

Smt. Radha Majumder
-vs.-
Sri Arun Kumar Majumder

Mr. Pradip Kumar Roy
Ms. Shraboni Sarkar
... for appellant wife

Mr. Debabrata Acharyya
Mr. Sital Samanta
... for respondent husband

The appeal is by the wife against judgment and decree dated 3rd February, 2012 in Mat. Suit no. 26/2002.

Mr. Roy, learned advocate appears for appellant and submits, his client was involved in financial circumstances that prevented her from fully contesting the suit and thereafter promptly preferring the appeal from impugned judgment and decree, gone against her in dissolving the marriage. Since the decree says it was on contest, his client preferred the appeal. Reported delay was 986 days, condoned by coordinate Bench on order dated 21st June, 2018. He submits, his client had stated in the application for condonation of delay that she had approached High Court Legal Services Committee and he had been appointed. Steps were thereafter taken for filing the appeal.

Referring to impugned judgment he submits, the allegation of cruelty was erroneously held to have been proved. Persons named were not produced as witnesses. Extreme financial hardship had prevented his client from

fully participating at trial but that by itself did not justify finding in impugned judgment and decree that the allegation was proved. He relies on following sentence in impugned judgment.

“The absence of cogent proof of illicit connection by the respondent is nothing but a mental cruelty against him by the respondent as defined u/s. 13(i)(ia) of the Hindu Marriage Act, 1955.”

Fact to be proved was erroneously taken to be allegation of illicit connection of the husband. His client had not alleged so in her written statement. There was no question of her requirement to prove as fact, that which was not alleged or pleaded by her. He also refers to paragraphs 28 to 34 in the petition, dealt with by his client in paragraph 14 of the written statement. Impugned judgment and decree should be reversed. On query from Court, he submits, initially Rs. 2500/- per month was decreed as permanent alimony. The same was subsequently increased to Rs. 5000/- per month. His client is receiving the alimony as paid month by month.

Mr. Acharyya, learned advocate appears on behalf of respondent husband and submits, the suit was filed in year 2004. Dilatory tactics were adopted by appellant. His client gave evidence and was cross-examined. The cross-examination could not shake his evidence. Such unshaken testimony was corroborated by the daughter. The daughter is married and living happily in her matrimonial home. Grave and serious allegations against his client were made regarding carrying on with

several women, including, his daughter. This part of the evidence is also corroborated by the daughter. It is because the daughter took the Box and corroborated unshaken testimony of the husband, appellant did not cross-examine her, nor turn up to give evidence and be cross-examined. In the circumstances, further corroboration was not required and the Court below correctly appreciated the evidence to find cruelty inflicted on his client. His client has allowed appellant to stay in his flat and is regularly paying her enhanced permanent alimony. Eighteen years of separation has happened and there should not now be reversal of impugned judgment and decree.

He relies on judgments of Supreme Court.

i) **Adhyaatmam Bhaamini vs. Jagdish Ambalal Shah** reported in **(1997) 9 SCC 471**, paragraphs 4 to 6. He submits, facts were similar where appellant wife (in that case) had argued in person saying, inter alia, she suddenly fell ill and was not in a position to attend the Court. She had made request to one advocate to submit application for adjournment. The application was not found in the record. Supreme Court said that there still remained the question whether there was sufficient justification for failure on the part of appellant to not appear before the family Court on subsequent dates. In this case, absence of appellant before the Court below was not even backed up by application for adjournment. In the circumstances, her absence must be seen as omission

to cross-examine her daughter and thereafter tender herself as witness. That has been the presumption drawn by the Court below.

ii) **G. V. N. Kameswara Rao vs. G. Jabilli** reported in **(2002) WBLR (SC) 491** paragraphs 8, 10, 12, 15 and 18. He submits, appellant, on receipt of notice of the petition for divorce, had made complaint under section 498A of Indian Penal Code, 1860. This, by itself, amounts to cruelty as was found on similar facts given in paragraph 8 of **Kameswara Rao** (supra). He submits, in paragraph 18 of the judgment, Supreme Court said as follows:

“We do not think that this is a case, where the appellant could be denied relief by invoking Section 23(1)(a) of the Hindu Marriage Act. On the other hand, various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant subjected to serious traumatic experience which can safely be termed as ‘cruelty’ coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act”

There should be no interference in appeal but confirmation of impugned judgment and decree.

We have the situation where appellant obtained legal aid in preferring the appeal. The application for condonation of delay, being part of the record, we have looked at it. She said in the application that she was seriously ill and in extreme financial crisis, for which she

could not attend the Court for hearing of the case and was unaware of passing of impugned judgment and decree. On recovery she approached High Court Legal Services Committee.

As aforesaid, the coordinate Bench found fit to accept her causes for the delay and condoned the same. Legal Services Authority provided her with assistance. The assistance was to enable her to file the appeal. As such, we must adjudicate the appeal on the materials that were there before the Court below.

Respondent's contention that reckless allegation against him was made by appellant to outsiders did not find corroboration by outsider witness, since none was produced by said respondent. Respondent examined himself and his daughter gave evidence as P.W. 2. Letters written by him to Councillor, Officer-in-Charge of Sarsuna Investigating Centre, Superintendent of Police, Secretary in the Labour Department, Government of West Bengal, Officer-in-Charge of Thakurpukur Police Station and marriage invitation card of his daughter's marriage were tendered as exhibits. The oral evidence was considered.

Our adjudication on facts need necessarily be confined to allegations made in paragraphs 28 to 34 in the petition. Allegations are firstly regarding appellant having taken up a 9.00 A.M. to 9.00 P.M., job to be independent as alleged by respondent. Consequently, she became ill. It is respondent's evidence that he put pressure on appellant to leave the job. Appellant in her

written statement said respondent forced her to work in a sales office, to earn money to meet family expenses. There was no corresponding suggestion given to respondent, in cross-examination. It appears that appellant took up the job and respondent caused her to leave it. On this count, we disbelieve appellant.

The next allegation of the husband is of an incident in July-August of 2003 regarding appellant visiting respondent's office and informing Committee of the Housing about, inter alia, him maintaining illicit relationship with the daughter. There is allegation that persons of the Housing came to the residence as a consequence. Appellant in her written statement admits that on one occasion she went to petitioner's office but, to meet him. She did not deal with the allegations regarding her approaching the Housing Committee members and some people thereafter visiting the residence. The daughter made corroborating allegation in her evidence-in-chief. There are some statements in her affidavit-in-chief, which are hearsay. The parts of her affidavit that can be attributed to be her evidence is in corroboration of what her father said in the petition, his affidavit-in-chief and from the Box, in cross-examination.

Mr. Roy is correct in his submission to say that the trial Court erroneously found absence of cogent proof of illicit connection by the husband, as alleged by appellant, amounting to mental cruelty against him. We read the sentence in context of the learned judge dealing

with issue no. 2 being – ‘*is the respondent guilty of cruelty?*’ It appears the Court below found, inter alia, as follows:

“Furthermore the case of the petitioner is totally corroborated by the testimony of her married daughter Sikha Mazumdar who stated on oath against mother/respondent as per plaint of the petitioner and also stated that she became ill due to torture by her mother/respondent and also physically injured by her mother/respondent.”

The Court said, as per quote relied upon by Mr. Roy, on analysis of the evidence. It does appear that allegation of illicit relationship or affair was made by appellant against respondent. In that context, the sentence relied upon by Mr. Roy tells us that the wife had made reckless allegation against the husband, amounting to cruelty.

We accept that the judgments relied upon by Mr. Acharyya are applicable to the facts and circumstances of the case and are in aid of his client.

In view of above, we are convinced that there is no scope to interfere with impugned judgment and decree. The appeal is found to be without any merit and the same is dismissed.

(Arindam Sinha, J.)

(Suvra Ghosh, J.)