

**THE HIGH COURT OF TRIPURA
AGARTALA**

MAT App. 10 of 2013

Sri Bijit Kumar Banik

S/O Late Brajalal Banik
Resident of Palace Compound
P.S. East Agartala,
District-West Tripura.

..... Plaintiff-Appellant

Versus

Smt. Kaberi Banik (Debbarma)

W/O Sri Bijit Kumar Banik
D/O Late Rohini Debbarma
Now residing at Ganesh Thakur lane
Near Bijoy Kumar Girls H.S. (+2) School,
B.K. Road, Krishnanagar, P.S.-West Agartala,
District-West Tripura.

..... Defendant-Respondent

**BEFORE
THE HON'BLE MR. JUSTICE U.B. SAHA
THE HON'BLE MR. JUSTICE S. TALAPATRA**

For the appellant : Mr. S Deb, Sr. Advocate.
Mr. S Datta, Advocate

For the respondent : Ms P Dhar, Advocate

Date of hearing : 04.02.2015

Date of delivery
of Judgment & Order : **18.02.2015**

Whether fit for reporting : **No**

JUDGMENT AND ORDER

(Talapatra J.)

This is an appeal filed under Section 19(1) of the Family Courts Act, 1984 challenging the legality of the judgment and decree dated 18.02.2013 delivered in TS (Div) 104/2009 by the learned Judge, Family court, Agartala, West Tripura whereby the petition filed by the

appellant herein under Section 13(1)(a) and (1)(b) of the Hindu Marriage Act, 1955 has been rejected.

2. The factual aspects relevant to the context may be briefly introduced at the outset. The appellant married the respondent on 22.07.1994 as per Hindu rites and customs. According to the appellant, the respondent expressed soon after their marriage her serious reservation to live in the joint family. Thus, the appellant was compelled to reside in a rented house at Advisor Choumuhani, Krishnanagar, Agartala. The respondent had habit to quarrel with him without any issue whatsoever and used to hurt him by abusive language almost on regular basis. Thus, the appellant was subjected to severe mental pain. Even sometimes the respondent used to physically assault him. The appellant bore the brunt of such mental cruelty to protect the dignity of his family. The respondent gave birth two sons. The respondent had lodged a complaint with the Women Police Station, Agartala framing the appellant and his mother for allegedly torturing her. However, when good sense prevailed, the respondent had withdrawn the said complaint stating, inter alia, that the said complaint was lodged on a moment of excitement. Admittedly both the appellant and the respondent lived together thereafter. Only on 30.10.2005, without any tangible cause the respondent left the matrimonial home. Despite repeated approaches by the appellant, she did not join in the matrimonial home. In the course of time, the appellant was given the custody of their elder son and he has been taking due care on spending a lot of money for his education but whenever he had gone for meeting his younger son, the respondent did not allow him to meet him.

3. The allegations, however, are apparently disputed by the respondent stating that the respondent was subjected to cruelty and it was impossible on her part to live in the joint family of the appellant or with the appellant. Thereafter, there had been no initiative from the end of the appellant for taking her back in the matrimonial home. Finally, the appellant has filed a petition under Section 13 of the Hindu Marriage Act on the ground of cruelty and desertion seeking the dissolution of the marriage but the respondent resisted such prayer by pleading every possible pleas.

4. But it appears that the appellant is not at all agreeable to reconstruct the marriage. It has been also contended that for long absence of cohabitation, etc., as is apparent from the records produced before this Court, the appellant is entitled to the decree of divorce on the ground of cruelty and desertion. In addition thereto, Mr. S Deb, learned senior counsel has submitted that the marriage has irretrievably broken down and in consideration of the Apex Court's decision in **Samar Ghosh V. Jaya Ghosh, (2007) 4 SCC 511** the appellant may be favoured with the decree of divorce.

5. Mr. S Deb, learned senior counsel for the appellant has further submitted that when the marriage has been irretrievably broken down, the continuance thereof itself creates cruelty. He has further submitted that there is no universal definition of the word 'cruelty' as the word 'cruelty' has to be conceived in the relevant context inasmuch as it changes its contours with the change of the context, but some principles over the years have been culled out. What is cruelty in a particular case may not be cruelty in some other

case on social context judging. Therefore, the Court is required to delve deep.

6. From the other side, Ms P Dhar, learned counsel for the respondent has submitted that the respondent has not been allowed to cross-examine appellant's witnesses and that is apparent from a bare reading of the cross-examination of the witnesses. She has further submitted that though the Family Court has the power to devise its own procedure for adjudication of the dispute but it cannot be said that all procedures would survive the test of reasonableness. She has stated that there was no opportunity at all for the respondent to cross-examine the witnesses as adduced by the plaintiff and no steps were taken for introduction of the documents in the open court on providing reasonable opportunity to the respondent for raising any question relating to admissibility or relevance. Thus, this Court is constrained to hold that despite several judgments passed in this regard as to providing adequate opportunity to the other side for cross examining the witnesses but again here is a case where such opportunity was denied.

7. On scrutiny of the records as well as on appreciating the submissions made by the learned counsel for the parties, this Court finds that no effective opportunity was granted for cross-examination of PW 1 and PW 3. It further appears from their cross-examination that the Court has only noted after completion of the examination-in-chief that, "It is not a fact that I deposed false". It appears that the cross-examination was not carried out for exposing the truth, rather having written that "It is not a fact that I deposed false" the examination of the witnesses was declared closed.

8. We are shocked to observe the way the family court has recorded the cross-examination. At this juncture Ms Dhar, learned counsel has submitted that the defendant has been seriously prejudiced for denial of the opportunity to cross-examine. Therefore, it is apparent that without such opportunities granted to the defendant the impugned judgment and decree has been passed. There are several judgments, as stated, where this High Court has rendered in unequivocal terms that the right to cross examine is a fundamental facet of the fair trial and component of natural justice. We are constrained to observe further that the way the cross-examination has been done and recorded by the court of the Judge, Family Court is wholly unacceptable in terms of the doctrine of natural justice. Apart that, the way the documentary evidence has been introduced in the records has not been introduced following the proper procedure as the respondent, defendant in the suit, did not have any opportunity of raising any objection against admissibility or relevance of the documentary evidence. These are material irregularities in the proceeding those have incapacitated the court to arrive at the correct finding on the fact. It is trite that fair procedure is a fundamental facet of the rule of law. Even though the Judge, Family court has the statutory right to devise its own procedure but he cannot devise such procedure, which is not in consonance with the principles of natural justice.

9. Hence, this Court has no hesitation to hold that the impugned judgment is liable to be set aside and accordingly the judgment and decree dated 18.02.2013 are set aside for the limited purpose of remanding the matter back for re-commencing the inquiry

after affording opportunity of cross-examination to the respondent, defendant in the suit, and to allow the respondent, the defendant No. 1 in the suit, to raise any objection in regard to the admissibility or relevance of documentary evidence. Hence, this matter is remitted for fresh consideration in the manner as directed above.

10. In the result, this appeal stands partly allowed, to the extent as indicated above. Draw the decree accordingly. Send down the LCRs forthwith with a copy of this order.

11. Before parting with the records, the Judge, Family Court, Agartala, West Tripura is directed to complete the entire proceedings within six months from the date of receipt of the case records along with a copy of this order.

JUDGE

JUDGE

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