

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE SOUMEN SEN
&
THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

FA 161 of 2013
With
CAN 1 of 2016
(Old CAN 3621 of 2016)

Sri Kishan Chandra Modak
Vs.
Smt. Ava Bhadra Modak

For the Appellant	:	Mrs. Sohini Chakraborty Ms. Prajaaini Das
For the Respondent	:	Mr. Prabal kumar Mukherjee, Sr, Adv., Mr. Suhrid Sur Mr. Aditi kumar
Heard on	:	20 th April, 2022
Judgment on	:	29 th April, 2022

Ajoy Kumar Mukherjee, J. :

1. This first appeal is at the instance of a husband in a suit for divorce and is directed against the judgment and decree dated 21st December, 2012, passed by the learned District Judge, Purulia, in Matrimonial Suit No. 115 of 2011, thereby dismissing petitioner's/Appellant's prayer for dissolution of marriage.

Being, dissatisfied, the husband /appellant has come up with the present appeal.

2. Appellant /husband filed Mat Suit No. 115/2011 in the court of the District Judge at Purulia for dissolution of marriage by a decree of divorce. The case made out by the petitioner in short is that parties married according to Hindu rites and customs on 01.12.2009. Few days after marriage respondent started various sorts of physical and mental torture upon the petitioner. The respondent used to leave the house of the petitioner voluntarily and used to go her parent's house regularly. Respondent had earlier love affair with some other person, which petitioner requested her to forget, but in vain. Petitioner noticed some days after marriage that in the midnight the respondent was talking over telephone secretly and later on petitioner came to learn that the respondent is living an adulterous life with one person. On being protest by the petitioner, respondent left her matrimonial home without permission of petitioner and since then, she is residing in her paternal house. Petitioner made several attempts to bring her back but the respondent refused to resume matrimonial tie.

3. On the basis of prayer made by petitioner before protection officer, Purulia on 25.07.2010, both the parties were called by protection officer Purulia on 08.09.2010, but before appearing to the protection officer, Purulia, the respondent lodged an information with the Purulia (Town) P.S. and on the basis of which Purulia (Town) P.S. case No. 133 of 2010 dated 07.09.2010 under section 498/406 I.P.C. was started against petitioner, his mother, Sister-in-law and brother of petitioner.

4. In view of above marital tie has been broken down and the existence of marital tie is nothing but an agony of both the parties. Accordingly petitioner has prayed for dissolution of marriage by a decree of divorce under section 13 of Hindu Marriage Act. Petitioner by way of filing certified copy of judgment passed in G.R. case No. 941/2010, which was started on the basis of Purulia (T) P.S. FIR No. 133/2010 dated 07/09/2010, prayed for admitting the same in evidence under the provision of Order XLI, Rule 27 of Civil Procedure Code. It appears that petitioner in paragraph 17 of plaint has made reference of said case in support of his allegation of cruelty allegedly inflicted by the respondent to the petitioner. After disposal of present Mat Suit No. 115 of 2011 by the Trial Court , said G.R. Case No. 941/2010 was disposed of on 07.05.2013 and for which he could not produce the same before Trial Court. Considering the same, prayer for admitting in evidence, copy of Judgement passed in G.R. Case No. 941/2010 by the judicial magistrate, 3rd Court, Purulia, is allowed.

5. The suit was contested by the wife/ Respondent by filing written statement, thereby denying the material allegations made in the plaint. The defence taken by Respondent /wife is that she was facing mental and physical torture within very short period after marriage by her husband and in-laws for no fault of her own. The respondent noticed that there is illicit relation in between her husband /petitioner and his elder brother's wife and on protest, respondent was subjected to severe mental pain and physical torture by the petitioner. The petitioner used to snatch all the salary of the respondent and on protest she was subjected to physical torture by her husband and mother-in-law.

6. In the month of February, 2010, the Respondent became pregnant and on hearing the same, petitioner and all the family members of petitioner started to create pressure upon her for termination of pregnancy. The respondent refused to do the same and on her plea of better treatment and nursing she was kept to the father's house on 06.04.2010 and since then, inspite of several requests, the petitioner did not take her back to her matrimonial home and lastly on 9th August , Respondent had been to Purulia (Town) police station for seeking help for staying with her husband and on the next day petitioner had been to the house of Respondent and taken her back to the house of petitioner.

7. When respondent was staying at her matrimonial home, she received a notice on 06.09.2010 from the office of protection officer and on that day she was not allowed to enter her bedroom by the petitioner when she returned from office and on the next day i.e. on 07.09.2010, in the early morning she was driven from her matrimonial home and on the same day, the respondent had been to the police station again and lodged FIR against petitioner and his family members and on the basis of the same, Purulia (Town) P.S. case no. 133 of 2010 dated 07.09.2010 was started. The respondent gave birth to a male child on 25.10.2010 and it was informed to the petitioner and his family members, but they did not turn up for a single day.

8. Learned Trial Court framed 7(Seven) issues out of which relevant issue no. 2,3,4 are as follows:-

(2) Did the respondent lead an adulterous life?

(3) Did the respondent treated the petitioner/husband with cruelty?

(4) Has the husband deserted the petitioner?

In order to substantiate his allegation, petitioner himself deposed as PW-1 and one Sanjoy Kumar deposed in favour of petitioner as PW-2. Petitioner also proved copy of FIR in connection with aforesaid Purulia Town P.S. case No. 133/2010 dated 07.09.2010 under section 498/406 I.P.C., which is marked as Exhibit -1 on behalf of the respondent. Respondent herself deposed as DW-1, however no document on behalf of the respondent was admitted in evidence.

9. While answering issue No. 2, learned Trial Court held that petitioner did not state with whom the respondent had been living adulterous life and in a compelling situation, if a wife lives at her paternal house then she cannot be blamed and relying upon ***Kamal alies Rita Bhattacharjee vs. Nityagopal Bhattacharjee 95 CWN 445***, Trial Court came to conclusion that the petitioner has levelled false allegation against his wife for leading adulterous life.

10. Learned Trial Court, in response to issue No. 4 observed that it is evident from plaint that since 30.03.2010, the respondent has been living in her parental house and the instant suit filed on 04.08.2011 which is before expiry of statutory period of two years and as such said plea is not maintainable in the absence of evidence that the respondent has deserted petitioner for a continuous period not less than two years immediately preceding the presentation of the case.

11. In respect of petitioner's prayer for dissolution of marriage on the ground of cruelty in terms of issue No. 3, Trial Court noted the cynical conduct of the petitioner towards his wife and son, when petitioner could not even say the

date of birth of his son, which is also demoralizing for a wife. Moreover, without filing a suit for restitution of conjugal rights, petitioner straightway filed suit for divorce which led to draw adverse inference by the trial court and this is also because in a specific question “if your wife intends to stay with you, are you ready to accept her?” to which the petitioner answered—“no because I was tortured both mentally as well as physically by my wife”. This part of evidence, according to trial court clearly indicates that the petitioner had never any intention to bring back his wife to her matrimonial home. Learned Trial Court concluded that it is true that petitioner has levelled an allegation against his wife before police for which FIR was registered, however said G.R. case No. 941/2010 is pending before court and as the subject matter is under judicial consideration, it is quite difficult to say whether there is any substance behind such allegations or not. In view of above learned Trial Court dismissed the matrimonial suit as petitioner failed to prove any of the grounds for divorce as alleged by him in the plaint.

12. With regard to the grounds namely desertion and adulatory against respondent, no serious effort has been made to question the findings of the court below, which has been rightly rejected by the court below. The ground which was pressed before us by Learned Counsel for the Appellant Mrs. Sohini Chakraborty (Nee Bhattacharya) is the ground of cruelty. Mrs. Chakraborty strenuously argued that in view of judgment passed by Judicial Magistrate in G.R. Case No. 941/2010, it is quite clear that respondent lodged serious allegations including character assassination of the husband and for which appellant and his family members had to undergo trial which ultimately

resulted in their acquittal. From the observations made by learned Trial Magistrate in his judgment, it is clear that the respondent treated the petitioner with cruelty and for which he is entitled to get decree of divorce. In this context, Mrs. Chakraborty has relied upon two decisions ***Rani Narasimha Sastry Vs. Rani Suneela Rani (2020) 18 SCC 247*** & ***Soma Banerjee Vs. Subhrojyoti Banerjee (2009) SCC online Cal 1888***.

13. Mr. Probal Mukherjee, learned Senior Counsel for the respondent argued before us that Respondent only given a writing before the police authority for doing the needful so that she can live with her in-laws peacefully which is evident from Exhibit-1 but police had started investigation, treating the same as FIR. Respondent was all along willing to resume matrimonial tie which is evident from her various conduct. Moreover, merely because petitioner and his family members faced a criminal trial Under Section 498A/406 I.P.C., that cannot be said to be a valid ground for holding that such a recourse adopted by the respondent amounts to cruelty. Mr. Mukherjee further argued it is open to everyone to ventilate her grievance before police authority but that cannot *ipso facto* be treated as cruelty.

14. So in the present context we need to only consider as to whether ground of cruelty in terms of section 13(1) (i-a) of the Hindu Marriage Act 1955 has been made out or not. The trial Court has noted the ground of cruelty on the basis of criminal case which set in motion against petitioner and his family members being G.R. Case No. 941/2010, but the trial court refused to rely on the said allegations as said G.R. Case No. 941/2010 was pending for adjudication when the impugned judgment was passed. We are absolutely

agreeable with the argument led by Mr. Mukherjee that mere lodging of complaint or FIR or where acquittal does not occur on merit in a criminal case, it would not automatically lead the court for a conclusion that respondent treated petitioner with cruelty. But at the same time each case has to be judged from its own perspective to see whether aspersions levelled by the wife against her husband and his family members which remains not proved before a court of law and attains its finality (as no appeal preferred against such observations) would amount to insult and cruelty and whether they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering to constitute cruelty.

15. Now first we are to look into the allegations levelled by the wife against her husband and family members in the light of pleadings, complaint, evidence and observations made by the trial magistrate and whether it satisfies the requirement of law to establish ground of cruelty. We are not unmindful to the submission made by Mr. Mukherjee that in the letter of complain marked as Exhibit -1, at the bottom, respondent has prayed for doing the needful so that she can live with her in-laws peacefully but at the same time said Exhibit -1 is subjected as FIR in its beginning . For better understanding as to what are the allegations levelled by respondent against petitioner and her family members, let us reproduce Exhibit-1.

“To

The Officer-in-charge,

Purulia Town Police Station

P.O. & Dist. Purulia

Sub:-F.I.R.

Sir,

I beg to inform you the following facts for sympathetic consideration.

- 1) That I, Smt. Ava Bhadra (Modak), D/o, Manik Chandra Bhadra, am a resident of North Lake Road, Purulia.
- 2) That at present I am working as a GNM staff in Chakaltoa B.P.H.C.
- 3) That I got social marriage with Kishan Chandra Modak s/o, Late Haripada Modak of Ashu Sahis Lane, Desh Bhandhu Road, Purulia on 1st December, 2009.
- 4) That the family members of my husband started Physical & Mental unbearable torture to me and it has been reported that my husband has an illicit relation with wife of his elder brother.
- 5) That they are not allowing me to enter their house unless I agreed to hand over the monthly salary to them & they forcibly snatch away my monthly salary.
- 6) That I have become pregnant and carrying a baby of eight months and my husband is threatening to harm my family. Even my husband threatens me in my place of posting. My life and property is a stake at the hands of my husband and mother-in-law Saila Bala Modak, my 'Ja' Kalpana Modak and elder brother-in-law, Binanda Modak.
- 7) That the ornaments which my father gifted at the time of marriage have been forcibly taken away by my husband.
- 8) That my husband is creating pressure to terminate pregnancy.
- 9) That sufficient food and clothing is not given to me.

10) That I have been pressurized to do all house-hold work against my physical condition.

Under the above circumstances, I request your kind self to do the needful so that I can live with my in-laws family peacefully.

Date: 07.09.2010

Yours faithfully

Ava Bhadra (Modak)”

16. Even if for the sake of argument if the submission made by Mr. Mukherjee that Exhibit-1 does not suggest that respondent had any intention to set the criminal law in motion against her husband or her in laws, then also the question which remains unanswered, is what prompted respondent (PW-1) her father (PW-2), her brother (PW-3), her mother (PW-4) to depose in support of contents of Exhibit-1, in order to convict them in a criminal trial. In this context what has been noted by trial Magistrate in relation to evidence adduced by respondent herein as PW-1, may be quoted from Paragraph 11 of the judgment:-

“PW-1 Abha Bhadra Modak, deposed before the Court that she was given marriage with the accused Krishna on 01/12/2009 and after her marriage she had been to her matrimonial home at D.B. Road, Purulia. According to her, for the first seven days after her marriage she was behaved well by the accused persons but thereafter they started to torture her on demand of her salary. She was a Nushing Staff at Chakaltor BPHC. On her refusal to hand over the salary her husband snatched her salary and kept her inside a room under lock and key and also used to beat her very on and off. She was not provided with any foods and cloths. Her clothes were kept inside the Almira under lock and key so that she could not avail those cloths. Dirty sands used to mixed up with her meal so that she could not take her food. She reported the facts to her parents and brothers. During her pregnancy her husband kept her

to her father's house so as to she can live peacefully during her pregnancy period, but unfortunately he did not take her back. She was threatened by the accused on the road while she used to go for her duty. Finding no other alternative remedy she approached before the O.C. Purulia (T) P.S. Accordingly, O.C. called her husband at P.S. and thereafter she was taken to her husband's place. But unfortunately, the torture was not stopped by the accused person, rather it was increasing day by day. Her husband used to throw away her meal in the drain instead of giving her for her nutrition's. It is also alleged by the complainant in her evidence that on 06/09/2010 her husband lodged a complaint against her before the Protection Officer, Purulia and thereafter on the next day she was driven out from her matrimonial home and on the preceding night she was compelled to stay outside the house of the accused-husband . Anyway, since then she has been staying at her father's house. According to the testimony of the complainant the valuable ornaments were snatched away by the accused before driving her out from their home. The accused-husband used to instruct her to miscarry her pregnancy but as she refused to comply his direction she was beaten up by the accused-husband. She identified her signature and the FIR marked as Ext-1."

17. Undoubtedly those allegations and /or aspersions in the alleged FIR (Exhibit-1) and in evidence during criminal trial and even in her written statement, leveling acquisitions of character assassination with brother's wife of petitioner outside wedlock i.e. extra-marital relationship with family member, extortion of money by petitioner, attempt to make forceful termination of pregnancy by petitioner , denial to provide sufficient food and clothing to respondent by petitioner are serious allegations/aspersions which , if remains not proved is certainly grave assault on the character, honour, reputation status as well as mental health of the petitioner in the context of

our society. In this context it would not be out of context to quote observations made by learned Trial Magistrate in paragraph 13 of his judgment.

“After considering the evidence of the complainant and the FIR lodged by her it appears to me that the complainant has exaggerated her evidence a lot. In the petition of complaint there is no mention of the fact of mixturing of dirty sand into her food or its thrown away to the drain. It is also not mentioned in the FIR that she was regularly beaten up by the accused persons on demand of her salary. From her cross-examination it appears that her salary has been paid through her Bank Account. In this situation, how the husband can snatch it away from her is not clearly described by the complainant. Complainant tried to rope as many as the relatives of the husband and made stereo type allegations against all the accused persons. The role played by each of the accused persons cannot be distinguish from the others. She made general allegations of torture and assault on her by the accused persons. It is to be further remember that the complainant was kept at her father’s house after few days of her marriage by the accused-husband for peaceful living during her pregnancy. Thereafter in the Month of August, 2010 she was returned back to her matrimonial home with the intervention of the Police Officers and within a Month she was driven out from her matrimonial home. All this facts indicate that she stayed for a little amount of time at her matrimonial home and within such short span of time the relationship went into such a worsen situation that the parties could not live together. Complainant has made a blunt allegation of illicit relationship without any evidence against her husband. She failed to produce any medical papers relating to her injury or treatment by any of the doctor. The date of assault or torture or snatching away her salary has not been specifically stated by the complainant.”

18. In this context we would also like to quote paragraph 12 and 13, the observations made by Hon’ble Apex Court on a similar context in Rani Narasimha Sastry (Supra).

“12. This Court has laid down that averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under section 13 (1)(i-a) of the Act. This Court in Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate has laid down the following in para 7: (SCC p. 339)

“7.The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under section 13(1)(1-a) of the Act. The position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of any educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law has also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High court. We find that they are of such quality , magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible.”

13. In the present case, the prosecution is launched by the respondent against the appellant under Section 498-A IPC making serious allegations in which the appellant had to undergo trial which ultimately

resulted in his acquittal. In the prosecution under Section 498-A IPC not only acquittal has been recorded but observations have been made that allegations of serious nature are levelled against each other. The case set up by the appellant seeking decree of divorce on the ground of cruelty has been established. With regard to proceeding initiated by the respondent under Section 498-A IPC, the High court made the following observation in Para 15:(Rani Narsimha Sastry case, SCC Online Hyd)

“15....Merely because the respondent has sought for maintenance or has filed a complaint against the petitioner for the offence punishable under Section 498-A IPC, they cannot be said to be valid grounds for holding that such a recourse adopted by the respondent amounts to cruelty”.

The above observation of the High Court cannot be approved. It is true that it is open for anyone to file complaint or lodge prosecution for redressal of his or her grievances and lodge a first information report for an offence also and mere lodging of complaint or FIR cannot ipso facto be treated as cruelty. But, when a person undergoes a trial in which he is acquitted of the allegations of offence under Section 498-A IPC, levelled by the wife against the husband, it cannot be accepted that no cruelty has been meted out on the husband. As per the pleadings before us, after parties having been married on 14-8-2005, they lived together only 18 months and, thereafter, they are separately living for more than a decade now.”

19. In view of aforesaid discussion, it is established that on the basis of some unfounded baseless allegations, petitioner and his family members had to face trial, which not only resulted in acquittal but also the observations made by trial magistrate goes to show that respondent has motivatedly made some blunt allegations of illicit relationship, extortion of money, creating presume to terminate pregnancy, refusal to provide sufficient food, clothing etc during her stay at her matrimonial home, which she failed to substantiate by cogent document or evidence and as such we have no hesitation but to conclude that respondent has treated petitioner with cruelty and for which

petition is entitled to get decree of divorce under section 13(1) (i-a) of the Hindu Marriage Act 1955.

20. We allow the appeal of the appellant and grant decree of divorce. However considering the fact the petitioner has also the responsibility to bring up the son presently aged about 12 years and was begotten during subsistence of their marriage, we direct the appellant to make payment of one time permanent maintenance including litigation cost of Rs. 6 lakhs to the son payable by the petitioner to the joint Bank A/C in the name of son and respondent within three months from today. The decree for permanent alimony passed by us will be executable after the expiry of three months from today, in case of default.

21. The appeal being F.A. 161/2013 and the connected application is thus disposed off but in the facts and circumstances of the cases, without cost.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Let the copy of the order be send to the learned District Judge, Purulia in Mat Suit No. 115/2011.

I agree

(Soumen Sen, J.)

(Ajoy Kumar Mukherjee, J.)