

Rakesh Sharma

Vs.

Surbhi Sharma

D.B. Civil Misc. Appeal No. 281 of 2000  
(Shiv Kumar Sharma and A.C. Goyal, JJ.)

06.11.2001

## **JUDGMENT**

**A.C. Goyal, J.**

1. Both these appeals have been filed by the husband and wife respectively challenging the judgment and decree dated 18.8.1998 passed by learned Judge, Family Court, Ajmer in matrimonial case No. 277/97, Rakesh Sharma v. Surbhi Sharma. The learned Judge while allowing the application of the husband passed the decree of judicial separation instead of decree of divorce in favour of the husband and against the wife.

2. The applicant husband Rakesh Sharma has filed appeal No. 281/2000 with a prayer that a decree of divorce instead of judicial separation should be passed in his favour while the wife Smt. Surbhi Sharma has challenged by filing appeal No. 411/2000, all the findings alongwith the above judgment and decree. We shall refer the parties in this judgment as husband and wife.

3. The facts in brief are that the applicant Rakesh Sharma was married to Smt. Surbhi Sharma on 11.2.1989 at Ajmer according to Hindu Rites and Rituals. A son was born out of this wedlock on 23.7.1992. The husband filed an application for divorce on 24.9.1997 in the Family Court, Ajmer under Section 13 (1), (ia) and (ib) of the Hindu Marriage Act, 1955 (for short 'the Act of 1955') on the grounds of cruelty and desertion. It is pleaded that wife is living separately at Ajmer since 27.11.1994 and thus she has deserted her husband Rakesh Sharma without any reasonable cause and his consent. The husband tried many a time to bring her back and also served notices in this regard on 21.5.94 and 23.6.94 but all in vain. Thus, the wife deserted him for a continuous period of more than 2 years, preceding the presentation of the application.

4. It is further pleaded that the wife instituted an application for judicial separation under Section 10 of the Act of 1955 against him making false allegations of ill treatment, demand of dowry from time to time and use of abusive language by the husband and his parents. Some of the details of the averments regarding these allegations in the application under Section 10 of the Act are mentioned in Para 4 of this application under Section 13 of the Act. The husband Rakesh Sharma submitted his reply to the application under Section 10 of the Act, denying all the allegations. Thereafter, the wife got the above application under section 10 of the Act, dismissed on 11.12.1995.

5. It is also pleaded by the husband that he filed an application for the custody of his minor son in the Family Court, Ajmer and in reply to this application, his wife Smt. Surbhi Sharma reiterated and raised some further false allegations about law family background, the character and conduct of the husband Rakesh Sharma. The allegations in nutshell were that her husband and his father used to consume liquor & smoke jointly, they often used filthy and abusing language, husband is suffering from bronchitis and on account of that, her minor son had also got infection, the mother of the husband is also suffering from mental disorder and other ailments and thus, it would not be in the interest of child to give his custody to the husband, that the husband was guilty of adulterous conduct and one such incident dated 11.11.95 has been specifically mentioned.

6. It is further stated that she made certain false complaints against him to his office his seniors and its caused mental tension to him and thus the wife has committed various acts of cruelty.

7. The wife Smt. Surbhi Sharma contested this application by filing reply on 4.4.98. She denied all the allegation made against her and further pleaded that the averments made in her application under Section 10 of the act of 1955 and in reply to the application of the husband for guardianship of minor son were and are true. Regarding dismissal of the application under Section 10 of the Act, 1955, it is stated that her husband assured her to live together, therefore, that application was got dismissed but, there was no change in the behaviour of the husband and he continued his cruel behaviour towards her. It is also stated that during the compromise proceedings on 25.7.96, her husband admitted his relations with a girl namely Preeti Sharma in the

presence of Smt. Kamlesh Mathur.

8. The trial court on the basis of the pleadings, framed following issues :

1. Whether, the non-appellant wife committed cruelty to the appellant husband ?
2. Whether the non-appellant wife deserted her husband without any reason for more than 2 years ?
3. Whether, the appellant is entitled to decree of divorce ?
4. Relief.

9. The husband Sri Rakesh Sharma apart from himself, examined his father Sri Suresh Chand Sharma. Wife Smt. Surbhi Sharma examined herself and produced N.A.W.2, Mukesh Sharma, N.A.W.3 S.P. Bhardwaj, N.A.W.4 Ashok Chaturvedi, N.A.W.5 Sharad Chaturvedi, N.A.W.6 Bhadur Singh Shekhawat and her father N.A.W.7 Vinay Kumari Mishra. The applicant husband produced documents which are Ex.P.1. Notice dated 21.5.94, Ex.P.2 Notice dated 23.6.94, Ex.P.3 copy of the application under Section 10 of the act dated 4.1.1995, Ex.P.4 copy of reply filed by husband on 2.11.1995, Ex.P.5 Carban copy of the complaint by wife dated 3.2.96, Ex.P.6 copy of the letter addressed by the Head Office of the appellant husband to wife Smt. Surbhi Sharma, Ex.P.7 reply of Smt. Surbhi Sharma to the application of the husband for guardianship, Ex.P.8 copy of the FIR lodged by Smt. Surbhi on 26.9.97 at Maheela Police Station, Ajmer and Ex.P.9 original registered envelope having the address of Smt. Surbhi Sharma. The wife Smt. Surbhi Sharma has produced Ex.A1 to Ex.A3 money order receipts, Ex.A4 a letter written by one Seema to Surbhi dated 22.12.94, Ex.A 5, Ex.A7, Ex.A8 receipts of payment of telephone calls, Ex.A6, receipt of Courier services and Exhibit A9 Part Hotel message. It appears that Exhibit A9 has been marked on a bill of the department of Telecom due to inadvertence. As per oral evidence, Exhibit A9 relates to the message left by the husband Rakesh Sharma in the name of N.A.W.2 Mukesh Sharma.

10. After hearing final submissions of the parties, learned Judge of the Family Court observed at Page Nos. 12 and 13 of his judgment that the cruelty has not been defined under the Act of 1955 but the Hon'ble Supreme Court in *Dastane v. Dastane, I* has defined the cruelty thus :

"It is a whole course of conduct of an offending party causing reasonable apprehension in the mind of spouse for harm or injuries resulting from living

with such a person."

11. Thus 'cruelty' postulates a treatment of the applicant with such cruelty as to cause a reasonable apprehension in the applicant's mind that it will be harmful or injurious for him/her to live with the other spouse.

12. Having considered the entire evidence of the parties, the learned Trial Judge has observed that out of 4, 3 allegations of cruelty have been proved. According to the trial Judge, it is proved that the wife has deserted her husband without any reasonable cause and without his consent and it amounts to cruelty. It has also been held that the allegations of ill-treatment, demands of dowry from time to time and use of abusive language by the husband and his parents made in the application under Section 10 by the wife were not proved and thus, by making such false allegations, the wife has committed cruelty to her husband. The trial Court has further held that a number of allegations including adulterous conduct of her husband raised in the reply of application filed by Smt. Surbhi Sharma were also not proved by her and it also amounts to cruelty. The fourth allegation regarding false complaints to the seniors of the husband was not found proved by the learned Judge. The Learned Judge thus, decided, issue No. 1 in favor of the husband. Issue No. 2 has also been decided in favor of the husband that the wife deserted her husband as provided under the law.

13. We have heard, learned counsel for the parties and scanned the entire evidence available on the record.

14. Learned counsel for the husband, while supporting the decision of the trial court on issues Nos. 1 and 2, has challenged only the relief allowed by the learned Judge. On the other hand, the learned counsel Sri Mehta on behalf of Smt. Surbhi has challenged the finding of the trial court on issues Nos. 1 and 2. It was argued by learned counsel Sri Mehta that right from the day of their marriage, demands for larger dowry were made not only by the husband but by his parents also and they always used abusive and derogatory language towards Smt. Surbhi and her parents and she was constantly subjected to humiliation. According to learned counsel Sri Mehta all the allegations made by the wife against her husband in the application under Section 10 of the Act, 1955 and the allegations made in the reply to the husband's application for guardianship were and are true, but the learned trial Judge did not consider and appreciate the evidence produced on behalf of the wife. The learned presiding officer

failed to appreciate that it was the wife who was subjected to cruelty by her husband and she was compelled to leave her matrimonial home. It was also argued that it is extremely difficult to produce any account of adultery, but the learned trial Judge even failed to consider the admission of the husband himself in this regard. The learned counsel Sri Mehta has drawn our attention to letter Exhibit A4 and argued the cruel attitude of the husband is very clear from the contents of this letter but learned Presiding Officer did not consider it at all. Thus, according to learned counsel Sri Mehta, the judgment and decree of the learned trial Court should be set aside. Learned counsel Sri Vajpayee for the husband has supported the findings of the trial Court on issues Nos. 1 and 2.

15. Having considered the arguments advanced by learned counsel for the parties and having gone through the entire evidence on record, we are of the considered opinion that the learned Judge Family Court, has rightly decided both the issues in favor of the husband Sri Rakesh Sharma. As stated earlier, 3 allegations of cruelty have been found proved by the trial court. The first ground of cruelty is desertion by wife. Leaving matrimonial home without husband's consent and not returning thereafter amounts to cruelty. It has been pleaded in Para No. 3 of the application under Section 13 of the Act, 1955 the Smt. Surbhi is residing separately since 27.11.94 without any reason and she did not return to her matrimonial home. In reply, Smt. Surbhi admitted that she is residing with her parents at Ajmer since 27.11.94, but she did not come out of matrimonial home at her own, as her husband after doing acts of cruelty for two days expelled her from his house and thus she came to her parents on 28.11.94. AW1 Sri Rakesh Sharma stated that his wife used to compel him to construct a new house and even quarreled with him in this regard and, thereafter, on 27.11.94, she alongwith her minor son left her matrimonial house from Ahmadabad and on enquiry, he came to know on 28.11.94 that she has reached Ajmer. It is also stated that he tried to bring her back but she did not come. Smt. Surbhi Sharma in her statement stated that her husband used to quarrel with her and also quarrelled on 27.11.94 and expelled her from the house. Thereafter, she took a sum of Rs. 5000/- front the wife of husband's friend and with the assistance of her father's friend at Ahmedabad, she came to Ajmer. N.A.W.2 Sri S.P. Bhardwaj, she came to Ajmer. N.A.W.2 Sri S.P. Bhardwaj, resident of Ahmedabad has stated that at about 7-8 pm on 27.11.94, Surbhi came to him and told him that he would kill her and she could not stay with him. Thereafter, he contacted her father on phone at Ajmer and, thereafter, he accompanied Surbhi from Ahmedabad to Ajmer. In cross- examination, he stated that she came to him for the

first time on that date. But the oral evidence produced by Smt. Surbhi on this point is not believable at all because she filed an application for judicial separation under section 10 of the Act, 1955 on 4.1.95 and it is specifically stated in Para 24 of this application as under :

izkfFkZ;ksa }kjk vius thou dks vlqjf{kr eglwl djus ij fnukad 27-11-94 dks ?kj ls nksigj 3-15 cts ml {k.k tks diM+s igus Fkh] mlh esa fudy xbZA

16. In view of this admission of Smt. Surbhi Sharma herself, her statement cannot be relied upon at all that she was expelled by her husband and thus the statement of Sri S.P. Bhardwaj is also not reliable that Smt. Surbhi Sharma was expelled from the house by her husband. Therefore, the findings of the trial court in this regard that Smt. Surbhi Sharma has deserted her husband since 27.11.94 without any reason appear to be justified. This argument of learned counsel Sri Mehta has no merit that the wife has categorically stated that she is still ready and willing to beside with her husband because it is very easy to make such statement. As a matter of fact, she left her matrimonial house without any reason and did not return thereafter.

17. Second allegation of cruelty relates to the allegations made in Exhibit 3 the application under Section 10 filed by Smt. Surbhi against her husband Sri Rakesh Sharma. As stated earlier, the allegations of ill-treatment, demands of dowry, threats of divorce by husband, cruel behavior of the parents of the husband and use of abusive language by the husband and his parents were made by Smt. Surbhi in her application Exhibit 3. The husband Sri Rakesh Sharma denied all these allegations with a plea that all these allegations are false and baseless, by filling his reply vide Exhibit 4 and, thereafter, the application Exhibit 3 was dismissed in default. It is also not disputed that the husband Sri Rakesh Sharma, thereafter filed an application for the custody of their minor son and Smt. Surbhi filed the reply vide Exhibit 7. In this reply, she reiterated the allegations of cruelty against her husband and also raised further allegations regarding family background of her husband. It is also averred in this reply that her husband used to smoke and consume liquor with his father, her husband is suffering from Bronchitis and her mother-in-law is also suffering from mental disorder and other ailments and thus it would not be in the welfare of the child to live with his father. The allegation of adulterous conduct have also been made against Sri Rakesh Sharma. It is pleaded that Sri Mukesh, the husband of her elder sister Dr. Sadhana once visited Calcutta on 11.11.95 and he saw her husband with a girl in the market. Sri

Rakesh Sharma introduced that girl as his cousin thereafter, on the same evening, her husband came to Sri Mukesh Sharma in Park Hotel with some other girl and introduced her his second wife called Preeti. Thus, according to Smt. Surbhi Sharma her husband, being characterless is leading immoral life.

18. It is also not in dispute that the wife Smt. Surbhi Sharma has admitted that she filed application Exhibit 3 as well as the reply Exhibit 7. She has also admitted that all the allegations made in Exhibit 3 and in Exhibit 7 were true. But Smt. Surbhi Sharma completely failed to prove these serious allegation and the findings of the trial Judge in this regard appear to be fully justified. It cannot be disputed that the burden to prove these allegations was upon the wife, but she failed to prove these allegations, Smt. Surbhi Sharma has given a general statement and reiterated these allegations, But no reliance can be placed upon her statement. As stated earlier, she stated that she was expelled by her husband from his house on 27.11.1994, while she herself admitted earlier vide Ex.3 that she herself left her matrimonial home at her own. She further stated that when she was expelled by her husband from the house, she took Rs. 500/- from the wife of her husband's friend, but in cross-examination, it was suggested to Mr. Rakesh Sharma that his wife took a sum of Rs. 500/- from Smt. Seema Pathak and according to Ex.3, Smt. Seema Pathak is the friend of Smt. Surbhi Sharma. It is also important to mention here that Smt. Seema Pathak has not been examined by Smt. Surbhi Sharma. In cross-examination, Smt. Surbhi Sharma stated the she does not know as to who demanded money from her father at the time of her marriage N.A.W.4, Sri Ashok Chaturvedi has narrated one incident dated 24.9.1997 and on this very day, this application of divorce was filed at Ajmer. Sri Ashok Chaturvedi has stated that on hearing hue and cry, he came out of his house in the noon and saw that the applicant Sri Rakesh was dragging his wife and both were pushing each other. In cross-examination, he denied the suggestions that the applicant Rakesh was not allowed to see her son and no such other incident took place. N.A.W.5 Sri Sharad Chaturvedi deposed that the applicant Rakesh often used to quarrel. N.A.W.6 Sri Shekhawat deposed that he and the father of Smt. Surbhi are in the same department and he was present at the time of marriage of Surbhi and in the night of marriage, the mother of Rakesh become annoyed on account of some dowry. N.A.W.7 is the father of Smt. Surbhi and he has also tried to support her daughter. He stated that her daughter informed him on phone on 27.11.94 that she was beaten by her husband and she has been expelled from the house. It is important to mention her that the fact of beating has not been narrated even by Smt. Surbhi Sharma and expulsion of Surbhi

from the house by husband has already be disbelieved being contrary to the contents of Exhibit 3. Therefore, on a close scrutiny of the entire oral evidence produced by Smt. Surbhi the allegation of ill-treatment, cruelty, law family background, demands of dowry appear to be unfounded and the trial Judge has rightly come to this conclusion that these allegations have not been proved at all. We have read the letter Exhibit A4. This letter seems to be written by Smt. Seema on 22.12.94 to Smt. Surbhi. But on perusal of this letter, no such inference can be drawn that the husband Rakesh Sharma treated her wife with cruelty. More so, Smt. Seema Pathak has not been examined and, therefore, no reliance can be placed upon this letter.

19. Third act of the cruelty on behalf of Smt. Surbhi relates to the allegations of adulterous life of her husband. The allegations in this regard in Exhibit 7 have already been narrated. According to the statement of Smt. Surbhi, these allegations are true. But there is no evidence to prove these serious allegation. According to the statement of Smt. Surbhi, her brother-in-law saw her husband once at Calcutta with a girl named Preeti Sharma and her husband introduced that girl to her brother-in-law as his wife. It was also lapsed by her that her husband during the reconciliation proceedings admitted this fact in her presence. N.A.W.2 Sri Mukesh Sharma, brother-in-law of Smt. Surbhi Sharma deposed before the trial Court that he was at Calcutta on 11.11.95 and he was staying in Park Hotel. In the morning of 11.11.95, he was in the market and he saw Rakesh with a lady, but he did not make any enquiry from Rakesh about that lady. Sri Mukesh further deposed that he invited Rakesh to come to hotel and at about 10 am (perhaps on the next day), Rakesh Sharma alongwith that lady came to see him and introduced that she is his wife Preeti. In cross-examination, he denied the suggestion that when Rakesh came to hotel, he was not there. Further, Sri Mukesh Sharma admitted this fact that when Rakesh came to see him in the hotel for the first time he was not there and a slip Exhibit A9 was left by Rakesh Sharma for him. As stated earlier, this is the slip which according to N.A.W.2 is Exhibit A9 but by inadvertence Exhibit A9 was put on a bill of department of telecom while slip marked Park Hotel message dated 11.11.1995, in the name of this witness and this message was not behalf of Rakesh Sharma left at the Park Hotel in the name of this witness. The husband Rakesh Sharma has denied all these allegations, although in cross-examination Sri Rakesh Sharma admitted this fact that he was in Calcutta on 11.11.95 on way to Assam. He also admitted this fact that he met Mukesh Sharma in Calcutta but he denied all other allegations regarding his company with any lady or with Preeti. On a careful consideration of the entire evidence on this point, it appears that Smt.

Surbhi Sharma has completely failed to prove these serious allegations. It is not believable that the husband would make admissions regarding his own adulterous life in presence of her wife. It is also important to mention here that in Para 8 of the reply Smt. Surbhi has pleaded that these facts were admitted by her husband on 25.7.96 in presence of Smt. Kamlesh Mathur during the reconciliation proceedings. But Smt. Kamlesh Mathur has not been examined. It is also important to mention here that the statement of Sri Mukesh Sharma is not in accordance with the contents of Exhibit 7. In para 17 of Exhibit P-7 it is stated that on 11.11.95 Mukesh Sharma met with Rakesh Sharma in the market of Calcutta and Rakesh Sharma was going with a girl and introduced that girl as his cousin. But Sri Mukesh Sharma has stated that he did not make any enquiry about the lady where he met Rakesh Sharma in the market of Calcutta. It is stated in Para 17 of Exhibit 7 that on the same evening, Rakesh came to be Mukesh Sharma at Park Hotel with other girl and introduced her as his wife Preeti but Sri Mukesh Sharma stated that Sri Rakesh Sharma came to see him at the hotel with the same lady. Therefore, the statement of Sri Mukesh Sharma does not inspire any confidence in this regard. It is also important to mention here that if it would have been true, it appears unnatural on the part of Sri Mukesh Sharma to inform immediately such serious conduct of Rakesh Sharma to Surbhi, Rather, according to Sri Mukesh Sharma himself, he invited Sri Rakesh Sharma with that lady to the hotel where he was staying.

20. Matrimonial matters are matters of delicate humane and emotional relationship. It demands mutual trust, regard, respect, love and affection but wife Smt. Surbhi Sharma raised false allegations that her husband demanded dowry. She also made serious false and scandalous allegations regarding adulterous life of her husband. Such false allegations constitute mental cruelty.

21. Thus, in view of the above entire discussion, it is held that there is absolutely no reason to interfere with the decision given by the trial court on Issue Nos. 1 and 2.

22. Now, we come to the relief clause. The learned trial Judge while deciding issue No. 3, observed that it is not possible for the parties to live together, because the wife has made false allegations of dowry as well as immoral conduct of her husband. The learned trial Judge further proceeded that the husband himself admitted during the course of the trial that he attempted many a times to bring her wife back and the wife has also stated that she, for herself and for her son, wants to live with her husband

and, therefore, it would be proper and in the interest of justice to pass a decree of judicial separation instead of divorce. The learned counsel for the husband argued that the trial Judge himself observed that there was no possibility for the husband and wife to life together and even then, decree of divorce was not passed and thus, the trial Judge committed illegality. It was next argued that since November 94, the wife never came to her husband and even after the decree of judicial separation dated 18.8.98 no such attempt was made by the wife Smt. Surbhi Sharma and thus there is no possibility of reunion. Therefore, the decree of divorce should have been passed instead of judicial separation, as the decree of judicial separation was uncalled for and unwarranted in facts and circumstances proved. The learned counsel for the wife as stated earlier has opposed even the judgment and decree of judicial separation.

23. We have given our thoughtful consideration to the arguments raised by learned counsel for the parties and keeping in view the arguments and the reasonings put forward by learned counsel for the husband, we are of the considered opinion that a decree of divorce, instead of judicial separation should have been passed by the learned trial Judge and, therefore, we deem it just and proper and in the interest of justice to convert the decree of judicial separation in to a decree of divorce. Accordingly, we allow the appeal No. 281/2000 filed by Rakesh Sharma and consequently modify and convert the judgment and decree dated 18.8.98 into a decree of divorce in favor of the appellant Sri Rakesh Sharma against the wife Smt. Surbhi and we hereby dismiss the appeal No. 411/2000 filed by Smt. Surbhi Sharma. Costs easy.

Appeal allowed.

Cases Referred.

1. AIR 1975 SC 1554