Monika Vs Chandra Prakash

Court: Rajasthan High Court (Jaipur Bench)

Date of Decision: May 15, 2015

Acts Referred: Hindu Marriage Act, 1955 - Section 10, 13
Penal Code, 1860 (IPC) - Section 120-B, 406, 498-A
Protection of Women From Domestic Violence Act, 2005 - Section 12

Citation: AIR 2015 Raj 129 : (2015) 4 CDR 2165 : (2015) 3 DMC 594 : (2015) 3 WLN 419

Hon'ble Judges: Ajay Rastogi, J; J.K. Ranka, J

Bench: Division Bench

Advocate: Sandeep Jain, for the Appellant; Nitin Jain and Party-in-Person, Advocates for the Respondent

Final Decision: Allowed

Judgement

Ajay Rastogi, J.
Instant appeal has been filed by the plaintiff-appellant (wife) aggrieved by judgment and decree dt. 29.05.2013 passed by

the ld. Judge, Family Court, Kota whereby the suit for divorce filed at the instance of the plaintiff-appellant on the ground of cruelty by the

defendant-respondent (husband) came to be dismissed.

2. The appeal has been preferred by the plaintiff-appellant (wife) and the respondent herein is husband. The petition, filed by the wife claiming

divorce u/Sec. 13 of the Hindu Marriage Act, came to be dismissed by the ld. Family Court vide judgment and decree dt. 29.05.2013 despite two

salient facts came on record that (1) in the FIR No. 219 dt. 12.09.2007 registered against the defendant-respondent (husband) at Police Station

Mahila Thana, Kota for offence u/Sec. 498-A, 406 and 120-B IPC after regular trial, the defendant-respondent (husband) was convicted u/Sec.

498-A IPC and sentenced to undergo two years imprisonment vide judgment dt. 12.10.2012, however, on appeal being preferred, the sentence

was suspended by the ld. Court of Appeal; and (2) the facts noticed by the ld. Family Court in the impugned judgment that it is a case where it is

not possible to restore back their matrimonial relations and it is a case of irretrievable break down of marriage but observed that such cannot be a

ground on which divorce can be claimed by the plaintiff-appellant (wife) u/S. 13 of the Hindu Marriage Act and dismissed her application seeking

divorce vide judgment and decree dt. 29.05.2011.

3. We shall initially refer to the facts. Parties are referred to as wife and husband. The spouses were married on 16.05.2005, as per the Hindu rites

and customs at Chauth-ka-Barwada, District Sawai Madhopur and immediately after marriage, the respondent-husband started demanding dowry

and torturing the wife and a situation was created before the appellant-wife that she was deserted by the respondent-husband since 23.02.2006

and according to the wife, there was no cohabitation between them and because of continuous matrimonial cruelty, one after the other and physical

assault for demand of dowry on 23.02.2006, she was thrown out of her matrimonial home and since then they are living separately and when

nothing positive came forward and the respondent-husband never came forward for restitution of conjugal rights and almost two years after being

thrown out of her matrimonial home, the appellant-wife filed petition seeking divorce u/Sec. 13 of the Hindu Marriage Act on the ground of cruelty

and desertion before the ld. Family Court, Kota on 11.01.2008. The respondent-husband filed reply/written statement on 18.06.2008 and denied

the allegations.

4. On the basis of pleadings of the parties, the ld. Family Court, Kota framed four issues which are relevant for the present purpose, are

reproduced ad infra:-

5. The wife in support of her case recorded statement of her own as AW-1 Monika @ Mona and AW-2 Paras Chand (her father) and at the

same time, respondent-husband in support of his defence recorded his own statement as NAW-1 Chandra Prakash and of witnesses, his mother

as NAW-2 Lad Devi, his father as NAW-3 Babulal and three neighbours as NAW-4 Kailash Chand, NAW-5 Vijay Shankar and NAW-6

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6. It reveals from the material came on record that for the mental physical cruelty which was committed by the respondent-husband, appellant-wife

lodged FIR No. 219 dt. 12.09.2007 registered at Police Station Mahila Thana, Kota for offence u/Sec. 498-A, 406 and 120-B IPC and after

filing of an application for divorce on 11.01.2008 in a criminal case instituted at the instance of the present appellant, the ld. Judicial Magistrate No.

1 held the respondent-husband guilty for offence u/Sec. 498-A IPC and sentenced him to undergo two years imprisonment vide judgment dt.

12.10.2012 but on appeal being preferred by the respondent-husband, his sentence has been suspended by the ld. Court of Appeal.

7. On the basis of the evidence which came on record, the ld. Family Court found that the fact of cruelty has not been established but still was of

the view that the marriage has been deteriorated to such extent that the parties does not live as husband and wife and finally arrived to a conclusion

that it is not within the competence of the ld. Family Court to grant decree of divorce, as prayed for and that cannot be a ground available to the

appellant-wife to grant decree of divorce and accordingly, dismissed the divorce petition filed at the instance of the appellant-wife vide judgment

and decree dt. 29.05.2013.

8. The wife in the instant case, is claiming divorce on the ground of matrimonial cruelty. Not to be left behind and her main bone of contention is

that after the husband has been convicted for offence u/Sec. 498-A IPC after regular trial by the competent court of jurisdiction vide judgment dt.

12.10.2012, the guilt of mental/physical cruelty has been established beyond reasonable doubt by the ld. trial court and she is entitled to seek

divorce and the ld. Family Court has committed a serious apparent error in deciding the Issue No. 1 against her. It is further contended that even

after the finding has been recorded, both are living separately for a long time and there is no likelihood of consummation of their marriage. After

mental/physical cruelty has been established beyond reasonable doubt by the ld. trial court and her continued residence with the husband as his

spouse was impossible because of the matrimonial cruelty inflicted on her by the husband and that being established and taken note of by the ld.

Family Court under order impugned, still the ld. Family Court denied decree of divorce to her and such finding is not legally sustainable in law as

she has made out a case for decree of divorce u/Sec. 13 of the Act.

9. In response to her claim for grant of decree of divorce, the respondent-husband appeared in person and contended that he was not guilty of any

matrimonial cruelty against his wife and from the evidence recorded by the ld. Family Court nothing is borne out of any matrimonial cruelty being

committed by him against his wife. He was not facing any financial problems and he has financial affluence and there is no question of any assault

being committed by him on the wife and the allegations of mental and physical cruelty are concocted and could not be prima facie established on

record during regular trial before the ld. Family Court and he always wanted the matrimonial dispute to be settled amicably and there was no

sufficient reason to grant divorced has prayed that the prayer made by the wife for divorce may be rejected and after it has been considered in

detail by the ld. Family Court, the appellant-wife is not liable to seek divorce and the present appeal deserves to be dismissed.

10. The parties have gone to trial on these contentions and wife examined herself as AW-1 and she gave a narration of the events in tune with her

averments in the petition for divorce and she examined her father as AW-2 Paras Chand, who has supported the averments made in the petition

for divorce filed at the instance of the appellant-wife. From the side of the husband, he examined himself as NAW-1 Chandra Prakash and denied

all the allegations levelled by appellant-wife against him in her petition for divorce and also in his statement recorded as AW-1 his defence was that

there was no mental and physical cruelty ever committed by him on the appellant-wife and the fact is that from the date of marriage, the appellant-

wife was keen to go for further studies and to do B.Ed. and had made up her mind to leave her matrimonial home with an intention to get public

employment in Divorcee Quota and a criminal case u/Sec. 498-A and 406 IPC instituted against him is based on false footing. It is stated by him

that he only wants to settle his matrimonial home for which he needs his wife and in support thereto, he got the statement of his mother recorded as

NAW-2 Lad Devi, his father as NAW-3 Babulal and three neighbours as NAW-4 Kailash Chand, NAW-5 Vijay Shankar and NAW-6 Rakesh

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11. It can be noticed that the ld. Family Court took note of the evidence recorded in the matrimonial case and also of the fact that criminal case

u/Sec. 498-A and 406 IPC was instituted against the respondent-husband but has not taken note of the judgment which was passed by the ld. trial

court convicting the respondent-husband for offence u/Sec. 498-A IPC vide judgment dt. 12.10.2012 and arrived to a conclusion that the

appellant-wife has failed to prove that it is a case of mental cruelty on the part of respondent-husband and observed that from the evidence of

AW-1 Monika @ Mona, she failed to establish matrimonial cruelty being committed on her by the husband-respondent and still recorded that

there is no possibility of resuming their matrimonial relations and she has made out a case of irretrievable break down of marriage as they are living

separately since 23.02.2006 but it is not within his competence to grant decree of divorce, as prayed for.

12. It is brought to our notice that the appellant-wife has filed an application u/Sec. 12 of the Protection of Women from Domestic Violence Act,

2005 before the court of ld. Judicial Magistrate No. 2, Kota (South) wherein after the parties being heard finally, order has been reserved on

09.04.2015. Order, till pronouncement, as informed, was awaited.

13. We have heard counsel for the parties and with their assistance perused the material on record.

14. The crucial question is whether the court below has erred in not taking into consideration the final judgment of the ld. trial court convicting the

respondent-husband for offence u/Sec. 498-A IPC vide judgment dt. 12.10.2012 and sentenced him to undergo two years imprisonment,

however, the sentence has been suspended, on appeal being preferred at the instance of the respondent-husband, by the Court of Appeal and this

court has to consider as to whether the proved acts justify grant of decree of divorce to the appellant-wife and if so, what relief?

15. The dispute is about matrimonial cruelty. It would be idle for the court to look for independent corroboration for such matrimonial cruelty.

Between spouses from respectable family back-grounds, matrimonial cruelty invariably takes place usually only within the four walls of the home

and it would be absolutely unreasonable for any court to expect disinterested independent ocular testimony on that aspect. A court commits

indiscretion of the unpardonable variety if it throws its hands up and holds that a firm conclusion cannot be reached for the reason that independent

ocular corroboration of matrimonial cruelty is not available. Strain the court must, to decide whether the evidence establishes matrimonial cruelty

even when inputs/versions are available only from the interested contestants. Broad probabilities have also to be assessed and evaluated when the

onerous task before the court is to choose between the interested testimony on either side. The husband and wife are young. They are in the pink

of their health and youth and it will only be reasonable to assume that unless there are valid reasons, a husband and wife in such circumstances are

unlikely to reside separately and the broad probability must inform any prudent mind and every court while attempting to resolve disputed

questions of fact like the ones which arises in the instant case.

16. The wife has a definite case that she was forcibly thrown out of her matrimonial home on 23.02.2006 and was physically beaten by the

respondent-husband and was mentally and physically tortured for demand of down and since 23.02.2006 she is residing with her parents and there

was no cohabitation of marriage and no efforts were made by the respondent-husband for restitution of their conjugal rights and she instituted a

criminal case against him for such a mental/physical cruelty and an FIR No. 219 dt. 12.09.2007 was registered for offence u/Sec. 498-A and 406

IPC at Police Station Mahila Thana, Kota and still when no efforts were made by the respondent-husband for restitution of their conjugal rights,

she filed an application seeking divorce before the ld. Family Court on 11.01.2008 and even during the course of pendency of divorce petition,

according to the wife, separate residence became necessary and inevitable because of the matrimonial cruelty heaped on her by her husband.

17. The husband in his testimony recorded as NAW-1 has blankly refused/denied all the allegations but has not come with any defence as to how

there was no matrimonial discord between them despite there was a specific allegation that wife recorded her testimony as AW-1 and gave

reasons which compelled her to go ahead for a separate residence which became necessary and inevitable because of matrimonial cruelty and has

further compelled her to file a criminal case against the respondent-husband for offence u/S. 498-A and 406 IPC. He remained completely silent in

regard to dispute, differences or bitterness which occurred between them and the reason for which the wife left her matrimonial home, which any

wife in the ordinary circumstances may not like to leave and the only defence with which the respondent-husband came forward in his statement

recorded as NAW-1 is that the appellant-wife was always keen to go ahead for further studies and to do B.Ed and was interested in getting public

employment which could only be possible if she becomes a Divorcee and to achieve her goal and get a public employment all such false statements

have been made by the appellant-wife accusing the respondent-husband.

18. One fact has been completely ignored apart from the statement recorded by the ld. Family Court that in a criminal case instituted against the

respondent-husband for offence u/Sec. 498-A IPC, charge against him stood proved beyond reasonable doubt by the court of competent

jurisdiction for offence u/Sec. 498-A IPC vide judgment dt. 12.10.2012 but the very guilt which stood proved, after regular trial, by the court of

competent jurisdiction by convicting the respondent-husband u/Sec. 498-A IPC has not at all been taken note of by the ld. Family Court in the

impugned judgment while recording evidence of mental/physical cruelty being committed by the respondent-husband and proceeded on the basis

of oral ocular evidence recorded by the parties during the course of trial in the divorce petition filed by the appellant-wife before the ld. Family

Court.

19. The contention of wife that there was no cohabitation also deserves merit and specific averment to this effect was made by the appellant-wife

in her petition for divorce and so also in her statement recorded as AW-1, however, still there is no specific denial by the respondent-husband in

her statement recorded as NAW-1 that if at all there is any cohabitation took place and as per her statement she left her matrimonial home after

she was subjected to physical cruelty on 23.02.2006.

20. We feel that we need not of 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 Vs. Neelu Kohli, AIR 2006 SC 1675 : (2006) 2 CTC 510 : (2006) 1

DMC 489 : (2006) 3 JT 491 : (2006) 3 SCALE 252 : (2006) 4 SCC 558 : (2006) AIRSCW 1550 : (2006) 2 Supreme 627 . It would be good

education for all courts, Family Courts and other courts, dealing with such applications for divorce, if they familiarize themselves with these

principles which will help them in discharging the onerous task before them in a better and more realistic and effective manner. We hence feel

persuaded to quote and extract of the said paragraphs 66 to 68 which read ad infra:-

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 or 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 psychological 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.

21. The crucial question which always remain open is as to whether in the facts and circumstances of a given case the complaining spouse can

reasonably be expected to live with the offending spouse and it is always a 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. If there would not have been any

judgment of the court of competent jurisdiction holding the respondent-husband guilty for offence u/Sec. 498-A IPC and sentencing him to

undergo two years imprisonment vide judgment dt. 12.10.2012, certainly it would a difficult task for this court to examine the evidence which has

come on record and to arrive to a conclusion as to whether the conduct, complained of, is so grave and weighty so as to arrive to a conclusion that

the appellant-spouse cannot be reasonably expected to live with the other spouse. However, there must be something more serious than ordinary

wear and tear of married life and courts have to be very practical and pragmatic in approach while dealing with the petitions for divorce filed on the

ground of cruelty and the court has to 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 the petition for divorce. However, trivial nature of allegations or 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 and this what

the court has to weigh the gravity while arriving to a conclusion as to whether the mental cruelty is of such a gravity which became unbearable and

beyond tolerance and the marriage for good reasons is not going to survive.

22. In the instant case, after regular trial by the court of competent jurisdiction, the respondent-husband has been held guilty beyond reasonable

doubt vide judgment dt. 12.10.2012 and sentenced to two years imprisonment for offence u/Sec. 498-A IPC and that could be the salient factor

which can certainly be taken note of in arriving to a conclusion that it proved the conduct of respondent-husband that amounts to mental/physical

cruelty and in this background, if the appellant-wife says that she is unable to stand the mental and physical cruelty and the evidence shows that the

respondent-husband used to assault her physically, we do not find any incorrectness/falsehood which stands corroborated by judgment of the

court of competent jurisdiction dt. 12.10.2012 convicting the respondent-husband for offence u/Sec. 498-A IPC and we are convinced that the

piece of conduct which has come on record and the judgment of the ld. trial court dt. 12.10.2012 convicting the respondent-husband for offence

u/Sec. 498-A IPC, do amount to matrimonial cruelty of the contumacious variety and in our considered view, the conduct of the respondent-

husband was such that the appellant-wife cannot reasonably be expected to live with him.

23. While examining issue No. 3, the ld. Family Court recorded a finding that there is no possibility and re-union between the spouse and was fully

satisfied that there is an irretrievable break down of marriage but declined to grant decree of divorce as not contemplated u/Sec. 13 of the Act and

left it open to be examined by this court and in this context, we would like to observe that the Apex Court has emphasized 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 marriage. Although the Apex Court has

repeatedly observed it many time, even though the legislature has not thought it fit to amend the law to incorporate irretrievable break down of

marriage as a ground for seeking divorce. It is true that law even today does not recognize irretrievable break down of marriage as a justified

ground to pass the decree for divorce.

24. However, when we look to the facts of the case, in totality, and after the satisfaction being record by the ld. Family Court, we find that in the

instant case apart from irretrievable break down of marriage, the other relevant facts which have come on record and taken note of by us are that

appellant-wife is residing separately since 23.02.2006 and in addition to this, there is a judgment of court of competent jurisdiction dt. 12.10.2012

whereby the respondent-husband has been convicted for offence u/Sec. 498-A IPC and sentenced to two years imprisonment, however, sentence

was suspended by the ld. Court of Appeal and in the present facts and circumstances, there is no possibility of the spouse resuming the normal

marital life and the relationship between the spouse have become strained over the years due to desertion of the appellant-wife by the respondent-

husband for several years and no efforts ever made by him even during pendency of application for restitution of conjugal rights and in the present

facts and circumstances, the appellant-wife had proved, from the evidence which has come on record, before the ld. Family Court both the factum

of separation as well as animus deserendi which are essential elements of desertion and we are satisfied that marriage between the spouses for all

practical purposes has become dead and there can be no chance of that being retrieved and it is better to bring the marriage to an end and what is

being contended by the appellant-wife before the court deserves acceptance and enforced continuity of marriage will only mean that the parties will

spend more years in bitterness against each other and once we arrive to a conclusion that re-union is impossible after the respondent-husband has

been convicted for offence u/Sec. 498-A IPC and this fact is not disputed that the appellant-wife is residing separately for almost nine years and

by this passage of time, disliking for each other must have been developed between both of them and the fact that there is no cohabitation between

the spouse which, in our considered view, is definitely an important circumstance which the ld. Family Court failed to notice in arriving to a

conclusion that such conduct certainly amounts to a mental cruelty and in these facts and circumstances, it makes the appellant-wife entitled to seek

divorce, as prayed for by her and, in our considered view, the findings which have been recorded by the ld. Family Court in reference to the Issue

Nos. 1-3, are wholly perverse and not sustainable in law

25. Consequently, the instant appeal stands allowed and the judgment and decree passed by the ld. Judge, Family Court, Kota dt. 29.05.2013 is

quashed and set aside and the appellant-wife deserves indulgence for grant of decree of divorce u/Sec. 13 of the Hindu Marriage Act and the

marriage between the spouses solemnized on 16.05.2005 is hereby dissolved.

26. No costs.