

IN THE HIGH COURT OF DELHI AT NEW DELHI

FAO No 71/1997 and CM 15664/2006

11.06.2007

Reserved on : May 30, 2007

Date of Decision : June 11, 2007

AJAY KUMAR Appellant

Through Mr. Dinesh Garg, Advocate

versus

SUNITA Respondents

Through Mr. S.N. Shukla, Advocate

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

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

Dr. S. Muralidhar, J.

1. This appeal is directed against the judgment dated 3.2.1997 passed by the learned Additional District Judge, Delhi in H.M.A. Case No 294 of 1996. By the impugned judgment the appellant's petition seeking divorce from the respondent on the ground of cruelty under Section 13 (1)(i-a) of the Hindu Marriage Act, 1955 was dismissed.

The versions of the appellant and the respondent

2. The parties were married on 25.6.1994 at Delhi. The appellant states that the marriage was not properly consummated because the respondent never offered herself for a complete sexual intercourse with the appellant. No child was, therefore, born from the wedlock. It is stated that neither the respondent nor her parents disclosed the actual age and physical condition of the respondent prior to the marriage. It is stated that the appellant was not aware that the respondent was older than the appellant and therefore the very foundation of the marriage was based on false and incorrect information given by the respondent. It is stated that after the marriage, the respondent did not do regular household work. The appellant was forced to wash his own clothes and that caused mental torture to the appellant. Frequent verbal altercations led to the breakdown of the marriage.

3. It is alleged that the respondent never gave the appellant complete sexual satisfaction and would stop the sexual intercourse after a very short span. This caused tremendous torture to the appellant. It is stated that the respondent behaved like this on the first night of marriage and throughout the honeymoon the respondent would become violent during the acts of sexual intercourse. The appellant states that she tried to seek medical assistance from expert doctors but even after one year's continuous treatment there was no improvement in the behaviour of the respondent. It is stated that after one such incident on 5.3.1996 when the appellant complained, the parents of the respondent threatened that the appellant would face dire consequences. They took away the respondent with them and that since then the parties have remained separate.

4. The written statement filed by the respondent is one of denial. It is stated that the appellant was a sexual pervert, handled the respondent roughly and did not consider her true emotions and feelings. The appellant left a very negative impression on the mind of the respondent. It is stated because of his behaviour, the respondent was under a great shock and mental tension in the new atmosphere in her matrimonial home and therefore, in the early days she could not adjust herself. It is denied that her actual age and physical condition were concealed. It is stated that the father of the respondent and father of the appellant are teachers and it was only after examining all the certificates that the marriage was arranged. It is stated that the respondent was not suffering from any ailment as alleged. The respondent was constantly harassed by the appellant, his elder brother and his parents for not bringing any dowry and was tortured on that count. On account of the demand for dowry, she was driven out of her matrimonial home on 5.3.1996. It is stated that attempts were made to sort out the differences but these remained unsuccessful because of the adamant attitude of the appellant and his family members.

Evidence at the trial

5. The appellant appeared as a solitary witness and reiterated his version as narrated in the petition. In his cross-examination, he admitted that the marriage was an arranged one and that the parents of both parties had known each other and were on good terms. He denied the suggestion that he had treated the respondent cruelly or that she had willingly surrendered herself for the consummation of the marriage. He denied the demand for dowry or the allegations that he had treated the respondent cruelly and driven her from the matrimonial home for not bringing dowry. He stated that he had not lodged any complaint before the police about the threats given by the brother of the respondent.

6. The respondent appeared as RW-1 and stood by her version of the case. She denied that she did not permit the petitioner to consummate the marriage or behaved violently when he attempted to have sexual intercourse. She voluntarily stated that the appellant got her treated in GTB Hospital when she underwent an abortion. This prompted a supplementary suggestion in the cross-examination, which she promptly denied, that she never became pregnant and that since she knew she could not give birth to a child she used to avoid having sexual intercourse. She maintained that there was a dowry demand. She stated that on 5.3.1996 the father of the appellant asked the respondent's brother to take her back to her parent's house.

7. The father of the respondent supported the respondent's version by deposing as RW-2. He denied the suggestion that before the marriage he knew that the respondent was older than the appellant and that she was undergoing treatment on account of irregular menstrual periods or that the appellant ever complained to him after the marriage that the respondent was not permitting sexual intercourse. He maintained that there was a dowry demand.

8. The brother-in-law of the brother of the respondent appeared as RW- 3. He stated that despite visiting the house of the appellant twice for settlement, the appellant and his family members refused to do so. He, however, could not recollect the dates of his visits.

Trial Court's conclusions

9. The Trial Court held that the appellant had not given the specific dates when the respondent treated him with cruelty; that the alleged acts of the respondent were nothing more than the normal

wear and tear of marriage life and do not amount to cruelty. It was held that the appellant had stressed more on the infertility of the respondent and that could not constitute a ground for divorce on the ground of cruelty.

Proceedings in this Court

10. During the pendency of the appeal, this Court on 10.4.2002 directed the appellant to pay the respondent interim maintenance in the sum of Rs.1,250/- per month with effect from 30.1.1998 onwards and also awarded Rs.4,000/- as litigation expenses. The parties at one stage, as recorded in the order dated 28.9.2006, had agreed to settle their disputes if the appellant paid the respondent a sum of Rs.3 lakh. The proceedings dated 28.9.2006 read as under: "Pursuant to deliberations in the Chamber, learned counsel submitted that parties have agreed to settle the disputes. As per the agreed settlement, the appellant would pay the respondent an amount of Rs.3 lakhs; the respondent in turn would ensure that the criminal proceedings initiated by her are withdrawn or dropped. The parties have agreed to apply for a mutual consent divorce. In view of the above statement by counsel for the parties, it would be appropriate that a compromise petition is filed in Court and necessary steps are taken to approach the trial court with an application under Section 13-B Hindu Marriage Act, claiming divorce by mutual consent."

11. Several adjournments were sought thereafter but the modalities of the payment of Rs. 3 lakhs could not be worked out. On 7.2.2007, the Court passed the following order: "Counsel for the appellant states on instructions that he is prepared to deposit the entire sum of Rs.3 lakhs as proposed in the draft settlement placed along with this affidavit dated 6.10.2006 in this Court and the respondent can be permitted to withdraw the said amount after the quashing of the criminal proceedings. Learned counsel for the respondent states that he will seek the instructions of the respondent on this revised proposal."

12. Learned counsel for the parties informed the Court on 30.3.2007 that no settlement was possible. The respondent had demanded the entire payment to be made up front even before the steps for effecting the settlement were set in motion. That was not acceptable to the appellant and therefore, the settlement fell through. Since it was not possible to persuade the parties to come to an agreement on this aspect, arguments in the appeal were heard and orders reserved on 30.3.2007.

13. At the time when orders were reserved, the parties did not have the benefit of a copy of the judgment of a three-Judge Bench of the Hon'ble Supreme Court in Samar Ghosh v. Jaya Ghosh 2007 (5) SCALE 1 (Civil Appeal No. 151 of 2004 decided on 26.3.2007). Accordingly, this Court on 2.5.2007 passed an order requiring the parties to address arguments on the applicability of the aforementioned judgment since it was felt that it would be relevant to the case on hand. The Court further expressed the view that the parties should be given one more opportunity to settle the matter in terms of the draft settlement deed placed on record by learned counsel for the appellant along with CM No 15644 of 2006.

14. Learned counsel for the parties again appeared in the chamber and informed the Court that there was no change in the position and no settlement could be worked out. Learned counsel for the appellant made his submissions on the basis of the aforementioned judgment of the Hon'ble Supreme Court and thereafter orders were again reserved on 30.5.2007.

The judgment in Samar Ghosh

15. Para 99 of the judgment of the Hon^{ble} Supreme Court in Samar Ghosh sets out illustratively the possible acts that could constitute cruelty. Some of illustrations which might be relevant for the present case are (SCALE pp.25-26):

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonable be asked to put up with such conduct and continue to live with other party.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill- conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(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.

(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.?

Analysis of the evidence in the present case

16. Turning to the case on hand, the appellant who examined himself as PW- 1 has stated in examination-in-chief as under: ?On the very first night of our marriage when I made attempt to consummate the marriage, the respondent firstly pushed me, she did not permit me to have sexual intercourse with her, and she threw her chappal and one steel glass towards me but I was able to save myself. After some time I again tried to have intercourse with the respondent and was successful in penetrating my organ but the respondent did not permit the act of sexual intercourse to be completed and again pushed me away and she also gave me injuries by nails and also abused me in filthy language. I felt very much disgusted and suffered mental tension due to this act of the respondent and did not prefer to make any attempt of having sexual intercourse with the respondent for a period of two months. On 23.8.1994 I again made efforts for having sexual intercourse with the respondent and the same incident was repeated by the respondent on that night also.? In the cross-examination, he made the following statement: ?The parental home of the respondent and my residing being nearer with each other, we were on good speaking terms. It is correct that the respondent is the only child of her parents. It is correct that the parents of the respondent had done the marriage in a very decent manner. It is wrong to suggest that I left a bad impression on the mind of the respondent at the time of our first night of our marriage or that I terrified her on that night or that she had completely surrendered herself for consummation of marriage of that during the entire period of resident of the respondent in the matrimonial home, there was no complaint from the side of the

respondent to me and my family members. I cannot say as to whether the respondent is physically fit now but she was not physically fit when she was living with me. Now I am not ready to keep the respondent she offers to live with me. It is wrong to suggest that I have filed a false petition for divorce because the family of the respondent could not fulfill our demands.?

17. On her part, the respondent in her written statement averred as under: ?It is strongly denied that after the marriage the respondent never offered her for a perfect and complete sexual intercourse with the petitioner and due to this reason no child has born out of this wedlock. On the contrary, it is submitted that the respondent being innocent was not aware of the sexual relations of husband and wife and she was totally lacking of sexual knowledge. On the other hand the petitioner, who seems to be a sex pervert handled the respondent roughly and did not consider her true emotions and feeling towards the petitioner. On the very first night, the petitioner had left a very bad impression on the mind of the respondent, because the petitioner could not behave properly with the respondent and the respondent was under a great shock and mental tension in the new atmosphere in her matrimonial house. The respondent was fully devoted towards her husband. The respondent has a bad impression from the activities of the petitioner on her first night and due to this reason the respondent could not restore herself in the beginning of her marriage. That the para no.8 of the petition is completely false and frivolous hence vehemently denied. The contents of this para are completely wrong. In fact the petitioner is a sex pervert and handled the respondent violently which left a bad impression on the mind of the respondent. The respondent was very much terrorized and shocked by the activities of the petitioner. The respondent during the stay in her matrimonial house was completely devoted towards her husband and never refused him for sexual intercourse. She is physically and not lacking in any manner. The averments made in this para are absolutely wrong and having no legs to stand. The respondent was tortured by the petitioner and family member for the sake of dowry and demand of Rs.1,00,000/-. The parents of the respondent got her medically checked in INMAS Hospital Timarpur, Delhi where she was declared physically fit on dated 1.8.1996. The respondent is having no disease at all and the allegations leveled against her are all frivolous and false wrong. The respondent was kicked out on 5.3.1996 by the petitioner and his parents on the day of Holi and told her that if she will not bring Rs.1,00,000/- from her parents for constructing a clinic for the petitioner, she will not be allowed to enter in her matrimonial home.?

18. During her examination-in-chief, the respondent was not asked questions about the sexual relations between the parties. Only in the cross- examination, she denied a series of suggestions in the following manner: ?It is wrong to suggest that on the first night of marriage I did not permit the petitioner to consummate marriage with me or that I threw the chappal or one steel glass towards him. It is further wrong to suggest that the petitioner did not use any force on me on the first night for having sexual intercourse with me. It is wrong to suggest that the petitioner got me treated in GTB Hospital for one year. Vol. He got me treated me partly when I suffered abortion. It is further wrong to suggest that I never became pregnant from the petitioner. It is further wrong to suggest that I was infertile or that I cannot give birth to a child or that on this very reason I used to avoid to have sexual intercourse. It is further wrong to suggest that I told the petitioner that I am infertile or unable to bear a child or that for that reason I used to restrain him from having sexual intercourse with her. It is correct that the case under Section 498-A/406 IPC was got registered by me against the petitioner and his family members after receiving the summons in this case.?

19. It requires to be at once noticed that as far as the respondent is concerned, she was trying to suggest for the first time by way of cross-examination that the appellant got her treated partly when I suffered abortion. Naturally, learned counsel for the appellant in the Trial Court was taken by surprise by this statement of the respondent made voluntarily, which finds no basis in the pleadings at all and therefore, had to make supplementary suggestion that the respondent did not ever become pregnant from the appellant. This suggestion was of course denied by the respondent.

20. This Court finds, on a careful reading of the pleadings, that the respondent did not anywhere mention the fact that she had become pregnant from the appellant. The Court finds that the Exhibits PW-1/1 to PW-1/11 bear out the case of the appellant that he was getting the respondent treated for gynaecological problems.

21. The appellant's description of what happened on the very first night of the marriage stands somewhat corroborated by the respondent except that each party blames the other for non-consummation. This appears to have been the sore point between the parties. On a collective reading of the pleadings and the evidence it is not possible to come to a definite conclusion that any one party was alone responsible for the absence of normal sexual relations in the marriage. It is indeed difficult to come by evidence which can conclusively establish such a position particularly when it is only the word of one against the other. The Trial Court may have been in a better position to evaluate the veracity of either version by examining the demeanour of the witnesses and perhaps by further informing itself by putting questions to the witnesses itself. Unfortunately, that does not appear to have happened in this case.

22. It is further unfortunate that for problems of this nature the parties did not seek the help of marriage counsellors and instead approached it as a purely medical problem. With the passage of time the situation appears to have crossed the point of reconciliation.

23. The evidence on record nevertheless shows unmistakably that the absence of normal sexual relations was definitely one reason for the failure of the marriage. It also cannot be denied that the appellant underwent mental agony as a result thereof. The subsequent separation and the preparedness of the parties to dissolve the marriage are clear indications that both the parties accept the inevitability of the marriage having failed.

24. It is a difficult situation where apportioning blame on any one party is not going to help matters. Although the appellant may not have succeeded in establishing conclusively that the denial of normal sexual relations by the respondent constituted cruelty, this Court is inclined to follow the dictum of Samar Ghosh insofar as the second illustration in para 99 of that judgment is concerned. On a comprehensive appraisal of the matter, this Court is of the view that neither party can reasonably be expected to continue to live the other without undergoing mental agony and cruelty. Further, the separation since 1996 has rendered the possibility of the parties resuming a normal married life too remote. The Court is therefore inclined to follow the dictum in Samar Ghosh on this aspect as well.

25. The Court is also satisfied that the appellant is not trying to take advantage of his own wrong. There are a few other factors that require to be noticed at this stage. Admittedly, the criminal case against the appellant and his family members was instituted by the respondent only after receiving the summons in the divorce petition. The appellant and his parents underwent short periods of

judicial custody. Also, as already noticed, clearly the respondent tried to add to her version in the course of cross-examination. A cumulative appraisal of these circumstances strengthens the conclusion that there is no prospect of the marriage surviving any longer.

Permanent Alimony

26. Given the amounts for which the parties had agreed to settle the matter, this Court considers it appropriate and in the interests of justice to require the appellant to pay the respondent some amount by way of permanent alimony as a condition for grant of divorce. This Court is guided in this respect by the judgment of the Hon'ble Supreme Court in Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and para 90 thereof in particular.

27. Accordingly, the impugned judgment dated 3.2.1997 passed by the trial court in H.M.A. No 294 of 1996 is set aside and the marriage between the appellant and the respondent is dissolved by a decree of divorce conditional upon the appellant paying to the respondent within a period of eight weeks from today and in any event not later than 13.8.2007, a sum of Rs.2 lakhs by way of a pay order or demand draft. Upon the appellant filing proof of payment of costs in this Court within a period of one week thereafter and in any event not later than 20.8.2007, a decree of divorce will be drawn up by the Registry in terms of this judgment. If the payment is not made as directed, the appeal will stand dismissed.

28. With the above directions, the appeal and application are disposed of with no order as to costs.

Sd/-

S. MURALIDHAR, J.

June 11, 2007