in the written statement may amount to cruelty. If it is established from the evidence that the allegations were evidently false, then such baseless allegations made in the written statement can amount to cruelty and the Court can pass a decree of dissolution of the marriage. In **Jayanti v. Rakesh Mendiratta**, 2016 (4)

CLJ 498 Del, it was held that in matrimonial proceedings, the pleadings assume great significance. Similarly, in the case of *V. Bhagat (supra)*, grave false allegations were made by the wife against the husband in her written statement. Such allegations were even put to the husband in cross-examination. The Supreme Court held that such allegations were bound to cause mental pain and anguish to the husband amounting to mental cruelty and dissolved the marriage between the parties. In the present case, we therefore agree with Mr. Prabhjit Jauhar that the allegations in the Written Statement are grave and serious accusations, which are likely to impact Respondent's self-image and adversely affected his mental well-being. Thus, having regard to the law on the subject, we find no infirmity in the findings and observations of the trial court that the allegation of the Appellant in the Written Statement with respect to the impotency clearly falls within the concept of cruelty as defined under law.

20. We cannot accede to the contention of Mr. Sharma that the allegation of impotency attributed to the Respondent was only qua the Appellant. In support, reliance placed on a portion of the statement of the medical expert Dr. Kumar, to the effect "*In unusual situations like this when a person does not like the partner, or the environment is not conducive, he may not get an erection*" is misplaced and out of context. This response is part of a longer answer to the question whether "*a person with a normal sperm count can be impotent*". Moreover, this is the general opinion of the expert on the subject. It was for the Appellant to produce evidence to establish the extent and nature of impotency of the Respondent, as is now being portrayed before us. She ought to have applied to the Trial Court to have the Respondent

medically examined in this regard. Undeniably, no such attempt was made. Since no evidence was produced by her to substantiate her case, this plea has no basis and is rejected.

21. We are also not at all persuaded by the explanation offered by Mr. Sharma for making allegations that are in controversy. Mr. Sharma argued that the allegation of impotency was in retaliation to the Respondent's allegation of impotency towards the Appellant. He laid considerable stress on the fact that, as the allegations in the petition were of a serious nature and since the Respondent was casting aspersions on Appellant's sexual behaviour, she was justified in retorting by making a counter-allegation. This explanation is wholly unconvincing, and does not dilute the act of cruelty committed by her. Besides the explanation is legally untenable and cannot be accepted. The averments made by a party in its pleadings before a Court of law have to be given due sanctity and have to be treated with seriousness. These allegations made in the pleadings are brought in the public domain and the Court is expected to give its verdict on the basis of the allegations and the counter-allegations made by the parties. No party can be excused of recklessness in allegations made before the Court of law. The consequences of false assertions have to follow. Allowing the respondent to get away with the consequences of false allegations, or treating them as trivial, would not advance the cause of justice. Even in *V. Bhagat*'s case (supra), the Supreme Court had taken a strong view of the matter with respect to false allegations, opining that such allegations made in a formal pleading filed in the Court went far beyond the reasonable limits of the wife's defense. Particularly, in the context of the proceedings under the HMA, Section 20 specifically

stipulates that the averments made in the pleadings will be treated as evidence and the court is thus empowered to act upon unfounded allegations made in pleadings. The assertions in the pleadings are to be supported by affidavit in terms of the HMA and the rules framed thereunder. The purpose of having an affidavit accompanying the pleadings is to give due sanctity to the same. In fact, now the rules of pleadings under several jurisdictions have evolved and they prescribe that the petitions be accompanied by a 'Statement of Truth'. All of these are methods to ensure that no party may level untrue allegations against the other in a court of law as mere counter-attack or in vengeance. We cannot allow the parties to be so casual about the averments made in the pleadings. There can be no justification for any party to retaliate by making untrue and false allegations regardless of how provocative the allegations may be. If the Appellant was hurt by the allegations made by the Respondent, she had her legal remedies against the same. It did not certainly give her a *carte blanche* to make counter allegations which were untrue and cause deep humiliation to the Respondent.

22. Further, we also find that the justification put forth by the Appellant to be contrary to the record. It was not a one-off casual retaliatory remark. The stand in the written statement was sustained all throughout the trial, till the stage of final decision. The imputations and allegations made by the Appellant in the Written Statement have been repeatedly reinforced during trial by giving suggestions to the Respondent and also to his expert witness during the course of their cross-examinations. Significant effort was made to establish that the Respondent was indeed impotent and incapable of sexual



intercourse. This line of cross-examination of the Respondent and his expert witness clearly establishes that the Appellant endeavoured to attribute the non-consummation of marriage to the Respondent's impotency. In fact, in the cross-examination and also in the pleadings, the Appellant has attempted to establish that Respondent's first divorce was also related to his sexual incompetence. We, thus not find any merit in the contention of the Appellant that the allegations of cruelty are only based on one stray incident. We do not find any infirmity in the finding of the Learned Trial Court on this aspect as well.

23. As regards Appellant's allegations relating to torture and mistreatment, we do not find anything wrong with the finding of the Learned Trial Court. The Learned Trial Court had meticulously examined the evidence produced before it and concluded that these allegations remained unsubstantiated and there is no reason to take an exception to the findings recorded by the Trial Court. The Appellant has not been able to establish her case that she was mistreated or tortured. In the absence of any cogent and independent evidence put forth by the appellant, the allegations levelled by her remain unsubstantiated and unproven.

24. We also do not agree with the Appellant that cruelty in the present case was not a sustained or severe one. The Supreme Court has elaborately discussed the concept of mental cruelty in *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511. Indeed, mental cruelty is a state of mind and what might be cruelty in one case may not be so in another case, as observed by the Trial Court. The Court has carefully examined the facts and evidence and



observed that the allegations are scandalous and malicious. Appellant persistently humiliated the Respondent causing him mental agony, pain and suffering. The cruelty in the instant case is of enduring and profound nature. Thus, notwithstanding the fact that there is no allegation of cruelty in the original petition, the Trial Court was justified to conclude that it was of grave nature that caused lasting disruption in the relationship between the parties. We also note that the Appellant's conduct of making unfounded allegations has continued right up to the appellate stage, as has been pointed out by Mr. Jauhar in his submissions. These false accusations which could not be proved are bound to cause deep hurt and anguish to the Respondent, who can reasonably apprehend that it would be perilous for him to live with the appellant. It is also abundantly clear that due to the mental pain, agony and suffering caused by the false accusations, the Respondent cannot be asked to put up with the conduct of the Appellant and to continue to live with her. Therefore, we do not find any infirmity in the impugned judgment on this ground as well.

25. Lastly, we also do not find any infirmity in the approach of the Learned Trial Court by placing reliance upon the judgment in *Samar Ghosh (supra)*, on the aspect of irretrievable breakdown of marriage. Undisputedly, the Appellant and the Respondent have been separated for more than eight years and since the separation has continued for a sufficient length of time, it can be presumed that the marriage has irretrievably broken down. The Trial Court has noted that although irretrievable breakdown of marriage is not a ground for divorce in the statute, however the courts have been taking this aspect into consideration. There has been a prolonged and continuous

separation, and the matrimonial bond is beyond repair. Therefore, refusing to sever the matrimonial ties would cause further mental cruelty to the Respondent. In view of the totality of the circumstances, evident from the nature of allegations and counter allegations made by the parties and the evidence that has come on record, the conclusion drawn by the Trial Court cannot be faulted with.

26. In view of the foregoing, we find no merit in the present appeal. Accordingly, the appeal and the applications are dismissed.

**SANJEEV NARULA, J**

**MANMOHAN, J**

**NOVEMBER 20, 2020**

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