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**Manoj Vs. Vidhya**

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**Court** : Kerala

**Decided On :** Dec-10-2009

**Reported in** : 2010(2)KLT305

**Judge** : R. Basant and; M.C. Hari Rani, JJ.

**Acts** : Hindu Marriage Act, 1955 - Sections 10, 13 and 13A; ;Constitution of India - Article 21; ;Code of Criminal Procedure (CrPC) - Section 125

**Appeal No.** : Mat. Appeal. No. 331 of 2008

**Appellant** : Manoj

**Respondent** : Vidhya

**Advocate for Def.** : N.N. Sugunapalan, Sr. Adv. and; S. Sujin, Adv.

**Advocate for Pet/Ap.** : O. Ramachandran Nambiar, Adv.

**Disposition** : Appeal dismissed

**Judgement** :

**R. Basant, J.**

1. Is proof of irretrievable break down of marriage irrelevant altogether in a claim for divorce on the ground of matrimonial cruelty?

ii) Can physical assault by husband against wife even when it is not gross be reckoned as natural wear and tear of marriage to avoid the consequence of a decree for divorce?

iii) Is a court justified in rigidly insisting on independent corroboration for proof of matrimonial cruelty?

These questions arise for consideration in these appeals.

2. These appeals are preferred by the appellant/husband. The respondent herein is his wife. In these matrimonial appeals, a common order passed in two Original Petitions is assailed. Those petitions are filed by the rival contestants for divorce and for restitution of conjugal rights. The petition for divorce was filed by the wife whereas the petition for restitution of conjugal right was filed by the appellant/husband. By the said common order, it was found that the husband is guilty of matrimonial cruelty. But the claim for divorce under Section 13 was not granted and the lesser relief of judicial separation under Section 13A of the Hindu Marriage Act alone was granted. The prayer for restitution was rejected.

(Ed. Note: Paras. 3 to 25 omitted being narration of facts and evidence)

26. It is contended that the acts of matrimonial cruelty have not been pleaded specifically and sufficiently with reference to dates and events. As noted earlier, it was not one piece of specific conduct that allegedly amounted to matrimonial cruelty. A series of acts - a course of objectionable conduct, is complained of. Law cannot distance itself from raw life and common sense. It would be idle to expect the wife to note the dates of such alleged continuous conduct in the calender and plead the same in meticulous detail. That he used to physically assault her and indulge in acts of mental cruelty is pleaded. No reasonable and prudent mind in the context can find fault with the wife and approach her testimony with reservations on the ground that specific dates of such cruelty are not pleaded. The need for specific pleadings is not a fetish but only a requirement to facilitate satisfactory and just resolution of factual disputes.

In the given situation it will be idle and puerile to insist on more specific pleadings about dates of the acts of cruelty. Similarly, the contention that the wife did not complain to the police or authorities about matrimonial cruelty cannot be accepted as the very contention betrays lack of nexus with real and raw life. No wife runs to the authorities with a complaint unless the particular event of cruelty is so gross.

27. We do hence concur with the court below that it is absolutely reasonable to prefer the evidence of PW1 to that of RW1 in the broad background of facts and circumstances in this case.

28. The question survives whether the evidence adduced is sufficient to prove matrimonial cruelty. This question arises for consideration before courts practically in every petition claiming divorce on the ground of cruelty. What can be said to amount to matrimonial cruelty? What pieces of conduct can be categorised as matrimonial cruelty? Is the piece of conduct complained of only part of the 'ordinary and natural wear and tear of every marriage'? When can it be held that the rubicon is crossed and the conduct amounts to matrimonial cruelty to justify the founding of a decree for divorce on such conduct

29. These difficult questions deserve very anxious and serious consideration in every such petition for divorce on the ground of cruelty. We feel that we need not on our own reiterate the principles. To us, it appears that every court dealing with these questions would do well to read and re-read paragraphs 66 to 68 of the decision in Naveen Kohli v. Neelu Kohli reported in : AIR 2006 SC 1675 : 2006 (2) KLT SN 29 (C. No. 41) SC. It will be good education for all courts - Family Courts and other courts, dealing with such applications for divorce, if they familiarise themselves with these principles which will help them in discharging the onerous task before them in a better, more realistic and effective manner. We hence feel persuaded to quote and extract the said paras. 66 to 68

66. To constitute cruelty, the conduct complained of should be 'grave and weighty' so as to come to the conclusion that the petitioner-spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than 'ordinary wear and tear of married life.' The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion

whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture of distress, to entitle the complaining-spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

67. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the phychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty/Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

68. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven.

All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hypersensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court.

(emphasis supplied)

The crucial question is whether in the peculiar facts and circumstances of a given case the complaining spouse can 'reasonably be expected to live' with the offending spouse. That is the million dollar question to be answered in each case. Having so understood, the law relating to matrimonial cruelty and the approach which the court should adopt while considering evidence to decide whether the proved conduct amounts to matrimonial cruelty, we take note of the particular circumstances of the case. RW1 in his evidence gives us clinching indications of the psyche of the parties. He admits categorically 'my wife was brought up in a very noble cultural background'. It is such wife who says that she is unable to stand the mental and physical cruelty. Her evidence shows that he used to assault her physically. Her evidence shows that he used to compel her to sign blank papers. Her evidence further shows that he used to insist that she should speak incorrectness/falsehood to people who come home and visit him. Her protestations against these were not taken kindly and resulted in assault against her. She has tendered evidence that her husband was suspicious and would not take kindly when she spoke to others. She used to be assaulted on this score also. In the given cultural background which is indisputably revealed in evidence, we find absolutely nothing wrong in the Court coming to the conclusion that these pieces of conduct do amount to matrimonial cruelty of the contumacious variety. We concur with the Family Court that the conduct of the appellant was such that she cannot reasonably be expected to live with him.

30. As to whether the conduct alleged amounts to such cruelty, the subsequent conduct would be crucially relevant. The court below had elaborately attempted to settle the dispute between the parties and to re-unite them. Parties were referred to the Mediator by this Court in an attempt to settle their disputes. After hearing the counsel initially we felt that an attempt must be made to settle the dispute between the parties by our intervention if that would be helpful. We are convinced that the marriage exists only in its shell and not in its substance. We are satisfied that it is impossible to persuade the spouses to live together now. Of course the appellant offers such resumption of cohabitation, but the wife is unwilling to do the same. She has her own reasons for such inability on her part to persuade herself to resume co-habitation with the husband.

31. An interesting question is raised as to whether irretrievable break down of marriage is relevant in this context. In several decisions, the Hon'ble Supreme Court has emphasised the need for a shift in the matrimonial law from the search for guilt to an acceptance of the eventuality and fact of death of the marriage. Though the Apex Court has repeated it many times, even now the Legislature has not thought it fit to amend the law to incorporate irretrievable break down of marriage as a ground for divorce. The learned Counsel for the appellant submits that irretrievable break down of marriage is irrelevant. In these circumstances, the learned Counsel for respondent places reliance on the decisions of the Hon'ble Supreme Court in Naveen Kohli (supra) and Bhagat v. Bhagat in : (1994) 1 SCC 337. The Hon'ble Supreme Court has emphasised in those cases the need to have a realistic approach to the need for de jure acceptance of de facto death of marriage. But the fact remains that law even today does not recognise irretrievable break down of marriage as a ground in itself to justify or found a decree for divorce.

32. The learned Counsel for the appellant relies on the decision in Vishnu Dutt Sharma v. Manju Sharma (2009 (1) KLT 940 (SC) to contend that irretrievable break down of marriage cannot be recognised as a ground for divorce.

33. It is not necessary to detain ourselves any longer with this controversy. It is undisputed that irretrievable break down of marriage is not a ground of divorce

under law even now. No court can grant a decree for divorce solely on the ground of irretrievable break down of marriage. The Hon'ble Supreme Court in Vishnu Sharma has made it clear that courts cannot legislate and however strongly they may feel that irretrievable break down of marriage must be introduced and accepted as a ground of divorce, they cannot grant decree for divorce on such ground unless the law is amended.

34. But that is far from saying that irretrievable break down of marriage is an irrelevant input in a claim for divorce on the ground of cruelty. Paragraphs 66 to 68 of Naveen Kohli extracted above really shows that the question is how the individual spouses to a particular marriage in question looks at the alleged conduct. If such alleged conduct persuades either of them to recognise the marriage as not retrievable, definitely that has a bearing on the question whether the conduct alleged amounts to cruelty or not. In a case like the instant one, where the acts alleged are the only reasons for separate residence of the spouses as found by the court below and as accepted by us, the fact that on account of these pieces of conduct, spouses have not been able to resume co-habitation is definitely a very important circumstance to decide whether such pieces of conduct amount to matrimonial cruelty or not. The pieces of conduct which compel the parties to live separately for such a long period of time (as to indicate irretrievable break down of marriage) can safely be held in the facts of that particular case to amount to matrimonial cruelty.

35. We make it clear again that irretrievable break down of marriage is by itself not yet a ground in law to order divorce. But in a claim for divorce on the ground of cruelty, if it is proved that certain pieces of conduct have made it impossible for the parties to resume co-habitation and revive the marriage and the marriage is dead de facto, such piece of conduct can certainly be reckoned as amounting to contumacious matrimonial cruelty to justify the plea for divorce. It is in that view of the matter that we look at the evidence of irretrievable break down of marriage available in this case. The pieces of conduct alleged can certainly be held to amount to matrimonial cruelty in the facts and circumstances of this case.

36. Naveen Kohli (supra) and a host of other binding precedents make it clear that the true litmus test for matrimonial cruelty is whether the piece of conduct complained of is such the complaining spouse 'cannot be reasonably expected to live with the other spouse'. This test admits and must accept a range of individual human variability. When it is shown that the petitioning spouse with no contumaciousness has not been able to 'live with the other spouse' because of such conduct complained of and the marriage has broken down irretrievably on that reason, that is the best evidence possible that the conduct complained of has made it impossible for the spouses to live together. Proof of 'inability to actually live together because of the conduct alleged' is thus intrinsically available in a case of irretrievable break down of marriage. We intend only to hold that irretrievable break down of marriage if proved, though not a ground for divorce in itself is not irrelevant, nay it is significantly relevant, in a claim for divorce on the ground of cruelty as we have indisputable evidence to show that the complaining spouse has not been able to live with the other spouse for that reason.

37. Our experience in this jurisdiction prompts us to think aloud on the state of matrimonial law and procedure in our country. Right to life under Article 21 of the Constitution must definitely include the right to a healthy harmonious matrimonial life. Marriage as an institution becomes meaningless if it were to be endured and not enjoyed. The right to opt out of an emotionally dead marriage will have to, subject to the concerns of public order and morality, be essentially accepted - tomorrow, if not today, as an incident of the right to life. It will of course have to be secured that the economically fragile divorced spouse is adequately protected. Section 125 Cr.P.C., more than effectively discharges this basic obligation in its fundamentals. Progressive Legislatures will certainly have to accept and recognise the economic right of the marital partners to honourably divide between them the wealth and assets acquired during coverture at the time of termination of relationship. If these concerns are properly addressed, a welfare socialist State cannot and must not, we feel, hesitate to recognise the right of a spouse to honourably walk out of an emotionally dead marriage with an incompatible spouse. The enormity of the number of lives involved inextricably in litigation for securing divorce, the inevitable law delays which contribute to the life of litigation and the loss of precious prime time in life of young spouses in such complex litigation do

all worry us and instill in us a deep sense of dissatisfaction and frustration. Is marriage an institution for imprisonment for life against the volition and desire of individuals? If either party does not want to continue matrimony can and should the system and laws compel him/her to continue to endure such matrimony? Cannot individuals be safely entrusted with right to choose their own fate? Should not marriage laws and the system realistically recognise that compatibility is sine qua non for the success of the institution of marriage? Should marriages dead de facto continue to live de jure? If so for whose benefit? Are the children in a nuclear family going to benefit in any manner by the continuance of such a dead matrimony between warring parents? Nature or God gives a person one opportunity to live in this stint of life and should she/he not be permitted to so arrange his life as to pursue happiness in a manner that is not opposed to public order and morality? Should not spouses of unhappy marriages be permitted to walk out of such marriages honourably and as friends on the mere ground of incompatibility of temperament, after the mandatory period of waiting, counselling and conciliation? Are people going to walk out of solemn marriages merely because law offers such opportunity to redeem themselves from dead marriages? The law maker and civil society must address themselves to these disturbing questions and come out with answers. We feel that it is the duty of the Kerala Legislature to lead the country on this aspect by bold and innovative legislation? Has not our Kerala experience shown us convincingly that easier and less cumbersome divorce laws do not necessarily increase the incidence of divorce and that marriages last longer in our culture not because the laws of divorce are draconian but because of the essential culture and attitude of the polity to marriage and family?

38. Yes, we have digressed. The feeling of shame and guilt worry us as the system of which we are part must share the blame for this unfortunate plight of the seeker of justice. The long queue of young couple, one of whom wants liberation from the marital tie and our inability to grant them the time that they need from us immediately cause anguish in us. Their plight disturbs us. That explains the digression. If these observations provoke thoughts in civil society, our digression would be justified.

39. There is yet another aspect we would like to clarify. Physical violence and assault has been proved in this case by the evidence of PW1. Can such pieces of physical conduct be held to be a mere incident of the 'ordinary wear and tear of marriage'? This question looms large. We are unable to accept that physical cruelty or physical assault flowing from the dominant spouse against the weaker one can ever be held to be an incident of the 'natural and ordinary wear and tear of marriage'. Let the message go loud and clear that courts will not reckon and tolerate physical assault by a dominant spouse against a weaker spouse as a mere incident of the natural and ordinary wear and tear of marriage. Such an anachronistic approach shall not persuade any court to ignore and close its eyes to such objectionable conduct and hold that they do not constitute contumacious matrimonial cruelty justifying a decree for divorce. In our republic, Article 21 of the Constitution must pervade all facets of human life. Home is not out of bounds for the noble sentiments and mandate under Article 21. Physical violence is anathema to law even at home. Courts shall not tolerate physical abuse and assault between the spouses also. If the victim condones and continues to condone that is a totally different matter. But in a case where the victim takes objection to such physical assault on her and claims divorce, the proof of such physical assault even if not gross shall and must certainly persuade every court to agree that matrimonial cruelty of the contumacious variety is established. No husband can claim an anachronistic and chauvinistic privilege in this era to chastise his wife by beating her or physically belabouring her notwithstanding the fact that he may be the security provider or the food provider for the wife. Disapproval of this Court against physical assault on the domestic front must be expressed unambiguously and we hence state with no amount of ambiguity at all that uncondoned physical assaults if proved must definitely lead to acceptance of the plea of the victim spouse for dissolution of marriage on the ground of matrimonial cruelty. Whatever may have been the history and the events of the past, at this juncture in societal and civilizational development, physical assault in the domestic environment against the spouse must be frowned upon in unmistakable terms. The husband can raise his hand to assault his wife only with the full knowledge that if the wife does not condone the same he risks the very marriage. No husband in this country shall raise his hands against his wife to assault her whatever be the provocation without

risking his marriage if such wife does not condone and chooses to claim divorce on that ground. Even assuming that such conduct is not gross and may not amount to culpable physical cruelty punishable under the penal law that would be actionable cruelty under matrimonial law warranting termination of marriage - whatever be the personal law applicable to parties. No greater disservice to the cause of emancipation and empowerment of women can be done by law and the system than the condonation of such acts on the theory of they are only natural or ordinary wear and tear of married life. Rigid insistence on independent corroborative, ocular versions to prove such contumacious behaviour also results in such gross injustice. Eloquent communication of that message - that courts shall not mechanically and rigidly insist on ocular corroboration for matrimonial cruelty and that all acts of uncondoned physical cruelty will be accepted as sufficient ground for grant of a decree for divorce, we are certain will help the system and the law to eliminate violence on the domestic front. In the instant case, we are satisfied from the evidence of PW1 which has been accepted by the court below and concurred by us that there has been physical assault on the wife. She is hence undoubtedly entitled to relief on that score also.

40. In these circumstances, we find no merit in the challenge raised by the learned Counsel for the appellant against the impugned order. The first ground of challenge is turned down.

41. Point No. 2: The wife contends that unfairly and unjustifiably, relief of divorce has been denied to her. Laudable though the sentiments of the court below may be, it having been held satisfactorily and convincingly that the husband is guilty of matrimonial cruelty of the contumacious variety there was absolutely no justification to deny the relief of divorce, contends the learned Counsel for the respondent. The learned Counsel further points out that the O.P. for divorce was filed as early as in 2006 and the impugned order was passed on 29.1.2008. A period of one year has already elapsed from the date of the impugned order and it is absolutely unnecessary now to wait endlessly with the unreal hope that the parties shall be able to settle their disputes harmoniously. The learned Counsel for the respondent points out that in spite of the decree for judicial separation, parties have not resumed co-habitation and if today the court below is moved for a decree

for divorce on that ground, the same is liable to be granted. In these circumstances, the agony may not be protracted. The decree for divorce itself may be granted, it is prayed.

42. We find merit in the cross objection raised by the respondent/wife. Even assuming that the court below was justified at that point of time in not granting the decree for divorce as prayed for and in granting the lesser relief of judicial separation only in the hope that the parties would settle their disputes, we are certainly satisfied that it is an empty and unreal hope now and that the challenge by the wife in the cross objection deserves to be allowed.

43. In the result:

(a) These appeals are dismissed. The impugned common order insofar as it concludes that the husband is guilty of matrimonial cruelty and rejects the prayer for restitution of conjugal rights is upheld.

(b) Cross objection of the respondent/wife is allowed. It is found that the turn of events now reveal that court below erred in not granting the decree for divorce as prayed for. At any rate, on the circumstances prevailing today, we are satisfied that the respondent's claim for divorce must be granted in full.

(c) The order in O.P. No. .963/06 is modified. The decree for divorce on the ground of matrimonial cruelty under Section 13 of the Hindu Marriage Act is granted. The marriage between the spouses solemnised on 1.6.1998 is hereby dissolved.

(d) Parties are directed to suffer their respective costs.

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