IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : HINDU MARRIAGE ACT

Judgment delivered on: 21.03.2012

FAO No.185/2001

Smt. Shashi Bala ……appellant.
Through: Mr. Atul Bandhu, Adv.

Vs.

Shri Rajiv Arora ……Respondents
Through: Mr. R.G. Srivastava, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J.

1. By this appeal filed under section 28 of the Hindu Marriage Act, 1955, the appellant seeks to challenge the impugned order and decree dated 12.2.2001 passed by the learned Trial Court whereby a decree of divorce in favour of the respondent husband under Section 13(i)(a) of the Hindu Marriage Act was granted and the counter claim filed by the appellant seeking a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act was dismissed.

2. Brief facts of the case relevant for deciding the present appeal is that the marriage between the parties was solemnized on 17.2.1991 according to Hindu rites and ceremonies. It was stated by the husband in his divorce petition that after the solemnization of the marriage, right from the inception, the attitude of the appellant was indifferent and she

complained that the marriage had not been solemnized with a man of her taste. As per the respondent husband, the appellant had refused to participate in the traditional ceremony of dud-mundri by saying that she did not like all this but without disclosing any reasons. As per the respondent, the appellant also did not take any interest in the dinner which was served on the wedding night i.e. 18.2.1991. It is also the case of the respondent that when both of them went to their bedroom around 11.30 p.m. the appellant was not responsive and she did not allow the respondent to have sexual intercourse with her. The respondent has alleged that it is only on 25.2.1991, that he was allowed to have sexual intercourse with the appellant for the first time, but again the appellant remained unresponsive and such conduct of the appellant caused mental cruelty to the respondent. It is also the case of the respondent husband that on 13.4.1991, the appellant refused to perform "chuda ceremony" which not only hurt the sentiments of the respondent but his parents as well. It was also stated that the appellant in fact removed the chuda and threw it under the bed by saying that she did not believe in all these things. It is also the case of the respondent that the appellant used to visit her parents on her own without even informing the respondent and finally left the matrimonial home on 16.4.1992 and since then she did not come back. It is also the case of the respondent that he had sexual intercourse with the appellant only for about 10-15 times during her stay with him for a period of about 5 months. It is also the case of the respondent that the appellant used to quarrel with his old parents and she also used to insist to shift to her parents' house at Palam colony. The respondent also alleged that on 11th March, 1991 the appellant tried to illegally remove the jewellery from the almirah which belonged to his mother and which was kept for his unmarried sister and while doing so she was caught red handed. It is also the case of the respondent that the appellant made a false complaint with the Crime Against Women Cell and Family Counsel Office, which complaints were ultimately withdrawn by her. Based on these allegations the respondent husband claimed the decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act.

3. In the written statement filed by the appellant wife, she denied all the abovesaid allegations leveled by the respondent husband. She denied that she had refused to participate in the "Dud Mundari Ceremony". The appellant had also stated that after taking lunch on the wedding day, one lady relative of her in-laws and parents of the respondent remarked that she did not bring bed and sofa sets in her dowry and in response she informed them that her father had given a bank draft of Rs. 30,000/- besides

presenting costly clothes, ornaments, TV, clothes for relatives, utensils and other articles in the marriage. It is also the defence of the appellant that on the wedding night the respondent entered the bedroom showering filthy abuses on the appellant and told her that she had not brought the dowry according to their expectations. It is also her case that she was also told by the respondent that the bank drafts should have been prepared either in the name of the respondent or in the name of his father. It was denied by the appellant that her attitude was indifferent at the time of dinner. She also denied the allegation of non-consummation of the marriage on the wedding night. The appellant took a stand that right from the wedding night i.e. 18.2.1991 the parties had normal physical relationship with each other. She also denied that she did not perform "chuda ceremony" or threw the chuda under the bed. She also denied that she left the matrimonial home on 16.4.1992. The appellant also took a stand that on 23.4.1992 the respondent, his parents and two sisters asked her to bring Rs. 50,000/- or otherwise leave the matrimonial home and on her refusal to meet the said demand, she was thrown out of the matrimonial home. The appellant denied that she had sexual relationship with the respondent only 10-15 times or she had refused to have sex with the respondent. She also denied that she never insisted the respondent to live in the house of her parents. She also denied that on 11th March, 1991 she made any attempt to steal the jewellery or she was caught red handed. She also stated that in the last week of April, 1991 she was told by the respondent to withdraw Rs. 30,000/- from her bank account as the old sofa lying in the house required replacement but no new sofa set was purchased when she brought the said money and gave the same to the mother of the respondent. The appellant also took a stand that she was prepared to live with the respondent as she had withdrawn from her society without any reasonable cause and without any fault on her part.

4. Based on the pleadings of the parties, the learned Trial Court framed the following issues:-

(i) Whether the respondent has treated the petitioner with cruelty?

(ii) Relief.

(iii) Whether the petitioner has withdrawn from the company of the respondent without any reasonable cause or excuse? If so, its effect.

The respondent in evidence examined himself as PW2 besides examining Shri Dalveer Singh, Head Constable as PW1 and Shri Vishwamitra, father of the respondent as PW 3, his colleague Shri Vijay Kumar Taygi PW4. The appellant on the other hand examined herself as RW1 with no other evidence in support.

5. After taking into consideration the pleadings of the parties, the learned Trial Court found that the refusal of the appellant wife to participate in the "Dud Mundari ceremony" and thereafter "Chudha ceremony", which were customary rituals in the family of the respondent husband caused embarrassment and humiliation to the respondent and such acts on the part of the appellant amounted to cruelty. The learned Trial Court also found that in the span of one year and two months of the married life, the parties had sex only for about 10-15 times and also denial of the appellant for sexual relationship on the very first night of the marriage is a grave act of cruelty as healthy sexual relationship is one of the basic ingredients of a happy marriage. The learned Trial Court also found that filing of the complaints by the appellant with the Crime Against Women Cell and Family Counsel Office also collectively caused mental cruelty to the respondent husband. Accordingly, the learned trial court granted a decree of divorce in favour of the respondent and against the appellant and consequently also dismissed her counter claim for restitution of conjugal rights.

6. Mr. Atul Bandhu, learned counsel appearing for the appellant before this court vehemently argued that the learned Trial Court did not refer to the evidence of the appellant wife wherein she has denied all the allegations leveled by the respondent husband in his petition for divorce. Counsel also contended that the marriage was consummated on the very first night and the appellant wife never denied sexual relationship to the respondent husband. Counsel also submitted that nowhere the respondent husband has stated that as to when he was refused any such sexual relationship by the appellant. Counsel thus argued that the learned Trial Court has granted the decree of divorce merely on the ground that the appellant wife did not participate in the dud-mundari ceremony and chudha ceremony and also she did not allow the husband to have sexual intercourse more than 10-15 times in a period of 5 months and as per the counsel, these grounds cannot be treated sufficient enough to constitute cruelty as envisaged under Section 13(ia) of the Hindu Marriage Act. In support of his arguments, counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme Court in Savitri Pandey vs Prem Chandra Pandey AIR2002SC591 and V. Bhagat vs D. Bhagat (Mrs) (1994) 1 SCC 337.

7. Mr. R.G. Srivastava, learned counsel appearing for the respondent on the other hand fully supported the reasons given by the learned Trial Court which entitled him to claim a decree of divorce under

Section 13(ia) of the Hindu Marriage Act. Counsel for the respondent also submitted that the appellant did not respect the sentiments of the respondent and his family members by refusing to perform customary rituals like dud-mundari ceremony and chudha ceremony. Counsel also argued that the appellant did not discharge her matrimonial obligations either towards her husband or even towards his old parents. Counsel also submitted that the appellant made false complaints to the Crime Against Women Cell and to the Family Counsel Office, which she later withdrew and such act of the appellant also caused mental cruelty to the respondent. Counsel also submitted that by denying normal sexual relationship to the respondent, the appellant had shaken and destroyed the very foundation of a sound marriage. Counsel also submitted that the respondent had duly discharged his burden to prove the case set up by him where as the appellant failed to discharge her burden and even could not prove her defence. In support of his arguments, counsel for the respondent placed reliance on the following judgments:-

1. Vinita Saxena vs Pankaj Pandit 2006(3) SCALE (SC) 367.
2. Naveen Kohli vs Neelu Kohli 2006(4) SCC 558.
3. Samar Ghosh vs Jaya Ghosh 2007 (4) SCC 511.
4. Praveen Mehta vs Inderjit Mehta AIR 2002 SC 2582
5. Rajinder Bhardwaj vs Anita Sharma AIR 1993 Delhi 135.

8. I have heard learned counsel for the parties and given my thoughtful consideration to the arguments advanced by them.

9. Cruelty as a ground for divorce is nowhere defined in the Hindu Marriage Act as it is not capable of precise definition. There cannot be any straitjacket formula for determining whether there is cruelty or not and each case depends on its own facts and circumstances. What may be cruelty in one case may not be cruelty in other and the parameter to judge cruelty as developed through judicial pronouncements is that when the conduct complained of is such that it is impossible for the parties to stay with each other without mental agony, torture and stress. It has to be something much more than the ordinary wear and tear of married life. The conduct complained of should be grave and weighty and touch a pitch of severity to satisfy the conscience of the court that the parties cannot live together with each other anymore without mental agony, distress and torture. The main grievance of the respondent herein is the denial of the appellant to have normal sexual relationship with the respondent. As per the case of the respondent, during the short period of 5 months he had sexual intercourse with the appellant only 10-15 time while the plea taken by the appellant is

that she had never denied sex to the respondent. The courts have through various judicial pronouncements taken a view that sex is the foundation of marriage and marriage without sex is an anathema. The Division Bench of this Court in the celebrated pronouncement of Mrs. Rita Nijhawan vs. Mr.Bal Kishan Nijhawan AIR1973Delhi200 held as under:
"In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body, the result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse."

The learned Trial Court referred to the judgment of this court in the case of Shankuntla Kumari vs. Om Prakash Ghai AIR1983Delhi53 wherein it was held that:
"(25) A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case. But willful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty, especially when the parties are young and newly married."

Hence, it is evident from the aforesaid that willful denial of sexual intercourse without reasonable cause would amount to cruelty. In the authoritative pronouncement of the Hon'ble Supreme Court in Samar Ghosh vs Jaya Ghosh (2007)4SCC511, the Hon'ble Supreme Court took into account the parameters of cruelty as a ground for divorce in various countries and then laid down illustrations, though not exhaustive, which would amount to cruelty. It would be relevant to refer to the following para 101 (xii) wherein it was held as under:-

"(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."

Although it is difficult to exactly lay down as to how many times any healthy couple should have sexual intercourse in a particular period of time as it is not a mechanical but a mutual act, however, there cannot be any two ways about the fact that marriage without sex will be an insipid relation. Frequency of sex cannot be the only parameter to assess the success or failure of a marriage as it differs from couple to couple as to how much importance they attach to sexual relation vis a vis emotional relation. There may be cases where one partner to the marriage may be over sexual and the other partner may not have desire to the same level, but otherwise is fully potent. Marriage is an institution through which a man and a woman enter into a sacred bond and to state that sexual relationship is the mainstay or the motive to be achieved through marriage would be making a mockery of this pious institution. By getting married, a couple agrees to share their lives together with all its moments of joy, happiness and sorrow and the sexual relationship between them brings them close and intimate by which their marital bond is reinforced and fortified. There may not be sexual compatibility of a couple right from inception of the relationship and depending upon physical, emotional, psychological and social factors, the compatibility between some couples may be there from the beginning and amongst some may come later. Undoubtedly, a normal and healthy couple should indulge into regular sexual relationship but there may be exceptions to this and what may be normal for some may not be normal for others as it would depend upon various factors such nature of job, stress levels, social and educational background, mood patterns, physical well being etc. Indisputably, there has to be a healthy sexual relationship between a normal couple, but what is normal cannot be put down in black and white.

10. Adverting back to the facts of the present case, the marriage between the parties was solemnized on 17.2.1991 and according to the appellant she was forced to leave the matrimonial house on 16.4.1992, whereas as per the respondent husband, the appellant wife practically stayed at the matrimonial home only for a period of five months as for rest of the period she stayed at her parental house. The case of the respondent is that he had sex with the appellant only for about 10-15 times in a span of five months of married life and that he was denied sexual relationship on the very first night of their marriage and denial of sex at the wedding night caused

great mental cruelty to him. The respondent husband also stated that he was allowed to have sexual intercourse by the appellant for the first time only on 25.2.1991.The appellant wife has denied the said allegations of the respondent husband and in defence stated that she was having normal sexual relationship with her husband and even had sexual intercourse on the wedding night. The learned Trial Court after analyzing the evidence adduced by both the parties found the version of the appellant untrustworthy and unreliable while that of the respondent, much more credible and trustworthy. The appellant on one hand took a stand that on 18.2.1991 the atmosphere on that night was very tense so much so that, both the parties could not sleep and speak to each other and she did not even take proper food and the whole night there was tension between the parties and the atmosphere was fully charged, but at the same time in the cross-examination of PW2 the suggestion was made by counsel that the appellant touched the feet of the respondent when he entered the room on the said wedding night and she also admitted that her husband had never taken liquor in her presence and he had never come to her in drunken state. It would be appropriate to reproduce para 55 of the Trial Court judgment to bring to surface the said contradiction on the part of the appellant.

"55.From the evidence on record, it is gathered that on the wedding night i.e. on 18.2.91 a "Dud Mundari" ceremony was to be performed but the respondent wife refused to participate in the same. This version of PW 2 has been fully corroborated by his father PW 3. The husband i.e. Rajiv Arora, had entered by both PW 2 and RW1. RW 1 in her cross-examination has stated that their marriage had been consummated on that very night and her husband had come to her and she did not have to persuade the petitioner. On the other hand the petitioner has stated that their marriage could not be consummated on their wedding night and he had sex with his wife for the first time only on 25.2.91. RW1 in her cross-examination has stated that the atmosphere that night was very tense and both the parties could not sleep and they did not speak to each other and her husband had grievance about the insufficient dowry which had been given in the marriage . RW 1 has also admitted that on 18.2.91, she did not take proper food as she was not feeling well. This version of RW1 that she did not take food that night is corroborated by the version of PW1 who has stated that on the wedding night at the time when the dinner was served the attitude of the respondent was indifferent and she did not take any dinner but she took only a little sweet."

11. In matrimonial cases, more often than not it is a challenging task to ascertain as to which party is telling truth as usually it is the oral evidence of one party against the oral evidence of the other. What happens in the four walls of the matrimonial home and what goes on inside the bed room of the couple is either known to the couple themselves or at the most to the members of the family, who are either residing there or in whose presence any incident takes place. Whether the couple has had sex and how many times or have had not had sex and what are the reasons; whether it is due to the denial or refusal on the part of the wife or of the husband can only be established through the creditworthiness of the testimonies of the parties themselves. Consequently, the absence of proper rebuttal or failure of not putting one's case forward would certainly lead to acceptance of testimony of that witness whose deposition remains unchallenged. In the present case, the testimony of the respondent that the appellant was never responsive and was like a dead wood when he had sexual intercourse with her remained unrebutted. It is not thus that the respondent had sex with her wife only about 10-15 times from the date of his marriage within a period of five months, but the cruel act of the appellant of denying sex to the respondent especially on the very first night and then not to actively participate in the sex even for the said limited period for which no contrary suggestion was given by the appellant to the respondent in his cross-examination. The respondent has also successfully proved on record that the appellant did not participate in the customary rituals of dud mundri and that of chudha ceremony, which caused grave mental cruelty to the respondent. It is a matter of common knowledge that after the marriage, certain customary rituals are performed and the purpose of these rituals is to cement the bond of marriage. The question whether there was a refusal on the part of the respondent not to perform the ritual of dud-mundari and chudha ceremony is difficult to be answered as on one hand, the appellant has alleged that she had duly participated in the ceremonies while on the other hand the respondent has taken a stand that there was refusal on the part of the appellant to participate in the ceremonies. No doubt the testimony of the respondent has been supported by the evidence of his father and there is no corroborative evidence from the side of the appellant, although her brother had accompanied her in doli and in such backdrop, adverse inference thus has to be drawn against the appellant for not producing her brother in evidence who could be the best witness to prove the defence of the appellant alleging her participation in the dud-mundari ceremony. Undeniably, these customary ceremonies are part of the marriage ceremony and refusal of the same that too in the presence of the family members of the husband would

be an act of cruelty on the part of the wife. The appellant has also failed to prove any demand of dowry made by the respondent or his family members as no evidence to this effect was led by the appellant. The appellant herein also filed criminal complaints against the respondent and his family members and later withdrew the same. Undoubtedly, it is the right of the victim to approach the police and CAW cell to complain the conduct of the offending spouse, however, frivolous and vexatious complaints like in the present case led to cause mental torture and harassment to the respondent and his family members. Thus, taking into account the conduct of the appellant in totality, this court is of the view that the same amounts to causing mental cruelty to the respondent.

12. Before parting with the judgment, this court would like to observe that the sex starved marriages are becoming an undeniable epidemic as the urban living conditions today mount an unprecedented pressure on couples. The sanctity of sexual relationship and its role in reinvigorating the bond of marriage is getting diluted and as a consequence more and more couples are seeking divorce due to sexual incompatibility and absence of sexual satisfaction. As already stated above, to quantify as to how many times a healthy couple should have sexual intercourse is not for this court to say as some couples can feel wholly inadequate and others just fine without enough sex. "That the twain shall become one flesh, so that they are no more twain but one" is the real purpose of marriage and sexual intercourse is a means, and an integral one of achieving this oneness in marriage.

13. This Court therefore, does not find any kind of illegality or perversity in the findings given by the learned Trial Court in the impugned judgment dated 12.2.2001 and the same is accordingly upheld. The present appeal filed by the appellant is devoid of any merits and the same is hereby dismissed.

Sd/-
KAILASH GAMBHIR, J

21.03. 2012