* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 31st July, 2023

% ***Pronounced on: 05th September, 2023***

\+ **MAT.APP.(F.C.) 220/2023**

NARESH KR. BABBAR .... Appellant

Through: Mr. Harpreet Singh and Mr. Jatin Kumar Gaur, Advocates with appellant in person.

versus

SEEMA .... Respondent

Through: Mr. Kapil Dua, Advocate.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The appeal has been preferred on behalf of the appellant/husband against the judgment dated 20.05.1999 passed by the Additional District Judge, Delhi vide which his petition for divorce/annulment of marriage on the ground of cruelty and there being a *sapinda* relationship between the parties has been dismissed.

2. The parties to the litigation got married on 04.05.1992 according Hindu rites & customs. There is no child from the said wedlock. The appellant asserted that Smt. Shivani Ditti: the grandmother of the respondent/wife is the sister of the father of the Appellant and thus, they fall within the prohibited degree of relationship, being the s*apindas* of

each other and therefore, the marriage is liable to be declared as a nullity in terms of section 5 read with section 11 of the Hindu Marriage Act, 1955.

3. The appellant had further alleged various acts of cruelty namely:

> *(i) The behaviour of the respondent towards the appellant was not right from the beginning as she was disrespectful to him and his parents.*
>
> *(ii) She threatened to implicate the appellant and his parents in false cases.*
>
> *(iii) She insisted on living separately in her mother's house and threatened to sprinkle kerosene oil on her body and burn herself. The parents of the petitioner gave in to her insistence and she set up her residence separately along with the appellant.*
>
> *(iv) The respondent failed to discharge her marital obligations, do any household work and to take care of the appellant.*
>
> *(v) She denied him co-habitation at night.*
>
> *(vi) She complained that the appellant was not of his choice as she wanted to marry a boy who was living near her parents' house at Baraut and consequently she used to mostly remain at her parental house.*

4. The appellant further claimed that the respondent finally left the matrimonial home on 20.11.1994 along with her father and took away all her valuables and jewellery. She started living with her parents at Baraut, U.P. The appellant made efforts for reconciliation, but did not succeed. He sent a Notice dated 07.01.1995 through his advocate requesting the respondent to return, but to no avail. He even approached the CAW Cell on 14.03.1995 in the hope that the respondent would come back but no action was taken by the police. The appellant thus, sought a decree of nullity or in the alternative a decree of divorce on the ground of cruelty.

5. The respondent in her **Written Statement** admitted the factum of marriage and claimed custom and usage prevalent among both the communities i.e. Aroras and Khatris of Jhang to which the parties belong to justify the validity of their marriage. She denied that the marriage between the parties was nullity.

6. The respondent denied all the allegations of inflicting cruelty upon the appellant and his family members. She denied that she ever made a demand for separate residence; instead she asserted that at the time of marriage a demand of car and Rs.5,00,000/- cash was made and when the demand was not met, the same became a cause of dispute between the parties. She claimed that the appellant never took her for outings and would go either to Vaishno Devi, Nainital or Haridwar only because his demands for dowry were not made and she was relegated to the status of a maid servant in the matrimonial home.

7. The respondent asserted that on 09.10.1994, Sh. Chunni Lal Babbar, Smt. Darshana and Ms. Asha- relatives of the appellant, schemed to kill her by leaving the cooking gas open and asked her to go to the kitchen and prepare tea for them. They wanted to get rid of the respondent as fire would have engulfed her as soon as she lit the match stick. She denied all the allegations of cruelty as were made against her.

8. The respondent also denied that she left the matrimonial home along with her father on 20.11.1994. She claimed that she came to Baraut U.P. in the month of August, 1994 on the occasion of Raakhi and went back along with the petitioner after one week i.e. on the day of Janamashtmi. She was left at at Baraut on 20.02.1995 by the appellant and his parents at the house of her uncle Sh. Krishan Lal as her father was not

at home. It is denied that she received any Notice or that any efforts were made by the appellant for reconciliation. She claimed that the petition is liable to be dismissed.

9. On the pleadings of the parties, **following issues** were framed: -

> *"(i) Whether there is any custom in the family of the parties to permit marriage between sapindas and persons having prohibited relationship with each other?*
> *(ii) Whether the respondent has treated the petitioner with cruelty?"*

10. The parties appeared as witnesses in support of their case. In addition, respondent examined RW-2 Mr. Mulakh Raj, her father, RW-3 Pandit Kasturi Lal & RW4 Mr. Ram Kumar Thareja, *inter alia* to prove the customs and usage for the marriage amongst the relatives in Aroras and Khatris of Jhang community.

11. **Learned Additional District Judge** observed that Section 11 r/w Section 5(v) of Hindu Marriage Act prohibits marriage between the persons who are *sapindas* and such marriages are liable to be declared void under Section 11 of the Hindu Marriage Act. However, the learned Additional District Judge on appreciation of the testimony of the witnesses examined by the respondent concluded that the custom of marriage between the children of brothers and sisters belonging to Arora and Khatri Community was prevalent even prior to the partition of the country; therefore, the marriage so performed between the parties who were *sapinda*s to each other, was valid.

12. **Learned Additional District Judge** also considered the respective testimony of the parties and concluded that appellant failed to prove that the respondent had inflicted cruelty upon him and consequently held that

the appellant was not entitled to divorce. Thus, vide impugned judgment dated 20.05.1999, the petition for divorce/nullity of marriage between the parties, was dismissed.

13. Aggrieved by the said judgment, the present Appeal has been preferred.

14. **Submissions heard.**

15. Marriage is a nullity amongst *Sapinda* under Section 5 read with Section 11 of the Hindu Marriage Act, 1955. Admittedly, Mrs. Shivani Ditti, grandmother of the respondent/wife is the sister of the father of the petitioner i.e. the appellant and respondent are related to each other as uncle and niece, and thus they are *sapindas* to each other.

16. *Sapinda* has been explained in Section 3(f) of the Hindu Marriage Act,1955 which reads as under:

> *"(i) "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;*
>
> *(ii) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them."*

17. Section 5 of the Hindu Marriage Act, 1955 defines the conditions for a Hindu Marriage. Sub-clause (v) provides that *"the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two".* While the appellant had asserted that the marriage was a nullity being in violation of the condition

of Section 5(v) of the Act by virtue of the parties being *sapindas* to each other, the respondent had asserted that the marriage between the *sapindas* was permitted in Jhang Community of Aroras and Khatris since prior to the partition. Since the parties belong to the Jhang Community, the marriage between the *sapindas* was recognized as a custom/usage and therefore, the marriage between the parties was valid.

18. Section 3(a) of the Hindu Marriage Act, 1955 defines custom and usage as under:

> *"the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:*
> *Provided that the rule is certain and not unreasonable or opposed to public policy; and*
> *Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family"*

19. Firstly, it would have to be ascertained whether there exists any custom in the community to which the parties belong, allowing or enjoining marriage between the parties within s*apinda* relationship and secondly, whether there have been such marriages over a period of time which have been performed and accepted by the community.

20. The onus of proving a custom would necessarily lie on the party propounding it. **Section 102 of the Indian Evidence Act, 1872** provides that the burden of proof in any proceeding or suit lies on a person who would fail if no evidence at all was given on either side. **Section 103** of the Act further provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. In the present case, the appellant/husband has been able to establish that there

exists a *sapinda* relationship between the parties which is also not denied by the respondent. It is the respondent/wife who is claiming that such marriages are recognized as valid in Jhang community amongst Aroras and Khatris to which the parties belong.

21. The respondent has relied on custom to claim the validity of their marriage. In *Arun Laxmanrao vs. Meena Arun* 2006(3) Mh.L.J., it was observed that for any custom to be recognized as a source of law under the Hindu Law, it has to be characterized by its *continuity, longevity and uninterruptedness*. The instances of such custom must therefore, be over a long period of time, occurring on regular interval without leaving the span of time. Such customs must be shown to exist and continue to exist before and after the marriage of the parties. It must further be shown to be accepted by the community.

22. The principal onus to prove was explained by the Privy Council in case of *Ramalakshmi Ammal vs. Sivanatha Perumal* (1872) 14 Moo India App, 570 wherein it was observed that if the person on whom the burden is to prove the existence of a custom fails to do so, then, he cannot succeed by claiming that the defendant did not succeed to prove that the custom did not exist.

23. It is the fundamental rule of law that the person who asserts in the positive has to prove the same. No person can be asked to prove a thing in the negative or a thing which does not exist. Following *Ramalakshmi Ammal* (supra) it was held in the case of *Harihar Prasad vs. Balmiki Prasad*1975 AIR 733, 1975 SCR (2) 932 as under :-

> *"It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and*

> *invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends".*

24. The Apex Court in the case of *Siromani and another vs. Hemkumar and others* AIR 1968 SC 1299 observed that:

> *"it is well established that a custom must be proved to be ancient, certain and reasonable if it is to be recognized and acted upon by the Courts of law; and being in derogation of the general rules of law the customs must be construed strictly."*

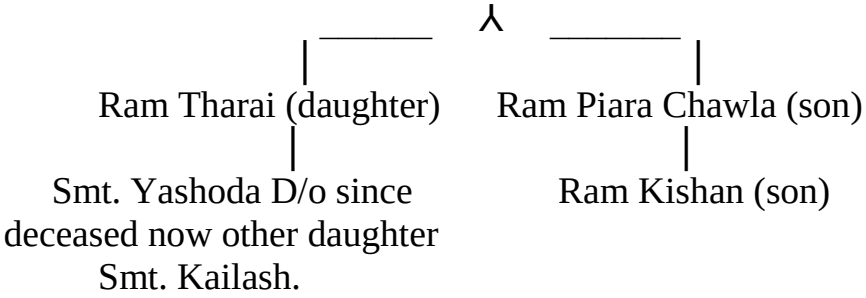
25. Thus, coming to the facts of the present case, since the custom and usage has been claimed by the respondent, the onus was on the respondent to prove such customs and usage. The respondent in her testimony as well as her father RW2 Mulkh Raj, RW3Pandit Kasturi Lal and RW4 Sh. Ram Kumar Thareja, a public witness have all deposed that there exists a custom and usage permitting marriage between persons related through *sapinda* in the Jhang Community. Various incidents have been given which are as under : -

(i) Smt. Mallan W/o Shri. Mani Singh

Bahadur Singh (Son)	Kartaro @ Kao (daughter)
Asha D/o Sh. Bahadur Singh	Krishan Lal S/o Kartaro

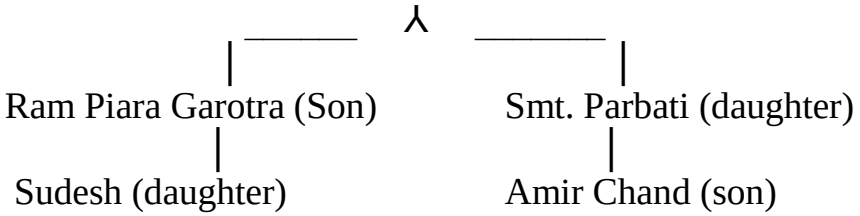
(Asha married to Krishan Lal in 1970)

(ii) Smt. Tharai Bai W/o Shri. Mala Ram



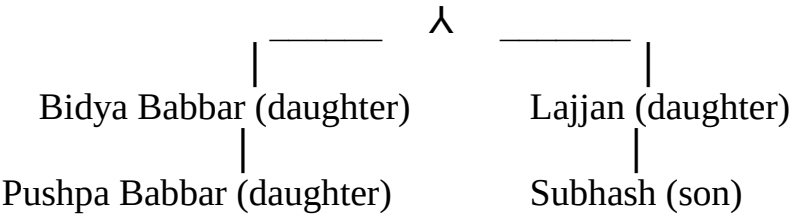
(Kailash and Ram Kishan married in 1970)

(iii) Smt. Thari Bai W/o Shri. Kanshi Ram



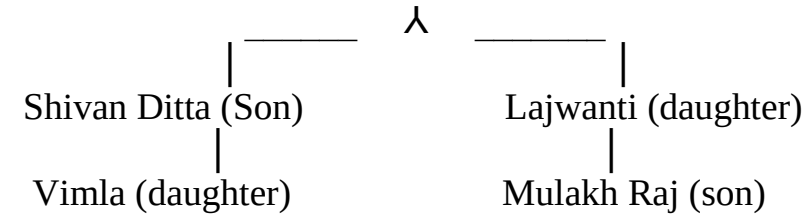
(Marriage between Amir Chand and Sudesh took place in Haryana)

(iv) Smt. Lal Chand Sachdeva



(Marriage between Pushpa and Subhash was solemnised in 1977)

(v) Smt. Bhawan Bai W/o Shri. Thakur Dass Sikka



(Marriage between Vimla and Mulakh Raj took place in 1960)

(vi) Shri. Ladha Ram Gulati

Mala Ram Gulati (Son) — Krishna (daughter)

Usha Gulati (daughter) — Ramesh Kharbanda (son)

(Usha married to Ramesh Kharbanda in 1980)

(vii) Smt. Ram Dei W/o Shri. Lareka Ram Gugnani

Ram Piari (daughter) — Ram Lubhaya (son)

Jeevan (daughter) — Ram Parkash (son)

(Jeevan married to Ram Parkash)

(viii) Shri. Jeewan Das Khattar

Bhagwan Dass Khattar (Son) — Parbati Thareja (daughter)

Smt. Kailash Khattar (daughter) — Harbans Thareja (son)

(Kailash married to Harbans Thareja in 1965)

26. It is claimed in all the aforesaid cases they were related as *sapinda.* However, the testimony of all the witnesses show that the marriages have been performed between 1960 to 1980 and not even one single incident of marriage between the *sapindas* has been given prior to the enactment of Hindu Marriage Act, 1955. In order to constitute a custom to override the Hindu Marriage Act, it had to be established and proved that this custom existed since prior to Hindu Marriage Act, 1955. No such incident has been proved on record. Any marriage after the enactment, if performed against the express provision of law, would not diminish the consequences

merely because these marriages have not been questioned by the community and would not confer any legality on these marriages.

27. The respondent in the present case though proposed to justify the validity of a marriage by claiming the same to be a custom, but the incidents relied upon by the respondent do not have attributes of either continuity or longevity. The factum of uninterruptedness of the custom is also not established. Merely because the stray incidents of marriage between the *sapindas* have not been questioned by the community, would not make out a case of positive assertion of a prevailing custom.

28. In the case of *Sharad Dutt vs. Kiran*1997 SCC OnLine Del 837, the Coordinate Bench of this Court after referring to Section 3(a) of the Act observed that for a custom to be recognized as a law, there should be clinching evidence to establish that it rests upon continuity, uniformity and longevity.

29. In the said case, the similar issue about the marriage of the parties who belonged to Jhang Community and were related as *sapinda* was considered and it was observed that any marriage performed after the enactment of Hindu Marriage Act, 1955 would not be valid if it is in violation of the conditions as mentioned in Section 5 of the Act. They can be accepted as valid only if it is protected by any custom or usage existing prior to the enforcement of the Act. In *Sharad Dutt* (supra), it was observed that the illustrations given of the marriage between the parties were after the enactment except one incident. It was concluded that such one incident was not sufficient to prove custom and thus, held that not objecting to the marriage which is prohibited by law, would not constitute a custom and usage and such marriage is void and is liable to be so

declared under Section 11 of the Act.

30. Learned Additional District Judge has therefore, fallen in error in concluding that the custom of marriage amongst the *sapinda* in Jhang Community, was proved. The parties are held to be in *sapinda* relationship with each other and there being no custom or usage validating their marriage, we hereby hold that the marriage is a nullity under Section 11 of the Hindu Marriage Act.

Divorce on the ground of cruelty under Section 13(1)(ia) of the Act, 1955

31. The appellant herein had also sought divorce on the ground of cruelty. The appellant has narrated various incidents of cruelty, main being an insistence by the respondent to set up a separate residence which in fact had also been set up. In case of *Narendra v. K. Meena* (2016) 9 SCC 455, the Apex Court held: -

> "*It is not a common practice or desirable culture for a Hindu son in India to get separated from the parents upon getting married at the instance of the wife, especially when the son is the only earning member in the family. A son, brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meager income. In India, generally people do not subscribe to the western thought, where, upon getting married or attaining majority, the son gets separated from the family. In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband and normally without any justifiable strong reason, she would never insist that her husband should get separated from the family and live only with her.*
>
> *... The persistent effort of the respondent wife to constrain the appellant to be separated from the family would be*

> *torturous for the husband and in our opinion, the trial Court was right when it came to the conclusion that this constitutes an act of 'cruelty'."*

32. The petitioner/ appellant had deposed that because of persistent insistence of the respondent and consequence threats that she would otherwise commit suicide by sprinkling oil, his parents had set him up in separate residence; a fact not denied by the respondent. As held by the Apex Court in *Narendra* (supra) such conduct to force the husband to separate from his family is an act of cruelty.

33. Furthermore, it has been claimed that the respondent failed to discharge her household duties, neglected the family members and threatened to implicate them in false cases. The threat did materialize when a case under Section 498A/504/506 IPC was registered against the appellant and his family members though they were acquitted after a protracted trial. Thereafter, a Revision Petition was filed by the respondent which also was dismissed.

34. This consistent and persistent act of the respondent to pursue the litigation over a period of time,is again an act of cruelty especially when the alleged evidence of cruelty has not been proved in this case.

35. This Court in the case of *Nishi vs. Jagdish Ram* 233 (2016) DLT50 held that the filing of false complaint against the husband and his family members constitutes mental cruelty. In the case of *K. Srinivas vs.K. Sunita* (2014) 16 SCC 34, the Apex Court held that filing of the false complaint against the husband and his family members also constitutes mental cruelty for the purpose of Section 13 (1) (ia) of the Hindu Marriage Act.

36. Similarly, it has been held by the Supreme Court in *Mangayakarasi*

vs. M. Yuvaraj (2020) 3 SCC 786, that an unsubstantiated allegation of dowry demand or such other allegations made against the husband and his family members exposed them to criminal litigation. Ultimately, if it is found that such allegations were unwarranted and without basis, the husband can allege that mental cruelty has been inflicted on him and claim a divorce on such a ground.

37. The respondent had further claimed that on one occasion she was asked to make tea at night when the knob of the gas had been deliberately left open in an attempt to burn her as soon as she lit the matchstick for lighting the stove. However, in her cross-examination she has admitted had the stove been on, foul smell would have spread not only in the house but also in the vicinity. If any such incident of fire would have taken place, the damage would not have been confined only to her or the kitchen but the entire house would have got engulfed. Moreover, there is no reporting of any such incident at any forum. Falsity of allegations made against the petitioner is writ large on its face.

38. In case of *Raj Talreja vs. Kavita Talreja* (2017) 14 SCC 194, the Supreme Court has observed as under: -

> *"Cruelty can never be defined with exactitude. What is cruelty will depend upon the facts and circumstances of each case. In the present case, from the facts narrated above, it is apparent that the wife made reckless, defamatory and false accusations against her husband, his family members and colleagues, which would definitely have the effect of lowering his reputation in the eyes of his peers. Mere filing of complaints is not cruelty, if there are justifiable reasons to file the complaints. Merely because no action is taken on the complaint or after trial the accused is acquitted may not be a ground to treat such accusations of*

> *the wife as cruelty within the meaning of the Hindu Marriage Act 1955 (for short 'the Act'). However, if it is found that the allegations are patently false, then there can be no manner of doubt that the said conduct of a spouse leveling false accusations against the other spouse would be an act of cruelty."*

39. Hence, the false complaints/allegations filed by the wife against the husband, constitute mental cruelty against the husband.

40. In addition, the appellant had claimed that she denied co-habitation and deprived him of conjugal rights. The respondent denied the same but she admitted in her testimony that she used to sleep on the bed while the appellant used to sleep on the floor. Though respondent had claimed that it was a forced situation where she was not allowed to sleep with the appellant, but it is difficult to accept that there was any such latent or patent force, specially when this was confined to the closed wall of their room. It is not denied that the parties got married in the year 1992 while the respondent left the matrimonial home in 1995. The parties' matrimonial life of five years was fraught with acrimony and mutual hostility.

41. In the case of *Samar Ghosh vs. Jaya Ghosh* (2007) 4 SCC 511, significant guidelines as to what must be the approach of the court to determine cruelty under Section 13(1)(ia) of the Act were defined. It was observed that what has to be examined is the entire matrimonial relationship as cruelty has to be gathered from injurious reproaches, complaints, accusations, taunts etc. During the entire matrimonial relationship, the individual instances or categorization of the acts as cruel is incapable of any straight definition. It is the effect of the conduct rather

than its nature which is of paramount importance in assessing the complaint of cruelty. The Court must bear in mind the physical and the mental conditions of the parties as well as their social status and should consider the impact of the personality and the conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view and such conduct must be examined in the light of the capacity and endurance of the complainant and to what extent such capacity was known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists.

42. The Apex Court in *Samar Ghosh* (supra), further observed with respect to Section 13(1)(i-a) of the Hindu Marriage Act that in a marriage where there has been a long period of continuous separation as 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 and can be termed as mental cruelty.

43. In the present case, indisputably parties are residing separately since 1995 which proves that they are unable to sustain matrimonial relationship thereby depriving each other from mutual companionship and conjugal relationship pointing to grave cruelty which cannot be interpreted to promote in perpetuity such long separation which is attributable to the respondent who left in November, 1994 as per her own assertions with no sincere effort to reconcile, amounts to striking at the root of the conjugal relationship itself, which is the bedrock of any matrimonial relationship, such separation of almost 28 years is an instance of utmost mental cruelty,

asking for immediate severance of matrimonial relationship on the ground of cruelty u/S 13(1)(ia) of the Act.

44. In the present case, not only there are specific incidents, but also the fact that there has been a long and continuous separation since 1995 which when cumulatively considered together amounts to cruelty.

45. Though we find that the acts of cruelty as proved by the appellant entitled him to a Decree of Divorce under Section 13(1)(ia) of the Act, but considering that the marriage has been held to be void under Section 11 of the Hindu Marriage Act, no decree of divorce need be made under Section 13 of the Hindu Marriage Act. We hereby declare that the marriage between the parties is a nullity under Section 11 read with clause (v) of section 5 of the Hindu Marriage Act, 1955.

46. The present appeal is allowed and disposed of accordingly.

47. Decree sheet be prepared accordingly.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 05, 2023/AT