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Ct-08

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FA 435 of 2009

with

**I.A No. CAN 3 of 2017(Old No. CAN 10794 of 2017)
CAN 4 of 2021**

**Sri Ashit Kumar Das @ Asit Kumar Das
Vs.**

Smt. Kalpana Das

Mr. Suprobhat Bhattacharyya
Mr. Dilip Kumar Chatterjee
Mr. Prabir Chatterjee
... For the Appellant

Mr. Sourav Sen
Ms. Sumita Das

... For the Respondent

This appeal has arisen out of the judgment and decree dated 15th September, 2008 passed by the learned Additional District Judge, 2nd Court, Hooghly in Matrimonial Suit No. 110 of 1993.

The matrimonial appeal is at the instance of the husband. The decree under challenge was based on a limited remand by which an opportunity was given to the appellant/husband to amend the plaint and substantiate his claim on the ground of cruelty. After the order of remand, amendment was allowed to the original plaint by way of insertion of paragraphs 13A to 13E. The said paragraphs are given below:-

“13A) That the entire contents in para 16 of the Written Statement beside the portion that “parties were married on the 25th day of Falgoon 1394, B.S at Bally in the house of the brother of the Respondent. Thereafter they began to live as husband and wife in the house of the husband and a son was born on

04.06.1989 out of the wedlock”, are out right false, concocted and scandalous too and is denied. The respondent wife is put to strict proof thereof with cogent evidence. It is false and concocted to say that after marriage it was seen that the petitioner used to lead very objectionable life with another lady. Although he was posted at Chinsurah but in the name of “Special Job”, “Urgent job”, etc. he used to spend night outside so that he could live with another woman. This fact was known to many and inspite of all sincere effort of the respondent she could not amend the habit of her husband. There was chaos many time. Well wishers advice also did not work. Later the petitioner was transferred to Sonarpur but he did not take his family there, on the other hand, threatened to kill her if she would press or attempt to go there. The statements of rest portion of the said para is also not true and is denied by the petitioner and the respondent wife is put to strict proof thereof.

13B) That the said false accusation of adultery and it's publicity to local people by the respondent wife and also anonymous letters to this effect to the employer of the husband petitioner from her end caused the life of the petitioner husband miserable which also affected the reasonable happiness of his wife and brings down the employee husband in the estimation of his employer and the same reflects also on his career and promotion opportunities.

13C) That the said false accusation of adultery had shocked and agonised the petitioner husband mentally and lowerdown him and his family members too in the eye of all concern of the society and as a consequence there of, it caused extreme mental distress and consequent detriment to health and mind of the petitioner.

13D) That these sustained course of conduct spreading scandals by the respondent wife against the petitioner husband renders their matrimonial bond beyond repair.

13E) That such false assertion and these sustained course of calculated scandals treatment towards the petitioner husband by the respondent wife was willful and amounts to cruelty towards the husband petitioner which the petitioner husband could not in the circumstances be called upon to endure and there is no feeling or emotions left in the mind and sole of the petitioner for the respondent wife anymore and as such continuation of marital alliance for name sake will only prolong his mental agony and affliction because of the fact that marriage is in truth come to an end and has now become a mere shell.”

Surprisingly, the husband did not adduce any evidence in support of the amended pleading.

Learned counsel appearing for the appellant tried to lay the foundation of the case of the appellant on the basis of the cross-examination of the respondent.

In her evidence the respondent/wife on 1st August, 2008 has stated that she came to know that her husband had an illicit relationship with a lady, name Rita. She found them in a compromising position. The evidence of illicit relationship appears to have been corroborated by OPW4 and OPW5, who happened to be neighbours of the appellant.

The appellant/husband since prayed for divorce and not the respondent/wife, as such, there was no requirement for her to implead Rita and claim for divorce on the ground of cruelty and adultery. If the said facts are proved, as alleged by the wife, certainly it amounts to cruelty. However, on the basis of preponderance of evidence, we find that the wife has substantiated her allegation by leading positive evidence, on the other hand, no evidence was led by the husband in support of his pleading in paragraphs 13A to 13E of the amended plaint.

It is elementary that he who asserts the facts is to prove the same. It was incumbent upon the husband to lay the foundation for the allegation against his wife to obtain a decree of divorce on the ground of mental cruelty. It would not depend on the wife's version unless the allegation made by the wife in the pleadings are found to be completely unmeritorious and unsubstantiated. When a divorce proceeding is opposed by the wife in which she alleged adultery and/or cruelty of the husband unless the court finds it to be a false assertion and if it goes the husband may not get a decree for divorce.

However, the husband has claimed divorce on the ground of cruelty alleged to have been inflicted by the wife by adverting to certain

allegations. It is for the husband to establish the set of facts pleaded in support of cruelty during trial. A false assertion of adultery certainly tantamounts to cruelty. However, the husband having failed to prove the assertion made in the amended pleading of cruelty, the evidence of the wife read with other evidences of the neighbours, OPW 4 and OPW 5 substantially proved the allegation of the wife that her husband had an illicit relationship with a lady, which allegations cannot be said to be unfounded or baseless.

When the onus to prove having not been discharged by the husband and the preponderance of evidence of illicit relationship against the husband has been established during the trial, we are not inclined to interfere with the decree passed by the Trial Court.

The appeal being FA 435 of 2009 fails and is hereby dismissed.

The affidavit filed in terms of the order dated 6th June, 2022 is taken on record.

The contents of the affidavit are deemed to have been denied by the respondent.

Any arrear maintenance amount found not to have been paid might be released by levying the execution case.

In view of dismissal of the appeal, CAN 10794 of 2017 and CAN 4 of 2021 is also disposed of.

(Siddhartha Roy Chowdhury,J.)

(Soumen Sen, J.)

