

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.82 of 2017

=====

Krishna Kumar Chaudhary @ Kishun Chaudhary S/o Late Dev Narain Chaudhary, Resident of Mohalla- Bag Taj Khan @ Pokhara, Ward No.17, Nagar Parishad-Hajipur, P.O.-Hajipur, P.S.-Hajipur Town, District-Vaishali.
... .. Appellant/s

Versus

Smt. Surekha Devi W/o Krishna Kumar Chaudhary @ Kishun Chaudhary, D/o Late Ram Nath Chaudhary, Present Address-through Sri Trilokinath Chaudhary, Jail Chowk, P.O.-Muzaffarpur, P.S. Muzaffarpur, District-Muzaffarpur
... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Satya Prakash Sinha, Advocate
For the Respondent/s : Mr.

=====

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN
and
HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT
(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 05-02-2018

Heard learned counsel for the appellant on the point of admission of this appeal.

This appeal is directed against the judgment dated 7.02.2016 passed by the Principal Judge, Family Court, Vaishali at Hajipur. A Divorce Case No.216 of 2012 was filed by the petitioner-appellant for dissolution of marriage with the sole opposite party-respondent.

According to the case of the petitioner-appellant, he was married with the opposite party-respondent on 20.01.2001 at Mahavir Temple, Police Line, Mali Ghat, Muzaffarpur. The wife



came with him at her matrimonial place. On 28.01.2001 the brother of the opposite party-respondent came for 'Vidai' of his sister and took her to her parents' house. It is stated in the petition that the stay of opposite party-respondent in her matrimonial house was pleasant for the petitioner and his family members. Subsequently, on 14.04.2001, the petitioner brought his wife back at his place, however, this time, during the stay of the respondent at the house of the petitioner-appellant was not good in comparison with her earlier stay as her nature appeared totally different and changed. It is alleged that on 28.04.2001, without any rhyme and reason and in the absence of the petitioner-appellant and without his consent, she went to her 'Naihar' with her brother along with all her belongings. The petitioner-appellant, thereafter, made several attempts to bring her back but she was not ready. Subsequently, the petitioner-appellant came to know that the opposite party-respondent was having illicit relation with some other person and out of that relationship, she gave birth to a female child even before completion of nine months after the marriage. It is further alleged that the opposite party-respondent had sold the joint family property through registered sale deed dated 27.03.2012 though a building was standing thereupon and was let out to a



person and a case for eviction was filed as the place was required for personal necessity of the petitioner-appellant himself.

Upon the aforesaid factual matrix, the concerned matrimonial case was filed. The opposite party appeared and filed written statement in which she admitted the marriage but had denied that her child was from another person and was born before completion of nine months of her marriage. She has alleged that after birth of female child, the petitioner-appellant along with his family members became angry and had shown hatred towards her. She has further stated that the land which she had sold was given to her under “*Bakhudaha Batwara*”.

On appreciation of the aforesaid pleadings of both the parties, following issues were framed by the court below :-

(I) Whether this case is maintainable?

(II) Whether the petitioner has got valid cause of action to bring this suit?

(III) Whether the O.P. has been cruel towards the petitioner?

(IV) Whether O.P. had illicit relation with another person before her marriage and she was pregnant at the time of her marriage and gave birth to a female child within the 9 months of her marriage?



From perusal of the aforesaid, apparently the issue nos. (III) and (IV) were the main issues for adjudication of the case.

From perusal of petition/complaint, it appears that the petitioner-appellant has alleged that the opposite party-respondent had given birth to a female child even before completion of nine months and he later on came to know that she was having illicit relationship with some other person, however, the name was not disclosed either in the pleading or in his deposition.

Now, it has to be seen as to whether such allegation can be raised for grant of decree of divorce under Section 13 (1) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act'). For better appreciation, the provision contained in Section 13 (1) of the Act are extracted as under :-

13. Divorce- (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

[[\(i\)](#) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

[[\(ia\)](#) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

[[\(ib\)](#) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

[[\(ii\)](#) has ceased to be a Hindu by conversion to another religion; or



[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

From perusal of the aforesaid provision in particular Section 13 (1) (i) of the Act, it appears that on the ground of voluntary sexual intercourse with any person other than his or her spouse but after solemnization of marriage, the same can be dissolved by a decree of divorce. However, in the present case, the petitioner-appellant has not alleged that after solemnization of marriage, the opposite party-respondent was leading an adulterous life rather he has stated that before the marriage she was in illicit relationship with somebody and a female child was born from that relationship even before completion of nine months after the marriage.

Thus, a question would be as to whether on such allegation which has been made in the plaint/petition regarding birth of a child prior to nine months from the relationship before marriage, a decree of divorce can be granted under Section 13 (1) (i) of the Act? The answer has to be in negative as there is no provision available not only in Section 13 (1) of the Act but in the entire provisions contained in Section 13.



However, on such ground, the petitioner-appellant could have filed a petition for declaring that the marriage between the petitioner-appellant and the opposite party-respondent was void on the ground that the respondent at the time of marriage was pregnant by some person other than the petitioner, i.e., Section 12 (1)(d) of the Act. Then the question would arise as to why the petitioner did choose to file a petition for grant of decree of divorce but not any petition under Section 12 of the Act? Answer lies in the provision contained in Section 12 (2)(b) of the Act. The relevant provisions are extracted as under :-

12. Voidable marriages -(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

[(a) that the marriage has not been consummated owing to the impotence of the respondent; or]

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner 13 [was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)], the consent of such guardian was obtained by force 14 [or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent]; or*

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-



(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if-

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of 15 [the said ground].

The aforesaid provision contained in Section 12 (2) (b) of the Act provides that the ground specified in clause (d) of sub-section (1), cannot be entertained unless the Court is satisfied that at the time of marriage the petitioner was ignorant of the facts alleged. However, in the present case, the petitioner-appellant has stated in his petition that the child was born even prior to nine months from the date of solemnization of marriage, therefore, he was aware of this fact but he did not take any step immediately even after the birth of child. Some of the allegation has been made by him while being examined as P.W. 1.



It appears therefrom that though he was aware at the time of birth of the child itself that birth had taken place before completion of nine months but he did not raise the issue immediately and filed a case for grant of divorce after about 11 years of marriage for the birth of the child. He has not given the vital dates either in his pleadings or in his evidence that on which date the female child was born and further that on which date he came to know that the child was born with some other person. Thus, in our opinion, it gives a fatal flaw as even Section 12 (2) (b) (ii) bars filing of any case in such a situation if the same is not filed within a year from the marriage.

Thus, in our view, had the case been filed even under Section 12 (1) (d) of the Act for declaring the marriage to be void, that would also nose-dived in view of the fact that it was not filed within one year of marriage and also due to the failure on the part of the petitioner to disclose the date of birth of the child and also the date of knowledge of the fact that the child was born from the relationship with some other person.

Having regard to the aforementioned facts and circumstances, we are of the considered opinion that a case under Section 13 (1) of the Act cannot be filed on such allegation having been made by the petitioner-appellant as there



is no provision for grant of decree of divorce on such allegation. That apart, even the petitioner has not been able to disclose the name of such person with whom he is alleging that there was relationship prior to the marriage. This is a further vital flaw in his case.

Coming to the issue of cruelty, it has been held by various Courts in their eloquent pronouncements that mere allegations made in the pleading would not be sufficient. The instances of such cruelty has to be given in the pleadings which would be required to be substantiated or corroborated in the evidence led by the party concerned.

From perusal of the plaint and the deposition of P.W. 1 (the petitioner-appellant), it does not appear that any instance of cruelty was cited by him. Not only that, the evidence is merely repetition of the pleadings. Though the witness has not been cross-examined but the question of cross-examination would come only if something substantial comes in the examination-in-chief. In the case in hand, no instance having been disclosed causing physical or mental cruelty at all, in our view, there was no occasion for the other side to cross-examine him on that point. It has been held by a Division Bench of this Court in **Seema Versus Suman Kumar Sinha and others [AIR 2016**



Patna 126] that merely repetition of the allegation made in the plaint while being examined in-chief cannot be considered as a piece of evidence.

Thus, it has to be held that the petitioner-appellant has failed in a manner to produce cogent evidence on the point of cruelty and, as such, there was no occasion at all for the opposite party-respondent to cross-examine him on that issue.

Apart from the above, it appears from the disclosure made in the plaint as well as evidence of P.W. 1 that nothing was done for eleven years and the present case was filed only after the wife had sold certain properties which she claims to have been given to her in partition, whereas, the petitioner-appellant's case is that before partition of the joint family property, his wife did not have power to alienate the joint family property. However, that may be a case to be tested in a civil court of competent jurisdiction by filing a proper suit but divorce cannot be granted on that ground.

Accordingly, in view of the aforesaid discussions, we do not have any hesitation in holding that though the P.Ws. 1 and 2 have not been cross-examined by the opposite party-respondent but the petitioner-appellant himself has completely failed to substantiate his allegation made in the plaint. Even on ground



that there was some relationship prior to marriage and the child was born prior to nine months, decree of divorce cannot be granted as Section 13 (1) of the Act clearly lays down that divorce can only be granted if there is voluntary sexual intercourse with any person other than his or her spouse after solemnization of marriage. Further, even if it is assumed that case was filed under Section 12 of the Act, the marriage cannot be declared void for the reason that neither the date of birth of the child was disclosed nor was the date of knowledge of such relationship disclosed. That apart, the name of the person with whom the wife was in alleged relationship, has also not been disclosed. Lastly, the suit was filed after about 11 years of marriage.

In the result, we do not find any reason to admit this appeal and, as such, the same is dismissed.

(Dr. Ravi Ranjan, J)

(Prakash Chandra Jaiswal, J)

V.K.Pandey/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	06.03.2018
Transmission Date	06.03.2018

