

(A.F.R.)

Court No. - 34**Case :-** FIRST APPEAL No. - 327 of 2017**Appellant :-** Surendra Pratap Singh**Respondent :-** Dr. Vishwaraj Singh**Counsel for Appellant :-** Ganesh Shanker Srivastava**Hon'ble Sudhir Agarwal,J.****Hon'ble Rajeev Misra,J.**

1. Heard Sri Ganesh Shanker Srivastava, learned counsel for appellant. None has appeared on behalf of respondent though vide order dated 01.05.2017, notice was issued to sole respondent. Vide order dated 12.07.2018, service was deemed sufficient. Hence, we proceed to hear and decide this appeal exparte.

2. This is plaintiff's appeal under Section 19(1) of Family Court Act, 1984 (*hereinafter referred to as "Act, 1984"*) arisen from judgement dated 22.03.2017 and decree dated 07.04.2017 passed by Smt. Shaily Rai, Additional Principal Judge/Additional District and Sessions Judge/ Fast Track Court No. 1, Varanasi, dismissing appellant's Matrimonial Petition No. 189 of 2007 filed under Section 13 of Hindu Marriage Act, 1955 (*hereinafter referred to as "Act, 1955"*) seeking divorce on the ground of cruelty.

3. Plaintiff-appellant instituted Matrimonial Petition No.189 of 2007, under Section 13 of Act, 1955 with a prayer that matrimonial relations between plaintiff and defendant be revoked by granting decree of divorce.

4. The plaint case set up by appellant vide plaint dated 10.08.2007 is that he is resident of village Amar Lok Hospital, Uska Road, Siddharthanagar, Tappa-Dharauli, Pargana, Tehsil- Naugarh, District Siddharthanagar while defendant-respondent is resident of Varanasi. Marriage between parties was solemnized on 04.05.2003 according to Hindu Rituals. Defendant after marriage came to her in-laws house

and started discharging her matrimonial duties and both were living happily. Both the parties are well educated. Defendant by profession is Doctor. Defendant's father Professor Daya Shanker Singh has generally stayed abroad. Defendant was also born at abroad and has stayed with her father in different countries like, South Africa, America etc. Defendant is an expert Doctor, therefore, parties jointly constructed Amar Lok Hospital for medical practice of defendant. With the passage of time, understanding between the two got disturbed since defendant has mostly lived abroad and enjoyed open lifestyle. Misunderstanding between the two resulted in some criminal cases also which were pending at the time of filing of matrimonial petition. Situation has come where both the parties have lost confidence among them and it is difficult to live together. Further on account of criminal cases, mental stress has reached a stage where both cannot live together under a single roof and causing mental and physical harassment to plaintiff. Both have no nuptial relations for the last one year. Relations of husband and wife have ceased and defendant has also not discharged her duties as wife. It has resulted in a hell like life to the parties. It is impossible for both to live together. Plaintiff repeatedly asked defendant to have a mutual divorce but she has not agreed. Cause of action arose in the first week of August, 2007 when defendant declined to cooperate for mutual divorce.

5. Matrimonial Petition was contested by defendant by filing written statement dated 13.11.2007 who stated that it is the plaintiff who has been harassing defendant mentally and physically throughout. He induced defendant to marry him on the pretext that he is a Doctor but later on, it was revealed that he was not a Doctor and, therefore, he has cheated defendant. For construction of Amar Lok Hospital except loan money, which was sanctioned by State Bank of India, Siddharthanagar under Doctor Plus Scheme, entire money was arranged and invested by defendant and plaintiff has not contributed any single penny therefor. Allegation that foreign stay of defendant

has caused in marital differences is incorrect and defendant has not harassed plaintiff in any manner and it is otherwise. Plaintiff has made dowry demand time and again and also caused physical and mental cruelty making her life a hell.

6. Aforesaid petition was initially filed in the Court of Civil Judge (Senior Division), Siddharthanagar. Defendant filed a Transfer Petition (Civil) No.142 of 2008 in Supreme Court and thereupon vide judgement dated 03.01.2011, it was transferred to the Court of competent jurisdiction at Varanasi.

7. For expeditious disposal of the suit, plaintiff filed Writ Petition No.45971 of 2011 which was disposed of vide judgement dated 12.08.2011 directing Court below to decide suit expeditiously without giving unnecessary adjournment to the parties.

8. Defendant sought amendment in written statement and sought to insert following paras and schedule:-

“16ए. यह कि वादी बहुत ही चालाक व मुकदमेबाज व्यक्ति है और वादी अपने को डाक्टर जाहिर करता था और जिसके बावत हम प्रतिवादिनी के माता-पिता व रिश्तेदारी, वादी के बातों पर पूर्णरूप से विश्वास करके हम प्रतिवादिनी की शादी साथ वादी/ याची मुताबिक हिन्दू धर्मशास्त्र व रीति रिवाज बिरादरी के रूपया पैसा खर्च करके किया था। चूंकि हम प्रतिवादिनी के माता-पिता काफी सम्पन्न थे, चुनान्चे उन्होंने हम प्रतिवादिनी को व वादी / याची को काफी रूपया व जेवरात व मोटर कार व अन्य सामान बरवक्त विवाह हम प्रतिवादिनी व याची को दिया था, अलावा इसके बिदायी के समय हम प्रतिवादिनी को अलग से काफी आभूषण व कपड़ा भी दिया था, जिसका विवरण नीचे दिया गया है।

16बी. यह कि बाद विवाह मजकूर हम प्रतिवादिनी व याची / वादी के सम्बन्ध काफी मधुर व अच्छे थे, चुनान्चे हम प्रतिवादिनी व याची / वादी ने मिल करके “अमर लोक सेवाश्रम” मजकूर के लिए जमीन भी क़य करके उस पर “अमर लोक सेवाश्रम” मजकूर कायम किया।

16सी. यह कि बाद शादी मजकूर जब हम हम प्रतिवादिनी को मालूम हुआ कि वादी / याची क्वालिफाइड डाक्टर नहीं हैं और उसके पास फर्जी डिग्री है, और उसने हम प्रतिवादिनी के माता-पिता व रिश्तेदारों को भी धोखा दे कर तथा खुद को डाक्टर बता हम प्रतिवादिनी को धोखा देकर हम प्रतिवादिनी से शादी कर लिया है, जिसकी जानकारी होने पर वादी / याची व प्रतिवादिनी में मनमुटाव हो

गया और वादी / याची अपनी कमी को छिपाने के लिए हमेशा हम प्रतिवादिनी को मारपीट व झगड़ा फसाद करने लगा और अन्तोगत्वा हम प्रतिवादिनी को मारपीट करके जबरदस्ती घर से निकाल दिया और हम प्रतिवादिनी को जब याची / वादी ने जबरदस्ती घर से निकाला तब वादी / याची ने हम प्रतिवादिनी मजकूर का सभी आभूषण व कपड़ा वगैरह जो कि हम प्रतिवादिनी को हम प्रतिवादिनी के माता-पिता ने विवाह के वक्त दिया था सभी वस्त्राभूषण अपने पास रख लिया और वह आज भी याची / वादी के पास हैं।

16डी. यह कि हम प्रतिवादिनी ने जब वादी / याची से उक्त आभूषण वगैरह जो वरवक्त विवाह हम प्रतिवादिनी के माता-पिता ने जो हम प्रतिवादिनी को दिया था, उसे मांगा तब वादी / याची ने उसे देने से इन्कार कर दिया तथा यानि हम प्रतिवादिनी से अलग से दहेज की मांग करने लगा।

17 ई. यह कि वादी / याची ने मुकदमा हाजा में जो कारण विवाह विच्छेद का दिया है, वह गलत व बनावटी है, और वादी / याची ने माकूल वजह नहीं दिया और जो कारण दिया है, वह दफा- 13 हिन्दू मैरिज एक्ट के शर्तों को पूरा नहीं करता है, चुनान्चे इस आधार पर भी दावा वादी / याची मय खरचा के खारिज किया जावे।

16 एफ. यह कि हम प्रतिवादिनी ने बार-बार वादी / याची से कहा कि वह इस वदोत्तर के अन्त में दिये गये उल्लिखित सामान जिसकी कीमत मुबलिग-37,50,000 रूपया होती है, हम प्रतिवादिनी मजकूर को अदा कर देवे और वक्त अदायगी के बावत हम प्रतिवादिनी से रसीद तहरीर करा लेवे किन्तु वादी / याची जानबूझ करके हम प्रतिवादी के उक्त आभूषण को हड़प करने की गरज से उक्त आभूषण व सामानों का विवरण जो नीचे दिया गया है, को देने से भी इकार कर दिया जिसको पाने का मुस्तहक व हकदार हम प्रतिवादिनी मजकूर है।

ख. यह कि वादोत्तर के प्रस्तावित तरमीम के पैरा-16 एफ. के बाद निम्नलिखित विवरण सम्पत्ति निम्नलिखित रूप से इजाफा किया जावे:-

॥ विवरण सम्पत्ति ॥

व विवरण समान जो वरवक्त शादी में प्रतिवादिनी के माता पिता द्वारा दिया गया है :-

1.	सोने का झुमका दो जोड़ी वनज	20 ग्राम
2.	सोने का गले का हर एक नग वनज	75 ग्राम
3.	सोने की अंगूठी दो नग वनज	10 ग्राम
4.	करधनी सोने की एक नग वनज	446 ग्राम
5.	सोने की मरदानी अंगूठी 5 नग	32 ग्राम
6.	सोने की सिकडी मरदानी वजन	266''
7.	सोने का गले का हार षडल एक नग	87''
8.	सोने का झुमका एक जोड़ी 2 नग	18''
9.	सोने की अंगूठी एक नग वनज	04''
10.	सोने का कंगन 3 सेट 6 पीस	368''
11.	मंगल सूत्र सोने का दो पीस वनज	78''

12.	बिछुआ सोने की 3 जोड़ी वनज	120''
13.	चूड़ी हाथ की सोने की 12 नग	312''

कुल सोना 1 किग्रा 842 ग्राम		
14.	करधनी कमर की 2 नग वनज	3.00 कि.ग्रा.
15.	पैर का पायल 8 नग वनज	3.00''
16.	पैर की विछिया 6 जोड़ी	42 कि.ग्रा.

6.42 ग्राम		

सोने के जेवरात मजकूर की कीमत मुबलिग-35,00,000 रूपया
व चांदी के जेवरात मजकूर की कीमत 2,50,000 रूपया

कुल योग 37,50,000 रूपया

प्रतिवादिनी''

9. Defendant, therefore, placed a counter claim in respect of her Streedhan.

10. Counter claim of defendant was contested and denied by plaintiff by filing objection.

11. Trial Court formulated following three issues:-

''1. क्या याची वाद पत्र के कथनों के आधार पर प्रत्युत्तरदाता के विरुद्ध विवाह विच्छेद की डिक्री पाने का अधिकारी है?

2. क्या वाद इस न्यायालय के क्षेत्राधिकार के बाहर है?

3. क्या याची किसी अन्य अनुतोष को प्राप्त करने का अधिकारी है?''

12. In support of plaint, plaintiff examined himself as PW-1, Laljee as PW-2, Ram Lautan Singh as PW-3 who filed their affidavit as a part of examination-in-chief and thereafter cross-examined by defendant.

13. Oral evidence of defendant comprised of her own statement as DW-1, statements of Ritiraj Singh as DW-2, Pawan Kumar Singh as DW-3 and Manoj Kumar Singh as DW-4. Besides, documentary evidence was also filed by defendant and detailed in the judgement of Trial Court.

14. Trial Court found that virtually, there was no pleading giving instances of cruelty, mental or otherwise justifying decree of divorce on the ground of cruelty under Section 13 of Act, 1955. Minor

differences between the parties did not come within the ambit of 'cruelty' justifying divorce. Trial Court, therefore, answered question-1 against plaintiff-appellant holding that he failed to prove its case by pleadings and evidence.

15. Issue-2 was also answered against plaintiff and, thereafter, issue-3 was also answered against plaintiff.

16. Before this Court, learned counsel for appellant contended that Trial Court has committed manifest error in observing that plaintiff failed to prove its case of 'cruelty' and secondly, contended that parties are not residing together for the last 13 years and marriage has become irretrievable, therefore, divorce should have been granted in the present case.

17. Two points for determination has arisen in this appeal which are:-

- (i) Whether appellant has pleaded and proved the incident of cruelty and Court below has wrongly taken a view otherwise.
- (ii) Whether decree of judgement of Court below can be reversed on the ground that marital relations are irretrievable.

18. Before proceeding to consider question-1, it would be appropriate to reproduce Section 13 of Act, 1955:-

“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

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) 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

(vii) 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.

(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 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 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”.”

19. Section 13 (ia) of Act of 1955 clearly provides that a decree of divorce can be granted, in case, after solemnization of marriage, petitioner has been treated with 'cruelty'.

20. 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'.

21. 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.”

22. 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.”

23. 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. ”

24. 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 charged 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. ”

25. In **Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr. (1981) 4 SCC 250** Court said that 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.

26. 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.

27. 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.

28. 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.

29. In **A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22**, Court observed that conduct of spouse, if established, an inference can legitimately be drawn that treatment of spouse is such that it causes an apprehension in the mind of other spouse, about his or her mental welfare then this conduct amounts to cruelty. Court observed that when a petition for divorce on the ground of cruelty is considered, Court must bear in mind that the problems before it are those of human beings and psychological changes in a spouse's conduct have to be borne in mind before disposing of petition for divorce. Before a conduct can be called cruelty, it must touch a certain pitch of severity. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty.

30. 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 depend on the facts of each case and have to be considered carefully by the Court concerned.

31. In **Samar Ghosh vs. Jaya Ghosh (supra)**, Court also 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.”

32. Examining pleadings in present case, we do not find that assertions in the plaint do satisfy pleadings needed for a case of divorce founded on cruelty and that being so, evidence also has not been led to prove cruelty, hence, Trial Court has rightly held that plaintiff-appellant has failed to prove cruelty. Therefore, question-1 answered against plaintiff.

33. Now, coming to question-2. We find that basically plaint is founded on pleadings that marriage has become irretrievable. Both are

living separately for the last one year and, therefore, divorce must be granted. Unfortunately, under Section 13 of Act, 1955, divorce is not permitted on the ground that marriage has become irretrievable.

34. The issue relating to irretrievable break down of marriage has been considered by a Division Bench of this Court in **First Appeal No. 525 of 2006 (Smt. Kavita Sharma Vs. Neeraj Sharma)** decided on 7.2.2018, wherein it has been observed as follows in paragraph 28:-

"28. The above findings recorded by Court below could not be shown perverse or contrary to record. Having considered the fact that parties are living separately from decades, we are also of the view that marriage between two is irretrievable and has broken down completely. Irretrievable breakdown of marriage is not a ground for divorce under Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and Rishikesh Sharma Vs. Saroj Sharma, 2006(12) SCALE 282. It is also noteworthy that in Naveen Kohli v. Neelu Kohli (supra) Court made recommendation to Union of India that Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for grant of divorce. "

35. Similarly this Court in **First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita)** decided on 17.11.2016 has also considered this question and observed as follows in paragraphs 7, 8, 10, 11, 12 and 13:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. *The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal,J.) was a member of the Bench.*

12. *In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-*

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the

legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in 'Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

36. 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.

37. In this regard, we may notice a recent authority of Supreme Court in **Civil Appeal No.4696 of 2013, R. Srinivas Kumar Vs. R. Shametha**, decided on 04.10.2019, wherein Court has observed that once marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to Society and injurious to the interest of the parties where marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie, the law in such case, would not serve the sanctity of marriage and it would show feelings and emotions of the parties. However, aforesaid judgement shows that since the ground that marriage has broken down beyond repair or has become irretrievable is not one of the ground on which divorce can be granted under Section 13 of Act, 1955, therefore, Supreme Court has exercised power under Article 142 of Constitution of India which power is not vested in this Court. Hence, second point is also

answered against appellant.

38. No other point has been argued.

39. Appeal lacks merit. Dismissed with costs.

Order Date :- 6.11.2019
Siddhant Sahu