

**Abhishek Roy Barman
Vs.
Moumita Roy Barman nee Hati**

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Mr. Partha Pratim Roy
Mr. Sarbananda Sanyal
Ms. Poulami Chakraborty
... For the Appellant

Mr. Sourav Mukherjee
Mr. Emon Bhattacharyya
Ms. Pooja Sah
Mr. Teesome Das
... For the Respondent

The appellant is aggrieved by the judgment and decree passed by the learned Additional District Judge, 1st Court at Sealdah, South 24 Parganas in Matrimonial Suit No. 69 of 2017.

The appellant is the husband. The appellant has filed a suit for divorce on the ground of cruelty. The marriage was solemnised on 7th November, 2013 followed by social marriage on 20th January, 2014. The wife visited her matrimonial home on 23rd January, 2014.

The appellant alleged that the wife/respondent deserted him on 14th May, 2015. The suit was instituted on 19th December, 2015 on the ground of cruelty and desertion. The wife filed the written statement but did not adduce any evidence. The case made out by the plaintiff/appellant before the trial court in short was that the respondent was stubborn and adamant, rough, ruthless, unmannered, vulgar, liar, selfish and ill-cultured. In justification of the same the plaintiff has stated in the plaint as well as in the affidavit-in-chief which is a replica of the plaint that the wife never used to cook and

perform any responsibility towards the husband and her in-laws. She used to misbehave with the old and ailing mother-in-law and very often she would threaten to commit suicide. The respondent was indifferent towards the appellant and she had continuously denied the company of the husband. Her behavior towards him was one of hatred and abhorrence. She abstained from sexual intercourse without reasonable cause. The respondent/wife one fine morning on 14th May, 2015 on 14th May, 2015, on some flimsy pretext of going to office, left her matrimonial home without informing anyone and since then she has been living at her parental house. These are the essential grounds mentioned in the plaint as well as in the affidavits-in-chief filed by the plaintiff and his mother for divorce on the ground of desertion and mental cruelty.

The respondent filed her written statement in which she denied all the allegations with regard to the desertion. She stated there that she was driven out from the matrimonial home.

The respondent did not contest the proceeding. The suit was heard ex parte.

The learned trial Judge dismissed the suit on the ground that the plaintiff had failed to prove desertion and cruelty.

Mr. Partha Pratim Roy, learned counsel appearing for the appellant, has submitted that the trial court has made out a third case for the parties.

It is submitted that the learned Trial Judge completely disregarded the fact that the respondent, although had the opportunity to cross-examine the plaintiff and his mother, who happens to be the mother-in-law of the

respondent, deliberately stayed away and did not participate in the proceeding.

Our attention is drawn to paragraph 42 of the written statement where it has been alleged by the respondent/wife that the plaintiff's mother is a "cantankerous lady grossly involved in personal gratification of demanding and hurting the respondent. With each passing day after the marriage the plaintiff's mother would make unreasonable demands and when her wishes were not fulfilled she would be angry".

Mr. Roy submits that the aforesaid allegation has not been proved. Mr. Roy has referred a division bench judgment in ***Kishan Chandra Modak v. Ava Bhadra Modak***, reported at **AIR 2022 Cal 219** to argue that unsubstantiated allegations constitute cruelty.

Mr. Roy submits that uncorroborated testimony of the plaintiff and his mother was sufficient for the court to arrive at a finding of cruelty and desertion and the suit ought to have been decreed.

Mr. Sourav Mukherjee, learned counsel appearing for the respondent, submits that irrespective of the fact that the defendant did not adduce any evidence was required to prove its case and since he was unable to discharge his burden of proof the learned Trial Judge has rightly disbelieved the plaintiff and dismissed the suit.

Our attention is also drawn to the legal notice dated 20th August, 2016 to argue that in the said notice the plaintiff has offered mutual divorce, as according to the plaintiff the marriage was unworkable and irreconcilable. The later letters disclosed in the petition are all written

subsequent to the filing of the suit with a view to make out a case for divorce. These letters subject to the filing of the suit are required to be ignored and cannot be the basis of cruelty or desertion.

We have carefully read the judgment under appeal. Learned Trial Judge has accurately summarised the facts. The case of the husband was disbelieved on the ground that the plaintiff had failed to produce any cogent document with regard to the cruelty, torture caused by the wife to the husband. It was observed that the documents with regard to the allegation of cruelty from the side of P.W 2 was also not corroborated or proved in accordance with law. The trial court has taken into consideration that the GDE was never produced and the allegations in the plaint have not been proved. The learned Trial Judge has also disbelieved the plaintiff that the respondent left her matrimonial home without reasonable or just cause. Mr. Roy was critical about the judgment as according to the learned Counsel the learned Judge did not apply his judicial mind to facts and evidence on record and has proceeded on his own notions of marriage. It is submitted the attempt to clarify the concept of marriage has no relevance to the fact in issue and such observation appeared to have influenced the learned Judge in dismissing the suit.

It is true that in the judgment the learned Trial Judge has mentioned certain principles that are expressed in a marriage, but we are unable to accept the submission of the learned counsel for the appellant that the judgment is based on such principles alone.

In a case of desertion it has to be established by the plaintiff that the defendant has left the matrimonial home without any just cause or excuse. We are unable to find out from evidence, which would suggest that the wife has deserted intentionally. If the husband or the mother-in-law hurts the sentiment of the respondent, which if unbearable, then the respondent is entitled to leave matrimonial home at the cost of her comfort and well being. It has to be appreciated that in a marriage the main sacrifice is made by the wife, as she is brought to a new environment and is expected of her to adjust to such a new surroundings. In this regard, it is her in-laws who are expected to make her comfortable and treat her as part of the family. It is more than the husband the wife has to sacrifice to give effect to a happy marriage. The husband and his family members are expected to treat her with respect, dignity and care. On the basis of the evidence it is very difficult to come to arrive at a definite finding who is responsible for the breakdown of the marriage. The court relied upon the evidence and applying the preponderance of probabilities arrived at its findings. In the instant case, we find from record that in the legal notice dated 20th August, 2016, it is alleged that the respondent was reluctant to stay with her in-laws and has expressed several times her intention not to live conjugal life with the husband. Finally one fine morning making some flimsy pretext, while going to office, the respondent left her matrimonial home without any intimation to the husband. The plaintiff made several requests to the respondent to return and stay at the matrimonial home but the

respondent refused to any such request. It is stated in the said letter that having regard to the mal adjustment, the respondent wanted mutual divorce to which the plaintiff did not agree. However, having regard to the fact that the marriage had become unworkable and irreconcilable, request was made to the respondent to give draft copy of mutual divorce. In reply to the said notice, the respondent has categorically denied the allegations made against her with regard to her conduct alleging cruelty to her in-law and she had never asked for divorce. She left on 14th May, 2015. She left for office after visiting a Doctor. It was alleged that on the instruction of the plaintiff the respondent did not return to her in-law's house and contact any relative of the plaintiff as the husband and his family members did not want her to communicate with them. It is stated that after one month from 14th May, 2015 she along with her relative went to the matrimonial home to pursue her husband and her in-laws to allow her to stay at her matrimonial home, but the relative of the plaintiff did not allow her and they rather insisted her for mutual divorce. It is also stated that the husband without informing the respondent left for Hariyana for some official assignment and in spite of several efforts being made to contact with the husband, the respondent was not successful. She was always ready to go to matrimonial home to live with the plaintiff. These letters are all prior to the filing of the suit. They carry high evidentiary value, that are required to be assessed in the backdrop of the pleadings and evidence on record. The legal notice did not mention any act of cruelty. Mere

stubborn attitude or reluctance to cook cannot constitute cruelty.

Cruelty under matrimonial law consists of series of acts and conduct so grave and weighty as to lead one to the conclusion that one of the spouse cannot reasonably be expected to live with the other spouse. It must be more serious than the ordinary wear and tear of married life. Cruelty is a mixed question of law and fact. Cruel treatment can be inferred from the entire course of conduct and incidents showing display of temperament, emotion and perversion by one spouse if established can give an impression to the court that it is no more possible to live with a happy conjugal life with the other spouse. Where there is proof of a deliberate course of conduct on the part of one, intended to hurt and humiliate the other spouse and such a conduct is persisted cruelty can easily be inferred. In the instant case, we do not find any such grave or deliberate course of conduct on the part of the wife, which can constitute cruelty. It is obvious that the letters produced by P.W 2 are after the filing of the suit and brought into existence for the purpose of the suit. Moreover, the allegations made therein also could not be proved.

In so far as the desertion is concerned, if the wife is not comfortable at her matrimonial home that means mere separate residence by wife would not constitute desertion. In desertion it has to be a positive and intentional act of abandoning of one spouse by the other without other's consent or without reasonable excuse. In the instant case the plaintiff made series of allegations against the wife without being able to

prove the ground of cruelty. The plaintiff could not prove that the respondent has given any threat to commit suicide or assaulted the plaintiff or misbehaved with the relatives of the plaintiff or insulted the parents of the plaintiff or insisted the plaintiff to leave separately from his parents. It is interesting to note that the wife is a working lady and there is no legal evidence of insanity or abnormal behaviour of the respondent alleged by the plaintiff and the plaintiff is required to prove such allegation by producing documents and evidence. In fact, these allegations having not been proved may constitute cruelty on which the wife could have asked for divorce. The purpose of Hindu Marriage Act is not to encourage divorce but to ensure that the institution of marriage is respected and the spouse live with dignity, respect and care. The divorce is the last resort. Of course, the institution of marriage cannot be a guardian knot. The Hindu Marriage is now codified. The concept of marriage after enactment of the Hindu Marriage Act is no more a sacrament and now it is contractual. The Act set out the circumstances when a spouse can seek divorce or judicial separation. However, in the facts and circumstances of the case the plaintiff has failed to prove cruelty and desertion. The decision in ***Kishan Chandra Modak*** (supra) is not applicable in the instant case as there is no false complaint made by the wife. It is true that the wife may have stated in her written statement that she was kept out of her matrimonial home which is contrary to her stand. In the reply to the legal notice but that by itself would not prove that the husband has

proved cruelty or desertion. The wife in the said letter has categorically stated that she is willing to stay at the matrimonial home and had made endeavour to return.

On such consideration, we do not find any reason to interfere with the judgment passed by the learned Trial Judge.

The appeal being FAT 133 of 2018 is thus dismissed without any order as to costs.

(Uday Kumar,J.)

(Soumen Sen, J.)

