

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.S-854 of 2023

[Mst. Lily Nadeem & othersv.....IX ADJ West Karachi & others]

Date of Hearing : 22.03.2024
Petitioner through : Mr. Mohammad Ayaz Kandhro,
Advocate.
Respondents through : N.R.
Mr. Ahmed Khan Khaskheli, AAG.

ORDER

Zulfiqar Ahmad Khan, J:- This petition assails the Judgment and Decree dated 14.07.2023 passed by learned Additional District Judge-IX West Karachi in Family Appeal No.119/2022 and Judgment and Decree dated 30.08.2022 passed by learned Family Judge-XXIV West, Karachi in Civil Petition No.2379/2021 (“Impugned Judgment & Decree”).

2. Briefly stated, the petitioner filed a Civil Petition under Section 22 of the Christian Divorce Act, 1869 for dissolution of marriage by way of judicial separation. The stance of the petitioner is that she married with respondent on 05.01.2002 and as the time went by the respondent’s behavior got harsh against her and he used to beat her and the matter didn’t end here, the respondent in the first of July 2021 kicked out the petitioner after beating as well as threatening her, thenceforth she initiated proceedings under Section 22 of the Act, 1869 for judicial separation which was dismissed by the learned Family Judge vide Judgment dated 30.08.2022. The Petitioner impugned the said findings of the learned Family Judge by filing Family appeal No.119/2022 which appeal of the petitioner was dismissed too vide Judgment dated 14.07.2023 on the ground that the

petitioner failed to prove cruelty, hence the petitioner before this Court.

3. The learned counsel for the petitioners argued that the impugned judgments are suffering from misreading and non-reading of material available on the record as the petitioner had satisfactorily substantiated the act of cruelty for dissolution of marriage. The attitude and behavior of the respondent No.3 had developed hatred and resentment in the mind of petitioner. He further argued that the evidence produced by the petitioner fully supported the stances and series of cruel acts pleaded before the trial Court but the learned lower fora failed to appreciate the same in its true aspect and rendered the findings which are against the evidence led by the petitioner.

4. Heard the arguments. The main disagreement or source of discord between the parties is whether the petitioner was entitled to claim a decree for dissolution of marriage on the ground of cruelty or not. The learned lower fora premised the impugned judgments on the ground that the petitioner failed to prove the cruelty basis upon which the marriage could be dissolved by way of judicial separation. The preview and analysis of the record as well as evidence unequivocally articulates that the petitioner discharged the burden of proving the cruelty of the respondent No.3 and quoted many incidents and her evidence was not shattered during her cross examination.

5. The purpose of appellate jurisdiction is to reappraise and reevaluate the judgments and orders passed by the lower forum in order to examine whether any error has been committed by the lower

court on the facts and/or law, and it also requires the appreciation of evidence led by the parties for applying its weightage in the final verdict. It is the province of the Appellate Court to re-weigh the evidence or make an attempt to judge the credibility of witnesses, but it is the Trial Court which is in a special position to judge the trustworthiness and credibility of witnesses, and normally the Appellate Court gives due deference to the findings based on evidence and does not overturn such findings unless it is on the face of it erroneous or imprecise. No doubt an Appellate Court may reappraise the evidence to ensure only that the approach of the Trial Court while recording and appraising the evidence was not flawed or perverse to the well settled principles of law, but it is not the function of the Appellate Court to interpret the evidence rather than considering it in its plain meaning and determine what was actually testified and deposed by the parties or their witnesses during evidence and it cannot pass the appellate judgment on the basis of presumption or speculation. The turn of phrase “burden of proof” entails the burden of substantiating a case. The meaning of “onus probandi” is that if no evidence is produced by the party on whom the burden is cast, then such issue must be found against him. Lawsuits are determined on preponderance or weighing the scale of probabilities in which the Court has to see which party has succeeded to prove his case and discharged the onus of proof which can be scrutinized as a whole together with the contradictions, discrepancies or dearth of proof. It is the burdensome duty of the Court to detach the truth from falsehood and endeavors should be made in terms of the well-known metaphor, to “separate the grain

from the chaff” which obligates the Court to scrutinize and evaluate the evidence recorded in the lis judiciously and cautiously in order to differentiate the falsehood from the truth and judge the quality and not the quantity of evidence. The petitioner in the Family Court proved her case which is profusely translucent from the evidence recorded in the Family Court. I have also scanned the judgment passed by the learned Appellate Court where too the findings of the learned trial Court was affirmed without realizing the fact that the allegations of maltreatment and cruelty were satisfactorily proved by the petitioner during the trial.

6. The cruelty alleged may be mental or physical, premeditated or unpremeditated, but lack of intent does not make any distinction. Obviously, if it is a physical act then it would be a question of fact, and in the event of mental cruelty, an enquiry is required to be made as to the nature of the cruel treatment to find out the impact or repercussions thereof on the mind of the spouse. Mental cruelty can be largely delineated as a course of conduct which perpetrates mental pain with such a severity and harshness which would render it impossible for that party to continue the matrimonial tie or to live together. The matrimonial relationship is based on a mutual trust between wife and husband with emotions and it obliges reciprocal respect, love and affection for evenhanded adjustments with the spouse without causing a sense of anguish and disappointment, therefore, while deciding any lis for dissolution of marriage on the ground of cruelty, the Court must adjudge the intensity and ruthlessness of the acts and examine whether the conduct complained of is not merely a trivial issue which may happen in day-

to-day married life, but is of such a nature which no reasonable person can endure.

7. The perception and perspicacity of cruelty, both physical and/or mental, can be catalogued as under:-

1) Halsbury's Laws of England (Fourth Edition), Volume 13, Para 1269, Page 602

Cruelty Generally

“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.

If the court finds that one spouse has, by reprehensible conduct or departure from the normal standards of conjugal kindness, caused injury to health or a reasonable apprehension of it on the part of the other spouse then it is cruelty if a reasonable person, after taking due account of all the circumstances of the case, would consider that the conduct complained of is of so grave and weighty a nature that the complainant should not be called upon to endure it. The court's principal motive in intervening in the parties' affairs is not

to punish one spouse for his or her past conduct but to protect the other for the future, and the object underlying the jurisdiction of magistrates' courts to grant relief in matrimonial causes is to afford a practical alleviation of intolerable situations with as little hardship as may be against the party against whom relief is sought.”

2) American Jurisprudence (Second Edition), Volume 24, Chapter: Divorce and Separation, Para 35, Page 217-218

35. Mental Cruelty

In jurisdictions where cruelty is a ground for divorce, and in accord with the view that cruelty need not consist of physical violence or threats of violence, it is generally held, either because of an express statutory provision to that effect or because of the implications from the statutory reference to “cruelty” and the like, that cruelty may consist of mental cruelty, provided, of course, that the misconduct impairs, or threatens to impair physical or mental health. Even where a statute defines the ground for a divorce as “treatment endangering life,” the cause of action need not be based on physical violence; a case may be made out by proving mental cruelty which endangers life.

It has been stated that mental cruelty, as a ground for divorce, is a course of unprovoked, offensive conduct toward one's spouse which causes embarrassment, humiliation, and anguish, so as to render the spouse's life miserable and unendurable, and which actually affects the spouse's physical or mental health.”

3) Corpus Juris Secundum, Volume XXV, at page 16

“**Cruel treatment.** Any act intended to torment, vex, or afflict, or which actually afflicts or torments without necessity, or any act of inhumanity, wrong, oppression or injustice, the willful infliction of pain, bodily or mental, such as reasonably justifies an apprehension of damage to life, limb or health. Cruel treatment does not always consist of actual violence; but includes mental anguish and wounded feelings.”

“**Cruelty.** Every willful act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted; any act of a human being which inflicts unnecessary pain; the infliction

of great pain or misery without necessity; either actual violence endangering life or limb or health, or conduct creating a reasonable apprehension of such violence. It has been said that the word clearly includes both the willfulness and cruel temper of mind with which the act was done, and the pain inflicted by the act.”

4) Black’s Law Dictionary (Ninth Edition), at page 434

“**Cruelty**. (13c) The intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human: abusive treatment; outrage. Cf. ABUSE; INHUMAN TREATMENT; INDIGNITY.”

“**Mental Cruelty**. (1898) 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.

5) Words and Phrases (Permanent Edition), Volume 10-A

Cruelty - In general (At page 329 to 331)

“**Cruelty**,” as [the] word is used in divorce cases, is an act that endangers or threatens life, limb or health of aggrieved party, including outrages upon feelings or infliction of mental pain or anguish. *Ingham v. Ingham*, Tex.Civ.App., 240 S.W.2d 409, 411.”

“Husband’s misconduct, which endangers wife’s health to degree rendering it physically or mentally impossible for wife to discharge marital duties properly, constitutes “cruelty” within meaning of divorce statute. *Schwartzmann v. Schwartzmann*, 102 A.2d 810, 813, 204 Md. 125.”

“If conduct alleged and shown in suit for divorce on ground of cruelty is of such a nature as utterly to destroy the legitimate purpose and object of the marital relationship, such conduct constitutes “cruelty” and justifies a divorce. *Best v. Best*, Tex.Civ.App., 214 S.W.2d, 806, 808.”

“**Cruelty**” warranting divorce may result from continuing course of abusive and humiliating treatment of one spouse by another, as in case of course of conduct calculated to torture complaining spouse’s mental health and emotional

nature and affecting his or her bodily health. *Humphreys v. Humphreys*, 281 S.W.2d 270, 281, 39 Tenn.App. 99.”

“**Cruelty**” which will justify divorce, is the willful, persistent infliction of unnecessary suffering, whether in realization or apprehension, whether of mind or body, to such extent as to render cohabitation dangerous and unendurable, and term comprehends conduct endangering life, limb or health or productive of mental anguish, and conduct of nature utterly destructive of purpose of marital relationship. *Gentry v. Gentry*, Tex.Civ.App., 394 S.W.2d 544, 546.”

Accusation of infidelity (At page 335)

“The public aspersion of a virtuous wife by her husband, charging her with unchastity, constitutes such cruelty as will entitle her to divorce. *Jones v. Jones*, 60 Tex. 451, 458, 461.”

“False accusations of adultery, maliciously made, without probable cause or reasonable grounds for belief, and producing requisite degree of anguish, suffering, and danger to health constitute sufficient cause to warrant limited divorce for “cruelty”. *Bostick v. Bostick*, D.C.Mun.App, 163 A.2d 817.”

In a pleading and by testimony in support thereof, accusations by husband or wife that his or her spouse has been guilty of marital infidelity, if false and made maliciously without reasonable cause for suspecting fidelity of other spouse, may amount to “cruelty” and justify granting of divorce, particularly if accompanied by proof of other cruel acts. *Maley v. Maley*, 140 P.2d 262, 265, 18 Wash.2d 766.”

“Continual charges to a wife of unchastity with a disavowal of paternity of the children, made continuously in the presence of others and in the presence of the children, would constitute “cruelty” within the meaning of the divorce laws. *Morris v. Morris*, 107 P. 186, 57 Wash. 465.”

“Circulation of false and slanderous statements, tending to destroy reputation and harmful to peace of mind and health, may constitute “cruelty” justifying divorce. *Williams v. Williams*, 291 P. 993, 994, 37 Ariz. 176.”

8. Section 10 of the Divorce Act, 1869 provides the grounds of dissolution of marriage which reads as under:-

10. When husband may petition for dissolution. Any husband may present a petition to the Court of Civil Judge praying that his marriage may be dissolved on the ground that this wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution. Any wife may present a petition to the 1 [Court of Civil Judge] praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery.

or of bigamy with adultery.

or of marriage with another woman with adultery.

or of rape, sodomy or bestiality.

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro.

or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Contents of petition. Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.

9. The grounds of the decree are provided in Section 19 of the Divorce Act, 1869 as under: -

"19. Grounds of decrees. Such decree may be made on any of the following grounds:-

- (1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;
- (2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;
- (3) that either party was a lunatic or idiot at the time of the marriage;

- (4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force

Nothing in this section shall affect the Jurisdiction of the Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

10. Undeniably, under Section 10 of the Act *ibid*, it is clear from bare reading that unless and until anyone of the grounds as mentioned above is not proved marriage cannot be dissolved meaning thereby to get the dissolution of marriage, the party is required to allege and prove the allegation. The learned courts below declined to award decree of dissolution of marriage on the ground that she had failed to prove the allegation of cruelty. The learned Lahore High Court in a judgment “*Mst. Parveen Amanual v. Additional District Judge-III, Rahimyar Khan and 2 others*” (PLD 2009 Lahore 213) held as under: -

"The bond of marriage between Christian husband and wife is of a permanent nature and as such the wife has to prove her case on the concrete facts after leading reliable and cogent evidence to the facts on which the claim of dissolution of marriage is based. Only then the Court can grant a decree for a judicial, separation within the meaning of section 22 of the Divorce Act, 1869 or to dissolve the marriage under section 10 of the same Act."

11. In a recent judgment “*Pervaiz Afzal v. Mehwish and 2 others*” (PLD 2020 Lahore 160) the Court endorsed that without proof of the allegation no one should be entitled to get dissolution of marriage by holding as under:--

"If for the sake of above-repealed section 7 of the Act is considered and the grounds as mentioned above are taken into account, even then, as stated above, the respondent No.1 has failed to discharge the burden shifted on her with regard to alleged ground of adultery. As such, the learned appellate Court, as elaborated above, has misread and non-read

evidence of the parties and has wrongly passed the impugned judgment and decree dated 20.11.2017 with regards to dissolution of marriage, which cannot be allowed hold field further, to this extent."

12. The learned Courts below failed to consider that the petitioner by stating certain facts alleged that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent and leveled allegation of cruelty and sought judicial separation on the ground of cruelty also.

13. The grounds of judicial separation are provided in section 22 of the Divorce Act, 1869 in the following manner: -

"22. Bar to a decree for divorce a mensa et toro, but judicial separation obtainable by husband or wife. No decree shall hereafter be made for a divorce a mensa et toro, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of as divorce a mensa et toro under the existing law, and such other legal effect as hereinafter mentioned."

14. Learned counsel for the petitioner during course of the hearing went through the examination-in-chief of the Respondent husband as well as cross-examination and pointed out certain admissions of the respondent husband. It is unequivocally clear that the respondent husband himself admitted to have threatened the petitioner on several occasions. It is considered expedient to reproduce the relevant constituent of the cross-examination of the respondent husband and the same is delineated hereunder:-

"It is correct to suggest that since July 2021 I many times have threatened at home of her parents."

“It is correct to suggest that Since July 2021 till now I have not given any maintenance amount to the plaintiff.”

15. It is gleaned from appraisal of the foregoing that the respondent husband admitted to threatened several times to the Petitioner. It is not necessary that there should many circumstances and scenes creating ground of cruelty, if the wife approaches the Court beseeching for separation from the husband on the ground of cruelty and strengthened her case through evidence, then it is obligated upon the Courts of Law to protect her. The petitioner claimed judicial separation and has available ground of cruelty in the light of Section 22 of the Act *ibid*.

16. During the course of arguments, learned AAG submitted that under Article 199 of the Constitution, the High Court has limited scope and cannot vary the findings of learned First Appellate Court. To meet with the said submission, I may say that this Court under Article 199 of the Constitution has the power to issue such directions, orders or decrees, as may be necessary for doing complete justice and in doing so, the Court is also empowered to look at the just circumstances of the case as it has appeared before it and also to mould relief as is just and proper for meeting the ends of justice¹. I may further note here that in exercising the jurisdiction to do complete justice and to issue directions, orders or decrees, as may be necessary, this Court is not bound by procedural technicality when a glaring fact is very much established on the record and even stand

¹ Per Gulzar Ahmed C.J. in *Martin Dow Marker Ltd, Quetta, v. Asadullah Khan & others* (2020 SCMR 2147) and *Muhammad Zahid v. Dr. Muhammad Ali* (PLD 2014 SC 488), *Dossani Travels (Pvt.) Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others* [PLD 2014 SC 1]; *Mst. Amatul Begum v. Muhammad Ibrahim. Shaikh* [2004 SCMR 1934] and *Imam Bakhsh and 2 others v. Allah Wasaya and 2 others* [2002 SCMR 1985].

admitted². In the case of Mst. Mariyam v. Muhammad Ayub Jatoy (C.P. No.S-624 of 2021, disposed of on 21.08.2023 by Zulfiqar Ahmad Khan.J) the similar principle was held. It is considered pertinent to mention here that the said decision was challenged by filing Civil Petition No.1213-K of 2023 before the Hon'ble Supreme Court of Pakistan and the same was dismissed vide order dated 18.12.2023 upholding and affirming the decision taken in the case cited supra.

17. Furthermore, the learned AAG articulated that the concurrent edicts recorded by the learned lower fora against the petitioner wife, therefore, the concurrent findings cannot be disturbed. To meet with the said submission, I may say that if the concurrent findings recorded by the lower fora are found to be in violation of law, or based on misreading or non-reading of evidence, then they cannot be treated as being so sacrosanct or sanctified that cannot be reversed by the High Court³. The High Court having observed the material irregularities and misreading/nonreading of the evidence can annul and set aside the edicts of the learned lower fora.

18. Hence, in the light of the above discussion, the instant writ petition is allowed, and the impugned judgments and decrees passed by the learned lower fora are hereby set aside and consequently the petition for judicial separation filed by the petitioner is allowed with no order as to costs.

Karachi
Dated:

JUDGE

Aadil Arab.

² Reference in this regard is made to the case of Muhammad Shafi v. Muhammad Hussain [2001 SCMR 827]; Gul Usman and 2 others v. Mst. Ahmero and 11 others [2000 SCMR 866] and S.A.M. Wahidi v. Federation of Pakistan through Secretary Finance and others [1999 SCMR 1904]

³ Per Muhammad Ali Mazhar.J in Mst. Faheeman Begum v. Islamuddin & others (2023 SCMR 1402)

