

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.178 of 2011

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Sandeep Kumar Agarwal son of Shri Ram Niwas Agarwal, C/o Sant Kabir Food Products, D-67/68, Industrial Area, Road No. 20, P.S. – Kotwali, District – Sant Kabir Nagar, (U.P.)

.... Opposite Party /Defendant / Appellant
Versus

Smt. Namrata Agarwal wife of Sandeep Kumar Agarwal, Daughter of Shri Raj Kumar Vohra, resident of vohra Gali, Mohalla – Katki Bazar, P.S. – Town, District – Darbhanga

.... Petitioner/Plaintiff /Respondent

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Appearance :

For the Appellant : M/s D.K.Sinha, Sr. Advocate and
Girish Chandra Jha, Advocate

For the Respondent : M/s Rajeev Roy and
Dharmesh Kumar Shrivastava, Advocates

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE DR. JUSTICE RAVI RANJAN

CAV JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date: 24.11.2015

I have heard the parties and perused the records of this case.

This appeal has been preferred against the judgment and decree dated 18.12.2010 passed by Principal Judge, Family Court, Darbhanga in Matrimonial Case No. 22 of 2005 by which the court below has allowed the divorce petition of the respondent and has dissolved the marriage of respondent and the appellant.

The petitioner – respondent instituted Matrimonial Case No. 22/2005 for grant of a decree of divorce under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as ‘the Act’)

against her husband Sandeep Kumar Agarwal, i.e., opposite party – appellant.

In her petition for dissolution of marriage filed under Section 13 of the Act the Plaintiff-respondent has stated that the parties to the petition were married on 3.12.1992 and had three children from the wedlock. Two out of the three children are daughters, namely, Shivani born on 5.10.1993 and Smriti born on 12.12.1996 and one is son, namely, Ayushman born on 3.10.2002. In the petition the petitioner-plaintiff-respondent has claimed that, few days after coming to her matrimonial house after marriage, she came to know that her husband was a habitual drunkard and occasionally use to come late at night and had accepted that he had got illicit connection with some lady also. She further alleges that after two years of marriage her husband started taking money from her for fulfilling his requirements and even sold one pair of her gold kangan which was given by her father. It is further stated that, about 3 ½ years before the filing of the matrimonial case, the firm of the husband was locked by the financier from whom money was borrowed and the same was put to auction sale also. Thereafter, she was asked to bring at least six lacs from her father to meet the expenses, however, her father could not manage the amount. The petitioner, thereafter, was put to brutal assault and was asked to



leave Gorakhpur. It was also complained that the articles given by her father at the time of marriage were not satisfactory. The petitioner – respondent tried her best to tolerate and accept the prevailing situation and condition to the best of her ability and capacity. However, she felt that the behaviour of her husband and his family members was changed and she was no more acceptable to them. Somehow the aforesaid fact came to the knowledge of her parents and then her father tried to assess the situation on telephone but he could not succeed as she was not allowed to talk to her parents. Even her husband and other family members did not talk to her parents. She also alleges that sometimes food was also not allowed to be given to her and sometimes the food given was of such quality that the same was not worth eating. She was not allowed to come out from the home and talk to any body subjecting her to mental tension and agony. It is claimed that her father came to Gorakhpur in the year 2000 and discussed the matter with her. The petitioner – respondent conveyed her father regarding cruelty and mental torture by the husband and his family members. She further claims that the ornaments and other articles given by her parents and relations were also taken away from her and she was not allowed to use them. Cruelty went to such an extent that she was not even allowed to sleep on bed rather she was compelled to sleep



on the floor of the bedroom. However, her father advised her to tolerate and try to normalize the situation and also requested his Samadhi and others to maintain cordial relationship. But situation became even worse. Some how the respondent managed to inform the same to her parents who were residing at Darbhanga. On getting information, the father of the petitioner – respondent reached Gorakhpur and stayed there for four days. However, when he was assured that everything would be normalized in future, he requested his Samadhi to allow her to go to Darbhanga for change of place and as such the petitioner came to her Naihar with her children on 1.10.2001 and remained at Darbhanga for about three months. It is claimed that none from her matrimonial house came to meet her or even talked to her during her stay at Darbhanga. Ultimately, the father of the petitioner, with the consent of his Samadhi again sent the petitioner – respondent to her matrimonial house on 16.1.2002 where, for few days, the behaviour of the family members including her husband remained normal but just after 15 days they again resorted to cruel behaviour. Her father again came with two respectable persons of Darbhanga and negotiated with the family members of the appellant. However, he was also humiliated by her husband and father-in-law. They told that they have broken relationship and would not allow the petitioner – respondent to



remain at Gorakhpur and directed them to take her back. On such a situation having arrived, the petitioner – respondent came back to her Naihar on 19.10.2003 and since then she is residing at her parents' place along with her children. During the stay of the petitioner - respondent at Darbhanga, appellant husband visited Darbhanga on 15.3.2004 and stayed there for five days. However, abruptly without giving any information again went to Gorakhpur and, thereafter, they did not have any contact with each other. She has sought a decree of divorce on ground of cruelty as well as desertion.

The husband – appellant contested the case by filing his written statement refuting the allegations of cruelty and the allegation that he is a drunkard and that he used to demand money from his wife and also that he had stolen golden kangan and sold it for meeting his expenses. Though he accepts in the written statement that Uttar Pradesh Finance Corporation used to issue notices by publishing in newspaper with respect to different reasons at different time as the business of the family of the petitioner is of large scale and time to time, had obtained loan from the Corporation, however, he has denied the fact that his firm has been locked by the financer and had demanded six lacs from the wife or from his in-laws for liquidating his debt. It is stated in the written statement that in fact the petitioner-respondent wanted to lead a free



life from very beginning. He has also refuted the claim that the respondent was not being accorded proper treatment. It has further been stated that the kitchen itself was in control of the petitioner-respondent, therefore, there was no question of prohibiting her to eat proper food. It is also stated that she used to go to shop etc. and time to time attend marriage and other ceremonies also as there was no restriction on her to go out of house. It has been denied that father – in – law came to talk to his family members due to misbehavior on their part. He has refuted the claim that he had demanded any money from his wife and her parents for liquidating his financial burden. It is also submitted that there was no dispute between him and his wife as his third child was born on 3.10.2002 at Gorakhpur Hospital itself and at that point of time she was regularly in consultation of a doctor of Gorakhpur. He has denied that any poisonous food was ever given to the respondent. He has also denied the allegation that, due to his and his family members' cruel behaviour, the petitioner-respondent was forced to go to her parents house on 21.02.2001 along with her children. He claims that his two daughters studied at Gorakhpur till the year 2003 and the eldest daughter used to learn Kathak dance also in Kadambari Lalit Kala Kendra till 2003. It is further stated in his written statement that in fact, on the pretext of ill health of her mother, the petitioner –

respondent's father took her to Darbhanga on 19.10.2003 only for 10-12 days but, thereafter, she changed her mind and did not return and her behaviour with the petitioner also changed. The appellant also tried his best since 2003-04 but could not succeed in bringing her back as she never paid heed to her request.

It is stated in the judgment that the effort of conciliation could not bear any fruit as the petitioner – respondent was adamant not to go with her husband. Even the children were not willing to meet their father. The husband had also filed the Case No. 305/2005 in the Family Court, Gorakhpur under Section 9 of the Act for restitution of conjugal right the matter went up to the Apex Court for transfer of the said case. Ultimately, that case was transferred to the court of Principal Judge, Family Court, Darbhanga and was numbered as Case No. 14 of 2007 and both the cases were heard analogous.

On such pleadings having been made by both sides the court below framed following issues:

- “1. Whether the case filed by the applicant is maintainable in the eye of law?
2. Whether the applicant is living separately and has been deserted by the Opposite Party without any reasonable cause and excuse ?
3. Whether the applicant suffered mentally and physically torture at the hand of respondent?

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4. Whether the petitioner and Opposite Party cohabited during the period of separation?
 5. Whether the applicant is entitled for a decree of divorce?
 6. Whether the Opposite Party is entitled for custody of child?
 7. Whether the applicant is entitled for any other relief or reliefs?"

After consideration of the evidence led by the parties the court below has passed the judgment and decree dissolving the marriage on the ground of cruelty by the husband. So far the point of desertion is concerned, it has been held that the case of the desertion was premature.

Upon hearing the parties, this Court finds following question for determination.

Whether it is a fit case for grant of decree of dissolution of marriage under Section 13(1) (ia) of the Act?

At the time of hearing, a supplementary affidavit was filed by the respondent stating that she would forgo and relinquish her right to seek any maintenance or any alimony from her husband if he withdraws both the appeals, i.e., M.A. No. 178 of 2001 and M.A. No. 179 of 2011. However, it is also stated that it would not bind her three children and they shall be entitled to claim and assert whatever right they may have in law. However, learned counsel for the appellant has categorically stated that offer is not acceptable to appellant rather he would pursue the appeals. Accordingly, that

issue was closed.

Altogether six witnesses have been examined by the petitioner-plaintiff-respondent and one documentary evidence being the notice printed in Dainik Jagaran, Gorakhpur dated 4.6.2007 has been marked as Ext. 1.

On the other hand the opposite party - respondent – appellant has examined altogether three witnesses and few documents have also been brought on record. Ext. A is the conveyance pass of his daughter Smriti Agrawal of Class I of Little Flower School, Gorakhpur, Ext. A/1 is conveyance fee of Rs. 2,100/- dated 8.10.2002 for Smriti Agrawal for the term of October to March, 2003, Ext. A/2 is fee card of Smriti Agrawal, Ext. B is birth certificate of Aayusman Agrawal issued by Municipal Corporation, Gorakhpur, Ext. C is Immunization records of Baby Namrata born on 3.10.2002 issued by Dr. Naresh Agrawal, Ext. D is the prescription of Dr. Savitri Agrawal dated 3.2.2003 of Namrata wife of Sandeep, Ext.. D/1 is prescription of Namrata dated 21.6.2002, Ext. D/3 is prescription of Namrata dated 29.1.2002, Ext. E is diagnosis report of Mrs. Namrata Agrawal issued by Dr. Chandra Mohan Tiwari, Ext. E/1 is Hematology report, Ext E/2 is diagnosis report of blood sugar dated 23.8.2002, Ext.E/3 is Urinalysis report and Ext F is discharge slip of Nangalia Hospital.



Learned counsel appearing for the appellant has submitted that cruelty is required to be proved by the respondent as she is making such allegation. He submits that the same could not be proved by leading cogent evidence. It is contended that if the respondent was being treated with cruelty from the beginning then the marriage could not have survived for about 11-12 years and three children would not have been born from the wedlock. It is also urged that if some poison was induced to the wife and she was regularly being treated with cruelty then no action was taken by her till the filing of the matrimonial suit specifically pointing out that no criminal case etc. was ever lodged by her. It has been stated that apparently, till 2003 the petitioner was regularly maintaining his children and was also imparting proper education to them. It is, thus, contended that the whole story has been concocted after October, 2003 as the petitioner-respondent was not willing to go back to her matrimonial house for the reasons best known to her.

Per contra learned counsel appearing for the respondent has submitted that the wife tolerated bad and cruel behavior to the best of her ability and, even if children were born from the wedlock, the same does not necessarily mean that there was no ill behavior on the part of the husband and the family members. It is contended that the business installation of the petitioner was locked and seized and



the family dipped into great financial burden for which they sold their house of Balia Hata also and shifted to flat and, thereafter, she was treated with cruel behavior several times when the respondent's father could not meet their demand of Rs. Six lacs for rescuing them from the debt. It is contended that the life of the respondent was made miserable and she was ordered to get out of the house. The court below has analyzed the evidence led by the parties. The father of the petitioner – respondent as well as petitioner herself has been examined as AW 4 and AW 6 respectively and have given categorical details in their respective depositions and have stood the test of cross-examination also. The father has stated how he had to go to Gorakhpur and talk to the in-laws of his daughter but the same could not materialize. It is also stated that he had gone there with the respectable persons for the purpose of negotiation and rapprochement and one of them has been examined as AW 5. The allegation of demand of money has also been supported by AW 1 and AW 2. AW 1 has stated regarding the demand of money and allegation of using abusive language and threats given in the year 2004 when the husband was there at Darbhanga and visited the shop of the father of the petitioner – respondent. So far the exhibits showing payment of fee etc. by the appellant are concerned, the court below has considered and has come to the conclusion that the

same was prior to October 2003 and as such that would not be of much relevance as till then the wife has claimed that she was somehow tolerating the cruel behavior but, thereafter, things crossed the limit of tolerance. She has never stated that, while she was staying at Gorakhpur in her matrimonial house, her children were not being imparted education.

The husband has examined three witnesses. Though he has refuted the allegation that he is in drinking habits and used to come late at night and, though has also stated that he is ready to live with his wife and is ready to keep his children also and also that he never treated his wife with cruelty, but, on the point as to why his wife was not living with him and has filed this matrimonial case, he has stated that she is doing it without any reason as she wants to lead immoral life which is a bald statement without any evidence in support of his claim. Merely questioning that had there been any cruel treatment upon the wife she might have lodged criminal cases would also be of no help to the appellant. The wife has stated all along that she had tolerated the cruel behavior till she could do the same. Non filing of criminal case cannot form a ground to disbelieve the cruel behavior which otherwise stands established by leading evidence. The court below has also noticed that even the children were not willing to talk to their father. Learned counsel or



the appellant has not been able answer it either from the evidence or from the pleading as to why, without any reason, the wife would choose to file a case for divorce after 10 – 12 years of marriage taking all the responsibilities on her shoulder of imparting education and also of the huge expenses to be born by her for marriage of two daughters after their attaining their marriageable age. On the other hand, she has filed a supplementary affidavit in this case stating that if the appellant withdraws the appeals she would not claim any maintenance or alimony. It may be a case that the parents of the respondent may be in a position to bear the expenses of the daughters and her children but it is unimaginable that the same can be a reason for filing a suit for dissolution of marriage. It appears from the evidence led by the respondent that she had tried to save the nuptial tie showing tolerance and adjustment and etc. but, ultimately, she was forced to leave her matrimonial house along with her children and take shelter at her parental home.

From the aforesaid discussions I am of the opinion that the respondent has been forced to live separately in view of the circumstances that had developed and taken place at her matrimonial house, thus, it cannot be termed as anything less than cruelty. After appraisal of the evidence led on behalf of both parties one has to



come to irresistible conclusion that this is a fit case for grant of decree of dissolution of marriage. Of course the court below has stated in the judgment that apart from physical torture, since the husband and wife have not cohabitated for last seven years, the wife is entitled for decree of divorce and that has been criticized by the learned counsel appearing for the appellant by submitting that irretrievable breakdown of marriage cannot form a ground of annulment of marriage, however, on deeper scrutiny of the judgment it appears that the decree of divorce has actually been granted on the ground of cruelty itself, however, the aforesaid observation has been made by the court counting the period since when the wife claims that she has come to her Naihar with the decision that there would be no purpose in staying at her matrimonial house in view of the cruelty imparted upon her, i.e., from October 2013 till the date of judgment, i.e., 18th December, 2010. It is well settled that the period during which the case has remained pending before a court of law cannot be counted for such purpose but then the aforesaid observation can be ignored as on the only contentious issue, i.e., the issue of cruelty, the evidence led by the wife weighs much more than the evidence led by the husband and in fact the decree has been granted on the ground on cruelty only. Learned counsel for the petitioner has placed reliance upon a decision of the Apex Court

rendered in **Lachman Utamchand Kirpalani V. Meena alias Mota**
[AIR 1964 SC 40] to show the desertion has to be proved by the
person claiming it. However, in the present case that would not be
relevant as there is already a finding recorded by the court below that
the case of desertion was premature.

Accordingly, this appeal, being devoid of merit, is
dismissed. However, there would be no order as to costs.

(Dr. Ravi Ranjan, J)

(Ramesh Kumar Datta, J) I agree.

(Ramesh Kumar Datta, J)

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