

A.F.R.

Reserved on: 04.09.2019

Delivered on 20.09.2019

Court No. - 34

Case :- FIRST APPEAL No. - 448 of 2015

Appellant :- Girish Chandra Srivastava

Respondent :- Smt. Reeta Srivastava

Counsel for Appellant :- Sriprakash Dwivedi

Counsel for Respondent :- Ratnesh Khare

Hon'ble Sudhir Agarwal,J.

Hon'ble Rajeev Misra,J.

(Delivered by Hon'ble Rajeev Misra,J)

1. This is plaintiff's appeal under section 19 of Family Court's Act 1984 (hereinafter referred to as "Act, 1984") arising out of judgement dated 16.7.2015 and decree dated 23.7.2015, passed by Principal Judge, Family Court, Varanasi in Marriage Petition No. 536 of 2013 (Girish Chandra Srivastava Vs. Smt. Reeta Srivastava) under section 13 of Hindu Marriage Act , 1955 (hereinafter referred to as "Act, 1955") whereby, Court below has dismissed marriage petition filed by plaintiff-appellant for divorce on the grounds of cruelty, adultery and desertion.

2. According to plaint allegations, marriage of plaintiff-appellant was solemnized with Reeta Srivastava on 30.11.2001 in a very simple manner. It is the case of plaintiff-appellant that defendant-respondent, without taking consent of plaintiff-appellant, left her marital home in January, 2002 and is residing at her parental home since then. When all attempts by plaintiff-appellant for conciliation between parties failed and defendant-respondent did not return to her matrimonial home to live along plaintiff-appellant, Marriage Petition No. 536 of 2013 (Girish Chandra Srivastava Vs. Smt. Reeta Srivastava) under section 13 of Act, 1955 was filed by

plaintiff-appellant for decree of divorce on grounds of cruelty, adultery and desertion. Apart from factual pleas in respect of aforesaid grounds, it was also pleaded in plaint that marriage between parties has been got solemnized by playing fraud. At the time of marriage, age of plaintiff was 43 years, whereas defendant-respondent was aged about 47 years. However, aforesaid fact was concealed and age of defendant-respondent was disclosed as 32 years. It was also alleged that at time of marriage defendant-respondent is younger to her brother Pankaj Khare, whereas true and correct fact is even at the time of marriage, defendant-respondent was elder to plaintiff-appellant. In elaboration of aforesaid ground, it was also pleaded that mensuration cycle of defendant-respondent has come to an end on account of her age. As such, defendant-respondent is incapable of reproducing a child. It was then pleaded that defendant-respondent committed cruelty both physical and mental upon plaintiff-appellant and his family members. Defendant-respondent was alleged to possess M.A. Degree, whereas, plaintiff-appellant is just High School. On account of such disparity, defendant-respondent used to make objectionable comments against plaintiff-appellant. It was also stated that defendant-respondent has failed to discharge her spousal obligations as well as her marriage obligations causing physical and mental cruelty to plaintiff-appellant. Defendant-respondent has refused to perform household jobs and has further entered into a scuffle with parents of plaintiff-appellant. False allegation regarding plaintiff-appellant being drunkard were also leveled by defendant-respondent causing mental agony to plaintiff-appellant. On the question of adulteress character of defendant-respondent, it was pleaded by plaintiff-appellant that defendant-respondent is in illegitimate relationship with Mahesh Khare her 'Jija' (husband of sister) and out of aforesaid illegal relationship, son has been born aged about 12 years. With respect to desertion by defendant-respondent, it was alleged by plaintiff-appellant that defendant-respondent has left house of plaintiff-appellant in January, 2002 without consent of

plaintiff-appellant and inspite of best efforts for conciliation and request made by plaintiff-appellant requesting defendant-respondent to return to her marital home and co-habitate with plaintiff-appellant having failed, plaintiff-appellant filed matrimonial petition for grant of divorce.

3. Summons were issued to defendant-respondent but in spite of that, defendant-respondent did not appear. Consequently, service upon defendant-respondent was affected through substituted serviced by way of publication in daily news paper 'Aaj'. In spite of aforesaid, defendant-respondent did not appear to contest marriage petition filed by plaintiff-appellant. Accordingly, Court below held service upon defendant-respondent to be sufficient. Consequently, marriage petition filed by plaintiff-appellant proceeded ex-parte against defendant-respondent.

4. Plaintiff-appellant, in order to prove his case, adduced only himself as P.W.1. He also filed six documentary evidence i.e. paper Nos. 8-Ga (I) to 8-Ga (VI) vide list of documents (Paper No. 7 Ga), in proof of his case.

5. To adjudicate marriage petition filed by plaintiff-appellant, Court below did not frame specific issues but independently considered grounds pleaded in plaint for grant of a decree of divorce.

6. Court below considered allegations made in plaint, oral testimony of plaintiff-appellant and documentary evidence adduced by plaintiff-appellant, while evaluating grounds for divorce pleaded in plaint. Upon consideration and evaluation of same, Court below concluded that none of the grounds raised by plaintiff-appellant are cogent enough to allow marriage petition filed by plaintiff-appellant and consequently, declined to grant a decree of divorce as prayed for.

7. It was pleaded by plaintiff-appellant that marriage of parties has been solemnized by playing fraud inasmuch as age of defendant-respondent was more than plaintiff-appellant at time of marriage but the said fact was deliberately concealed.

8. Court below took the view that on the aforesaid ground, marriage

petition ought to have been filed within a period of one year from date of marriage or from date of knowledge of aforesaid fact. Admittedly, marriage of plaintiff-appellant with defendant-respondent was solemnized on 30.11.2001, whereas Marriage Petition has been filed in the year 2013 vide plaint dated 30.5.2013, without disclosing date on which plaintiff-appellant discovered aforesaid fact. As such, marriage petition filed by plaintiff-appellant on aforesaid ground is barred by limitation.

9. We have considered the finding recorded by Court below in respect of ground urged by plaintiff-appellant that fraud has been played inasmuch as defendant-respondent is elder to plaintiff-appellant but said fact was concealed at time of marriage between parties. As such, same has been got solemnized by playing fraud. Section 12 of Act 1955 relates to voidable marriages. For ready reference Section 12 of Act 1955 is reproduced herein below:

“12 Voidable marriages . (1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

(a) that the marriage has not been consummated owing to the impotence of the respondent; or]

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner 13 [was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)], the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage:-

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if-

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the

petitioner has not taken place since the discovery by the

petitioner of the existence of the said ground.”

(Emphasis added)

10. When finding recorded by Court below on the question that marriage of parties was got solemnized by playing fraud is examined in the light of provisions contained in Section 12 of Act, 1955, it is explicitly clear that finding recorded by Court below on the aforesaid question is perfectly just and legal. Plaintiff-appellant has himself not detailed in his marriage petition as to when the factum that age of Defendant-respondent is more than Plaintiff-appellant was discovered by him. In the absence of pleading in that regard in plaint itself, suit filed by Plaintiff-appellant stood clearly barred under Section 12(2) (a) (i) of the Act, 1955.

11. Plaintiff-appellant also pleaded commission of cruelty upon his parents by Defendant-respondent. Divorce can be granted on the ground of cruelty as per section 13 (1) (i-a). For ready reference, same is reproduced herein below:

“(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or”

12. Said issue was considered by Court below but refused to be accepted. Court below concluded that in order to prove 'cruelty', Plaintiff-appellant has not produced any supporting documentary evidence nor has adduced any independent witness to prove the same.

13. Admittedly, Plaintiff-appellant only made allegations of cruelty being committed by Defendant-respondent in the plaint. However, Plaintiff-appellant failed to plead any specific instance of 'cruelty'. Once it was alleged by Plaintiff-appellant that 'cruelty' was committed by Defendant-respondent upon his parents, then plaintiff-appellant ought to have detailed specific instances of 'cruelty' alleged to have been committed by defendant-respondent. Apart from above, parents of plaintiff-appellant were the best persons to prove commission of 'cruelty' upon them by defendant-respondent. However, for reasons best known to Plaintiff-appellant he did not adduce his own parents to prove commission of cruelty by defendant-respondent as alleged by him. We therefore find no illegality in the finding recorded by Court below on aforesaid issue. Consequently, we affirm the same.

14. It was then pleaded by plaintiff-appellant that defendant-respondent does not perform household jobs which is unbecoming of a wife. On this factual premise plaintiff-appellant pleaded for grant of a decree of divorce. However, Court below has considered the aforesaid plea raised by plaintiff-appellant but concluded that same by itself is not sufficient to grant decree of divorce as prayed for by plaintiff-appellant.

15. Section 13 of Act, 1955 provides for grounds of divorce. For ready reference Section 13 of Act, 1955 is reproduced herein-under

“ 13 Divorce. --(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

*[(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or*

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]
(ii) has ceased to be a Hindu by conversion to another religion; or
[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

- (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
- (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]
- (iv) has, [***] been suffering from a virulent and incurable form of leprosy; or
- (v) has, [***] been suffering from venereal disease in a communicable form; or
- (vi) has renounced the world by entering any religious order; or
- (vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; [***]

[*Explanation.* ¶In this sub-section, the expression ¶desertion¶ means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

(viii) [***]

(ix) [***]

[(1-A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,---

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or [bestiality; or]

[(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

[(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.]

Explanation. --This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]

STATE AMENDMENT

Uttar Pradesh.-- In its application to Hindus domiciled in Uttar Pradesh and also when either party to the marriage was not at the time of marriage a Hindu domiciled in Uttar Pradesh, in section 13--

(i) in sub-section (1), after clause (i) insert (and shall be deemed always to have been inserted) the following

“(1-a) has persistently or repeatedly treated the petitioner with such cruelty 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; or”, and

(ii) for clause (viii) (since repealed) substituted and deem always to have been so substituted for following.

“(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and--

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party; or”.”

16. Section 13 (I) (i-a) of Act, 1955 provides for grant of decree of divorce on the ground of cruelty. The term 'cruelty' has not been defined in Act, 1955. Consequently, same has been subject-matter of debate for long.

17. Recently a Division Bench of this Court in **Smt. Sarita Devi Vs. Sri Ashok Kumar Singh reported in 2018 (3) AWC 2328** has considered the question of cruelty in detail in paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27 and 29 which reads as under:-

“16. In *Samar Ghosh vs. Jaya Ghosh* (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

17. In *Black's Law Dictionary, 8th Edition, 2004*, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

18. The concept of cruelty has been summarized in *Halsbury's Laws of England, Vol.13, 4th Edition Para 1269*, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists."

19. In *24 American Jurisprudence 2d*, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse. "

20. One of the earliest decision considering "mental cruelty" we

find is, *N.G. Dastane v. S. Dastane* (1975) 2 SCC 326, wherein Court has said:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. "

21. In *Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr.* (1981) 4 SCC 250 Court said that a concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

22. In *Shobha Rani v. Madhukar Reddi*, (1988) 1 SCC 105, Court observed that word 'cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of 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 conduct and its effect on the complaining spouse. There may, however, be cases where 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, cruelty will be established if 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.

23. In *V. Bhagat v. D. Bhagat (Mrs.)*, (1994) 1 SCC 337 considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with 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 other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard

must be had to the social status, educational level of 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 thus has to be determined in each case having regard to the facts and circumstances of each case.

24. *In Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.*

25. *In Savitri Pandey v. Prem Chandra Panadey, (2002) 2 SCC 73, Court held that mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.*

27. *In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778 Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as 'cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.*

29. *In Samar Ghosh vs. Jaya Ghosh (supra) Court said that though no uniform standard can be laid down but there are some instances which may constitute mental cruelty and the same are illustrated as under:*

"(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 reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely

intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(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 behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead 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.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial

bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

18. The aforesaid Division Bench judgement clearly explains different shades of 'cruelty' which by itself are sufficient enough to dissolve the marriage on the ground of cruelty. The aforesaid judgement also prescribes the mode as to how 'cruelty' has to be proved and in what decree it has to be proved so as to grant of decree of divorce on the ground of 'cruelty'.

19. With the aid of the aforesaid material, Court has now to examine, whether plaintiff-appellant was able to successfully establish cruelty on the part of defendant- respondent and therefore, entitled to the decree of divorce on the aforesaid ground.

20. From perusal of plaint, we find that allegation of cruelty made by plaintiff-appellant is only allegation but does not give any specific instance or instances of cruelty having been committed by Defendant-respondent. Merely on the allegation of cruelty having been committed without giving specific instances in support of such allegation, same cannot be considered by Court. In the present case, Plaintiff-appellant has failed to plead specific instances of cruelty. Plea raised by plaintiff-appellant is not covered under judgement of Apex Court in Samar Ghosh (Supra) wherein Apex Court has given various instances of mental cruelty. Plea raised by plaintiff-appellant neither singularly nor when considered cumulatively along with other grounds pleaded in plaint, is sufficient enough to grant decree of divorce. Consequently, we do not find any error much less an error on face of record in conclusion drawn by Court below that decree of divorce cannot be granted on ground that wife has refused to perform household job.

21. Plaintiff-appellant in support of his divorce suit further pleaded that defendant-respondent was in illegal relationship with her 'Jija' i.e.

husband of sister namely Mahesh Khare. From aforesaid illegal relationship, a son aged about 12 years was born. Court below refused to entertain this ground as Rule 6 of The Hindu Marriage and Divorce Rules, 1956 (hereinafter referred to as “Rules, 1956”) were not complied with inasmuch as Mahesh Khare was not impleaded as a party to the proceedings. Apart from above bare pleading no cogent evidence has been adduced by Plaintiff-appellant to substantiate aforesaid plea. Once infidelity of wife of Defendantn-respondent i.e. wife was challenged, it was incombent upon Plaintiff-appellant to apply for D.N.A. Test of the child as well as Mahesh Khare. However, no such step was taken by Plaintiff-appellant. Consequently, Court below rejected the aforesaid ground for grant of divorce prayed for by Plaintiff-appellant. He has also not impleaded the person allegedly involved in adultery with defendant-respondent.

22. We have examined the finding recorded by Court below with regard to adulterous character of Defendant-respondent as alleged by Plaintiff-appellant. For ready reference Rule 6 of Rules, 1956 is reproduced herein-under:-

“6. Necessary Parties- (a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make the alleged adulterer or adulteress a co-respondent to the petition unless he or she is excused by the Court from doing so on any of the following grounds:

(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery,

(ii) that such person is dead;

(iii) that the respondent if a woman is leading the life of a prostitute and that the petitioner knows of no person with whom adultery has been committed; or

(iv) Any other reason that the Court considers sufficient.

(b) In every petition under Sec.13 (1) and (2) of the Act, the petitioner shall make 'the other wife' mentioned in that section a co-respondent.

(c) In every petition under Sec. 11 of the Act on the ground

that the condition in Sec. 5 (1) is contravened the petitioner shall make the spouse alleged to be living at the time of the marriage a co-respondent.

(d) If a petitioner does not make the alleged adulterer or adulteress a co-respondent he shall at the time of presenting the petition file a separate application supported by an affidavit giving the reasons.”

23. Admittedly, Rule 6 of Rules, 1956 is mandatory in nature and therefore, Plaintiff-appellant was obliged to implead Mahesh Khare i.e. 'Jija' of Defendant-respondent as a party to the marriage petition.

24. That apart, we find that once ifidelity of wife was challenged stating that a son was born out of cohabitation with Mahesh Khare i.e. 'Jija' of Defendant-respondent, it was incumbent upon Plaintiff-appellant to apply for D.N.A. Test of alleged illegitimate son and Mahesh Khare. However, for reasons best known to Plaintiff-appellant no such steps were taken. Reference in this regard be made to judgement of Apex Court in **Dipanwita Roy Vs. Ronobroto Roy, 2015 (1) SCC 365 in which** Court considered the question of presumption arising out under section 112 and the necessity of holding D.N.A. test. Court referred to provisions of Section 112 and thereafter observed as follows in paragraphs 9, 10, 11, 13, 14, 15, 17, 18:

“9. Learned counsel for the appellant-wife, in the first instance, invited our attention to Section 112 of the Indian Evidence Act. The same is being extracted hereunder:

“112. Birth during marriage, conclusive proof of legitimacy- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

Based on the aforesaid provision, learned counsel for the appellant-wife drew our attention to decision rendered by the Privy Council in Karapaya Servai v. Mayandi, AIR 1934 PC 49, wherein it was held, that the word 'access' used in Section 112 of the Evidence Act, connoted only the existence of an opportunity for marital intercourse, and in case such an opportunity was shown to have existed during the subsistence of a valid marriage, the provision by a fiction of law, accepted the same as conclusive proof of the fact that

the child born during the subsistence of the valid marriage, was a legitimate child. It was the submission of the learned counsel for the appellant-wife, that the determination of the Privy Council in Karapaya Servai's case(supra) was approved by this Court in Chilukuri Venkateshwarly vs. Chilukuri Venkatanarayana, 1954 SCR 424.

10. Learned counsel for the appellant-wife also invited our attention to a decision rendered by this Court in Goutam Kundu vs. State of West Bengal and another, (1993) 3 SCC 418, wherein this Court, inter alia, held as under:

“(1) That Courts in India cannot order blood test as a matter of course.

(2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.” Reliance was also placed on the decision rendered by this Court in *Kamti Devi and another v. Poshi Ram, AIR 2001 SC 2226*, wherefrom, the following observations made by this Court, were sought to be highlighted:

*“9. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The *raison d'etre* is the legislative concern against illegitimizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.*

10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleric Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g., if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to

the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

11.....Its corollary is that the burden of the plaintiff-husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff-husband. “ (emphasis is ours)

11. Lastly, learned counsel for the appellant-wife, placed reliance on the decision rendered by this Court in Sham Lal @ Kuldeep vs. Sanjeev Kumar and others, (2009) 12 SCC 454, wherein it was inter alia, held as under:

“Once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access. In the instant case, admittedly the plaintiff and Defendant 4 were born to D during the continuance of her valid marriage with B. Their marriage was in fact never dissolved. There is no evidence on record that B at any point of time did not have access to D.” (emphasis is ours).

13. All the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The question that arises for consideration in the present appeal, pertains to the alleged infidelity of the appellant-wife. It is not the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13(1)(ii) of the Hindu Marriage Act, 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had voluntarily engaged in sexual intercourse, with a person other than the respondent. There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was aimed at the alleged adulterous behaviour of the appellant. In the determination of the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore, insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play.

14. A similar issue came to be adjudicated upon by this Court in *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another*, (2010) 8 SCC 633, wherein this Court held as under:

“21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of “eminent need” whether it is not possible for the court to reach the truth without use of such test.

23. There is no conflict in the two decisions of this court, namely, *Goutam Kundu vs. State of West Bengal* (1993) 3 SCC 418 and *Sharda vs. Dharmpal* (2003) 4 SCC 493. In *Goutam Kundu*, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In *Sharda*, while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

24. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the

court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court. “ (emphasis is ours)

It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties.

15. Recently, the issue was again considered by this Court in *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik* and another, (2014) 2 SCC 576, wherein this Court held as under:

“15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstances, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is

known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice." (emphasis is ours) This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112 of the Indian Evidence Act.

16. It is borne from the decisions rendered by this Court in *Bhabani Prasad Jena (supra)*, and *Nandlal Wasudeo Badwaik (supra)*, that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.

17. The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the

process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.

18. We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

“114. Court may presume existence of certain facts – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.”

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.”

25. Thus having considered the legal provisions and case law regarding proof of fact as to whether illegitimate son was born out of

cohabitation with another person, we find that Plaintiff-appellant has committed a procedural error in plaint by not impleading Mahesh Khare 'Jija' of Defendant-respondent as a party to the Divorce Petition even when the same was mandatorily required under Rule 6, of Rules 1956. Further no application was filed by Plaintiff-appellant before Court below to ascertain the D.N.A. Character of illegitimate child and Mahesh Khare 'Jija' of Defendant-respondent. In the absence of aforesaid, Court below was totally handicapped to consider the aforesaid issue pressed by Plaintiff-appellant for annulment of marriage. Court below thus did not commit any illegality in refusing to grant a decree of divorce to Plaintiff-appellant on this ground.

26. Lastly, it was pleaded by Plaintiff-appellant before Court below that parties have been living separately since January, 2002, as such, marriage of parties has broken down irretrievably. It was the case of Plaintiff-appellant that defendant-respondent without taking consent of plaintiff-appellant and out of her own free will left her matrimonial home in January, 2002 and is residing with her parents since then. In spite of repeated request made by Plaintiff-appellant defendant-respondent has refused to live with Plaintiff-appellant in her marital home. Reliance is placed upon judgements in **Sukhendu Das VS. Rita Mukherjee, 2007 (9) SCC 632**. Reliance is placed upon paragraphs 6 and 7 to buttress the submission that in present case also, wife defendant-respondent is living separately since January, 2002 and inspite of knowledge of divorce suit has refused to participate in the same, consequently marriage of parties has broken down irretrievably and forcing appellant to stay in a dead marriage would itself constitute mental cruelty. Para 6 and 7 of the judgement in **Sukhendu Das (Supra)** read as under:

“6. Mr. Raja Chatterjee, learned counsel appearing for the Appellant submitted that the Respondent deserted the Appellant about 17 years back and she refused to come back and live with him. Apart from the allegation of desertion, the learned counsel also alleged mental cruelty on the part of the Respondent who threatened the Appellant in the year 2005 that she would get a criminal case filed against him if he did not stop attempts to get the divorce. The learned counsel further submitted

that the Appellant and the Respondent have been living apart due to matrimonial discord since 17 years and for all practical purposes the marriage has broken down.

*7. The Respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of Notice, the Respondent did not show any interest to appear in this Court also. This conduct of the Respondent by itself would indicate that she is not interested in living with the Appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty [**Samar Ghosh v. Jaya Ghosh**, 2007 (2) R.C.R (Civil 595; 2007 (2) R.C.R. (Criminal) 515 : 2007 (2) Recent Apex Judgements (R.A.J) 177: (2007) 4 SCC 511 (para 101) (xiv) . The High Court observed that no attempt was made by either of the parties to be posted at the same place. Without entering into the disputed facts of the case, we are of the opinion that there is no likelihood of the Appellant and the Respondent living together and for all practical purposes there is an irretrievable breakdown of the marriage. ”*

27. Court below also considered above mentioned ground. Court below upon evaluation of evidence on record, concluded that Plaintiff-appellant had previously filed Marriage Petition No. 258 of 2003 for grant of divorce. Defendant-respondent appeared in aforesaid marriage petition. She appears to have subsequently filed an application under Section 24 of Act, 1955 for grant of interim maintenance. Same was allowed. However, on account of failure of Plaintiff-appellant to pay interim maintenance to defendant-respondent, earlier Marriage Petition NO. 258 of 2003 filed by Plaintiff-appellant came to be dismissed. Restoration application filed by plaintiff-appellant was also rejected. That apart, Defendant-respondent had herself filed Case No. 448 of 2003 in the Family Court, Gorakhpur for restitution of conjugal rights as contemplated under Section 9 of Act, 1955. As such, it is established that Defendant-respondent has not herself abounded Plaintiff-appellant. To the contrary on account of conduct of Plaintiff-appellant, Defendant-respondent has been forced to live separately. On the facts as noted above, it cannot be said that marriage between parties has broken down irretrievably. Consequently, we have no hesitation to hold that finding recorded by Court below that marriage between parties has not broken down irretrievably, does not suffer from any illegality, perversity or being erroneous. Defendant-respondent is

legally wedded wife of plaintiff-appellant. As such, plaintiff-appellant is legally and morally bound to maintain his wife. Record shows that plaintiff-appellant has miserably failed in discharging his moral and legal obligation.

28. In view of discussion made herein-above, appeal fails and is liable to be dismissed. It is accordingly dismissed. Cost made easy.

Order Date :- 20.09.2019

Arshad