

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.390 of 2015

Amit Chaudhary Son of Vivekanand Choudhary Resident of R-10-1005, Udai Giri Apartment , Police Station Kotwali District Patna .At Present residing at C/O V.N. Choudhary , Mohalla Acharaj , Post Office Baunsi , Police Station Baunsi , District Banka.

... .. Appellant/s

Versus

Poonam Chaudhary Wife of Amit Choudhary Daughter of Diwakar Thakur Resident of Flat No. 81, R.B.I. Colony Police Station Digha , District Patna at Present C/O Diwakar Thakur , Panch Mandir Marg , Road No. 2, Shivpuri , Patna.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. K.N. Choubey, Sr. Advocate
For the Respondent/s	:	Mr. Vijay Bardhan Pandey, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE SATYAVRAT VERMA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SATYAVRAT VERMA)

Date : 08-02-2023

Heard Mr. K.N. Choubey, learned Senior counsel for the appellant/husband and Mr. Vijay Bardhan Pandey, learned counsel for the respondent/wife.

The present appeal is directed against the judgment and decree dated 31.08.2015/08.09.2015 passed in Matrimonial Case No. 475 of 2008 by the learned Additional Principal Judge, Family Court, Patna whereby the Matrimonial Case No. 475 of 2008 filed by the appellant, seeking divorce from the respondent on the grounds of



desertion and adultery, has been dismissed.

Before advertng on the merits of the appeal, it is pertinent to briefly state the facts of the case.

The appellant filed Matrimonial Case No. 475 of 2008 wherein he pleaded that the father of the respondent died much earlier and therefore her brother-in-law and sister performed her marriage with the appellant on 24.06.2005. After the marriage, the respondent came to her matrimonial home along with the appellant and thereafter accompanied him to Noida where the appellant was posted as an Engineer in a private company. Thereafter, they went to *Vaishno* Devi temple for offering prayers and also celebrating their honeymoon. They thereafter returned to Raipur where the father of the appellant was posted and the couple were given a warm welcome. The respondent invited her brother-in-law (Rajesh Kumar Mishra) and her sister (Neelam Devi). After the reception, the respondent insisted for and accompanied her brother-in-law to Patna. The appellant returned from Raipur to Noida but he faced hardships in his day to day life. After much persuasion, the respondent joined him on



20.08.2005 at Noida. During her stay, she became pregnant. Thereafter, the brother-in-law and the sister of the respondent came and pressurized the appellant to allow the respondent to accompany them to Patna. The appellant, under pressure, allowed her to accompany them. Accordingly, she left for Patna on 25.10.2005. The appellant, thereafter, requested the brother-in-law as well as the sister of the respondent to send her back but they started delaying her return and finally on 10.07.2007 refused to send the respondent on the ground that she was being ill-treated. This left the appellant utterly shocked. The effort of the appellant to bring her back also failed as the respondent very sternly disclosed to him on phone that her brother-in-law is her first priority in her life and she cannot even dream of going against his wishes. The appellant, on inquiry, came to know that the father of the respondent had left behind valuable properties and the respondent was one of the heirs and thus her brother-in-law and sister did not want to part with the property which the respondent would have inherited. This was the reason for them to create a



situation that the respondent leaves her claim over the property. A child but was born who till date is under custody of the brother-in-law and sister of the respondent. The appellant, in order to have his conjugal rights restituted, filed an application under Section 9 of the Hindu Marriage Act, 1955 (Matrimonial Case No. 457 of 2007) in which the brother-in-law and sister of the respondent were also impleaded as opposite parties along with her.

The respondent filed her written statement in Matrimonial Case No. 457 of 2007, denying the contentions of the appellant but did not state that she was willing to resume her conjugal life nor her brother-in-law ever disclosed that he was ready to send her back.

Despite such luke-warm approach of the respondent, the appellant again contacted her telephonically and wanted to know the reason for not accompanying him on which she flatly disclosed that she cannot live without her brother-in-law as he is the first male in her life. Thus, it was pleaded that the cause of action for filing the Matrimonial Suit arose on 25.10.2005 when respondent went back to Patna along



with her brother-in-law and her sister, and on 10.07.2007 when her brother-in-law and sister refused to send her back and lastly when the respondent disclosed her intention on telephone of not joining him as his wife.

From the facts pleaded in the Matrimonial Suit by the appellant, it is culled out that respondent on 25.10.2005 left for Patna and stayed there and never returned and finally on 10.07.2007, her brother-in-law and sister refused to send her back. The appellant has also alleged that the respondent was in relationship with her brother-in-law.

The respondent appeared and filed her written statement wherein she pleaded that her marriage was solemnized on 24.04.2005 as per Hindu rituals and after marriage she was taken to the ancestral village of her husband and thereafter to Noida, where the marriage was consummated. The brother-in-law and sister of the respondent spent huge amount in the marriage in anticipation that she would lead a happy and prosperous conjugal life. The appellant had demanded Rs. 12 Lacs before marriage for purchasing a flat at Noida and the same



was provided to him by her brother-in-law and sister before the father and uncle of the appellant. But, when she started living at Noida, she was shocked to see the profligate and libertarian life of the appellant. The younger brother of the appellant also used to live with him. Her attempts of dissuading her husband from leading such life-style only infuriated him. She was subjected to mental and physical torture, causing mental shock, pain and agony to her. On 20.08.2005, the appellant came to Patna and took her to Noida when his behaviour became even more cruel. He started torturing her mentally and physically in various ways and even pressurized her to sell her share of land at Patna and demanded Rs. 5 Lacs for purchasing a Car. On refusal, he started avoiding the respondent. On coming to know that she is pregnant, the appellant and his family members pressurized her for abortion. Late, the uncle and aunt of the appellant came to Patna and asked her to put her signature on divorce papers to which she flatly refused and requested them to convince the appellant to act like a prudent husband but they used vulgar words and did not even care to caress



her child who was born on 29.05.2006 at Kurji Holy Family Hospital, Patna. The appellant, it has been urged, gets salary of Rs. 60,000/- and his father is a pensioner who lives at Raipur. His brother is an Engineer. The appellant has thus no other responsibility except the respondent. The respondent showed her inclination to accompany the appellant to her matrimonial home but only on assurance that he shall have no relation with any other woman and he shall keep her with love and affection and dignity.

From the written statement of the respondent, it appears that the marriage was solemnised on 24.06.2005. The appellant had demanded Rs. 12 lakhs fore marriage for purchasing a flat at Noida which was paid. The appellant was leading a colourful life and pestered her for leading the same kind of life and on her refusal, was subjected to torture, both mental and physical. After marriage, the appellant demanded Rs. 5 lakhs for purchasing a Car and on her refusal, he started avoiding the respondent and never made any effort to meet the child; rather he sent his uncle and aunt to the respondent for getting the divorce paper signed.



On the basis of the pleadings of the parties, the learned Family Court framed the following issues:-

1. Is the suit as framed maintainable?
2. Has the petitioner got valid cause of action for the suit?
3. Whether the respondent deserted the petitioner without any sufficient cause?
4. Whether the respondent had been leading an adulterous life?
5. Whether the petitioner is entitled to get a decree against the respondent?
6. To what relief or reliefs the petitioner entitled?
7. If issue no. 5 is proved, then whether the respondent is entitled for permanent alimony and maintenance under Section 25 of the Hindu Marriage Act, 1955?

Both the parties led oral as well as documentary evidence and the learned Family Court, having considered the pleadings as well as the evidence adduced on behalf of the parties, dismissed the above suit by the impugned



judgment and decree dated 31.08.2015 and 08.09.2015 respectively on the ground that the appellant could not prove the factum of desertion and adultery.

The learned Senior counsel further submitted that from the side of the appellant, four witness were examined, including the appellant Viz. Bhawesh Kant Jha (uncle of the appellant) PW-1, Amit Choudhary (appellant) PW-2, Vivekanand Choudhary (father of the appellant) PW-3 and Anil Kumar Jha (cousin) PW-4 and two exhibits were also brought on record from the side of the appellant as recorded in the impugned judgment. From the side of the respondent, 5 witnesses were examined including the respondent namely DW 1 Birendra Kumar Thakur (brother of the respondent), DW 2 (Rakesh Kumar Mishra), DW 3 Neelam Devi (sister), DW 4 Shesh Narayan Rai and DW 5 Poonam Kumari (respondent) and from the side of the respondent, three exhibits were also brought on record that is Exhibit A, A/1 and A/2 as recorded in the impugned judgment.

The relevant evidence is of the appellant and the respondent but briefly the Court would record the evidence



of the witnesses brought from the side of the appellant and the respondent in order to appreciate the controversy in issue i.e. whether the matrimonial case filed by the appellant could have succeeded on the grounds of adultery and desertion.

The PW 1 Bhawesh Kant Jha, in his examination-in-chief, which was filed on affidavit has stated that the appellant is his maternal nephew. The marriage was solemnized on 24.06.2005. After the marriage, the respondent accompanied the appellant to Noida. The respondent, from the beginning, had an extra marital affection for her brother-in-law and immediately after marriage, she accompanied her brother-in-law and sister to Patna. Thereafter, on 20.08.2005, the respondent came back to Noida and after staying for some time, she went to Patna and it was during this period of her stay, she became pregnant, and a child was born. The respondent claimed her brother-in-law to be the first man in her life and the appellant to be the second one. The respondent's father had left valuable properties behind him which she has inherited



and she also earns through rent from the properties left behind by her father. The appellant made endeavours to bring her back but when she was not willing to accompany him, he filed an application under Section 9 of the Hindu Marriage Act (Matrimonial Case No. 457 of 2007), in which respondent refused to stay with the appellant. She has been getting Rs. 7,000/- per month by way of maintenance under Section 25 of the Hindu Marriage Act, 1955. The witness further deposed that the appellant or his family members never demanded Rs. 12 Lakhs for purchase of flat or Car. **In his cross-examination** at Para 23, he has stated that he does not know as to from when the relationship went sour. They are staying separately since 25.10.2005 and he is not aware whether at the time of the birth of the child, the appellant or his parents went to the house of the respondent or not. Further, at Para 24 of his cross-examination, he has stated that he does not know as to how many times the appellant or his family members had gone to bring the respondent back, though in 2007 they had gone. Further, at para 25 of his cross-examination, he



has stated that the effort for reconciliation between the parties was made, but he is not aware whether the appellant is ready to keep the respondent as wife or not and at Para 26 has stated that he is not aware about the result of the application filed under Section 9 of the Hindu Marriage Act.

From the evidence of PW 1, it is clear that he is not a material witness nor is he aware what efforts were made to bring back the respondent to the matrimonial fold.

The PW 2 in his examination-in-chief which was filed on affidavit repeated what was pleaded in the suit as recorded hereinabove. The PW 2 **in his cross-examination** at Para 24 has stated that they got married on 24.06.2005 and the respondent stayed with him till October, 2005, whereafter she went back to her parental home. Later, he came to know that a son was born but he does not remember the date on which the child was born. Thereafter, in 2007, he went to her maternal home where he saw the child. He has been providing maintenance to the respondent but does not make any payment for the



maintenance of the child. At Para 25 of the cross-examination, he has stated that he is not aware as to who performed the *Kanyadan* of the respondent. The parents of the respondent are dead and he is not aware as to how many brothers were present at the time of marriage as he was not informed about the same nor he has any relationship with her brothers-in-law. At Para 26 of his cross-examination, he has stated that respondent has her house at Shivpuri but he has not seen any document relating to the property. At Para 28 of the cross-examination, he admitted that he filed an application for restitution of conjugal rights but the same was withdrawn and at Para 29 of his cross-examination he has admitted that both the parties were ready to stay with each other after an attempt for reconciliation was made during pendency of the application filed for restituting the conjugal rights.

From the evidence of PW 2, it is clear that though he has stated that he made endeavours for bringing the respondent back to the matrimonial home but his



conduct reflects to the contrary in the sense that he has not furnished any explanation as to why he withdrew the application filed under Section 9 of the Hindu Marriage Act. This gives an impression that it was only a ploy to take undue advantage. The revelation that he does not know when his child was born also shows that despite being aware that his wife conceived during her stay at Noida, he never took any efforts to find out about the child till 2007. Further, he has also accepted that he does not pay anything for maintenance of the child which speaks volumes about his conduct and seriousness to bring back the respondent to her matrimonial home. Further, from his evidence, nothing comes out which could even remotely suggest that the respondent was living an adulterous life. Thus, his entire effort to seek divorce on the grounds of adultery gets negated. The appellant has accepted that he also does not want to live with the respondent which goes to demonstrate that he was never interested in restituting his conjugal rights; rather was only trying to make out a case for desertion. The respondent, in Para 12 of her written



statement, has very clearly stated that she is willing to accompany the appellant provided he gives an assurance that he shall keep her properly but even the said assurance was never given.

The PW 3 also filed his examination-in-chief on an affidavit and stated that the marriage was performed on 24.06.2005 and after the marriage, she accompanied the appellant to Noida, whereafter, she started pressurizing the appellant for going back to Patna. Thereafter, again in August, 2005, she came to Noida where she conceived. Her sister and brother-in-law thereafter came to Noida and took her back to Patna. Her brother-in-law and sister clearly refused to send her back. A child was also born. The respondent has more affection for her brother-in-law than the appellant and after the death of her parents, she started living with her brother-in-law on account of which her relationship with her brothers also soured. The father of the respondent had left behind properties in the name of the respondent. An amount of Rs. 7,000/- is being paid towards her maintenance and no money was ever



demanded for purchase of flat or Car and the respondent, since October, 2005, is staying separately. **The PW 3 in his cross-examination** at Para 27 has stated that now, they are not ready to keep the respondent and at Para 28, has stated that the brother of the respondent never informed about the birth of the child. He did not go to see the child but the appellant had gone to see the child.

From the evidence of PW 3, it is clear that he has admitted that now the family is not ready to keep the respondent nor even after coming to know the birth of his grandson, he visited the respondent.

The PW 4 is the maternal brother of the appellant, who has stated in his examination-in-chief which was filed on an affidavit that the marriage was solemnized on 24.06.2005. The respondent's father had left behind property in her name. The respondent plainly refused to stay with the appellant, whereafter, the appellant filed an application under Section 9 of the Hindu Marriage Act being Matrimonial Case No. 457 of 2007. The appellant is paying a monthly sum of rupees 7,000/- to the respondent and



had never demanded any money for purchase of flat or car and the respondent since 25.10.2005 is not staying with the appellant. **The PW 3 at para 22 of his cross-examination** has stated that he is not aware of the result of Matrimonial Case No. 457 of 2007. Further, whatever he has stated in his affidavit is based on what he heard from the appellant and his father.

The evidence of PW 4 is not at all material.

Thereafter, the evidence of the respondent and her witnesses was taken.

The DW 1 has submitted his examination-in-chief on an affidavit wherein he has stated that the marriage was performed on 24.06.2005 and out of the wedlock, a child was born. The respondent stayed at Noida where the appellant had been working. The parents of the respondent had died prior to her marriage and she was brought up by her sister and at the time of marriage, an amount of Rs. 20 Lakhs was spent but after the marriage, the appellant demanded money for purchase of car. The appellant never came to visit his child. The allegation of



adultery is false. Her brother-in-law is like her guardian and the appellant only leads a colourful life. Further, the appellant wanted to use the respondent for getting his promotion. The respondent is willing to stay with the appellant provided the appellant assures on affidavit that he will change his ways. **In his cross-examination**, he has supported what he stated in his examination-in-chief.

The DW 2 also submitted his examination-in-chief on affidavit wherein he stated that the marriage was performed on 24.06.2005 and an amount of Rs. 20 Lakhs was spent at the time of marriage. The respondent stayed with the appellant at Noida where she became pregnant and gave birth to a child. The appellant demanded money for purchasing a car. The parents of the respondent died prior to her marriage and she along with her child stays with her sister and receives a monthly maintenance of Rs. 7,000/- only. The allegation of appellant regarding adultery is false; rather the appellant only leads a colourful life and has also come to know that he has performed a second marriage. Further, the appellant coerced the respondent to spend her



time with his boss for his promotion. **The DW 2 in his cross-examination** at Para 26 has stated that the respondent as per his knowledge, never refused to reconstitute her conjugal rights during the proceedings of Matrimonial Case No. 457 of 2007.

The DW 3 submitted her examination-in-chief on an affidavit wherein she supported the case of the respondent and has stated that the appellant leads a colourful life and when his demand for purchasing a car was not met, he ousted the respondent from her matrimonial home and kept back the jewellery and clothes and during proceedings, when efforts were made by the Court at reconciliation, the appellant had fled. Further, the allegation of adultery is completely false. **The DW 3** withstood the test of cross-examination and has stated at Para 25 that respondent is willing to join the appellant provided he assures that he will improve his character.

The DW 4 is not a material witness.

The DW 5 is the respondent herself and has submitted in her examination-in-chief on an affidavit



wherein she has pleaded nearly verbatim the facts which she had pleaded in her written statement. **The DW 5 in her cross-examination** at Para 3 has stated that the appellant is a drunkard and leads a colourful life and has extra marital affairs with girls. At Para 6, she has stated that she has come to know that the appellant has performed a second marriage. Further, at Para 7, has admitted that she gets monthly maintenance of Rs. 7,000/- only but that is not sufficient and at Para 8 has stated that she wants to stay with her husband and child provided he quits liquor and improves his character. She stayed with her husband only for two and half months at Noida and made endeavours to stay with the appellant before and after the birth of the child but no one came to see the child after his birth.

From the evidence of the defence witnesses, it is clear that the appellant was leading a colourful life and wanted to use the respondent for his personal benefit and never made any serious endeavours to bring her back. Even the matrimonial case filed for restitution of conjugal rights was



withdrawn. The father of the appellant in his cross-examination has clearly stated that he does not want the respondent back. Even the appellant in his cross-examination has admitted that he does not want to revive his matrimonial relationship.

The learned Senior counsel for the appellant submitted that no amicable settlement between the parties could not be arrived at and the fall out of such breakdown of talks of settlement has given rise to a situation where the marriage has irretrievably broken down. For the last 17 years, spouses are not in contact with each other. Attention of this Court is drawn to a judgment of the Supreme Court in Samar Ghosh Vs. Jaya Ghosh 2007 (4) SCC 511, wherein the Supreme Court, after analyzing various cases under the British, Canadian and American laws and taking reference of the cases decided by the Supreme Court in N.G. Dastane (Dr.) Vs. S. Dastane and various other cases, came to a conclusion that mental cruelty is not a static concept and there could be no straitjacket formula or fixed parameters for finding out as to what is mental cruelty.



Only instances could be recounted, which cannot ever be exhaustive. Some of the instances, which has been found to display mental cruelty are when it would not be possible for the spouses to live with each other without undergoing acute mental pain, agony and sufferings, or when it is found that a wrong party cannot reasonably be asked to put up with the conduct of the other party or continue to live with him/her. The Supreme Court was categorical enough in holding that mere coldness or lack of affection cannot amount to cruelty. Even frequent rudeness of language, petulance of manners, indifference and neglect would not construe mental cruelty unless it reaches a degree which would make the married life of the other spouses absolutely insufferable.

One of the grounds but which would surely comprise mental cruelty is the long period of continued separation from which it could only fairly be inferred that the matrimonial bond is beyond repairs. In such case, the marriage becomes an affliction though supported by a legal tie. Refusal to sever that tie does not serve the sanctity of



marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

This situation is definitely of mental cruelty.

The learned Senior counsel further submitted that several attempts have been made for reconciliation and negotiations at any term acceptable to the respondent but except for her cold response that she would not like to discontinue the ties of man and wife, there has been no effort on the part of the respondent to end the stalemate.

The appellant is paying a monthly sum of Rs. 7,000 to the respondent for her maintenance. The son born out of the wedlock is also being maintained by him. The records of this case reveal that in the past, a proposal for one time settlement was made by the appellant, offering 40 Lakhs to the respondent towards all her matrimonial dues and assurances to defray the expenses incurred in maintenance of the child till he attained majority or secured his appointment.

It is submitted that the respondent has not even responded to this offer but only insisted for



resumption of matrimonial bond.

The learned Senior counsel next urged that there could be no way in which the appellant could prove adultery of his wife but the wife refusing to sever the matrimonial ties after 17 years of leading separate life is the indication of irretrievable breakdown of the marriage on grounds of mental cruelty.

The learned counsel for the respondent rebuts such submissions and urges that the matrimonial suit was not filed for seeking divorce on grounds of mental cruelty, rather the ground raised were of adultery and desertion and from the evidence of PWs, it is clear that not even remotely, the allegations against the respondent of leading an adulterous life could be proved. Still the appellant never made any efforts to bring back the respondent and his son which amply demonstrates that he was never interested in resuming his conjugal relationship. It is next submitted that even the allegation of desertion was not proved. For seeking divorce on grounds of desertion, two essential conditions must precede i.e. the factum of separation and



the intention to prove that cohabitation permanently came to an end. Either spouse who claims to have been deserted must bring to the fore the absence of consent and absence of reasonable cause for deserting the other side and for this proposition, the learned counsel relied on a judgment of the Supreme Court in the case of ***Savitri Pandey Vs. Prem Chandra Pandey reported in AIR 2002 SC 591.*** It is next submitted that from the evidence on record of the parties, it would manifest that the appellant very wisely made no endeavours to bring the respondent back to the matrimonial fold and to create an evidence for seeking divorce on grounds of desertion. He even resorted to creating legal evidence by filing a matrimonial suit for restitution of conjugal rights and subsequently withdrew the same when from the evidence of the respondent, it is clear that she always intended to resume her conjugal life provided the appellant gave her assurance that he will change his lifestyle and improve his conduct. It is next submitted that divorce is not for mere asking; it is a sacrament and the conduct of the party seeking divorce



become relevant and the fact which stands admitted from the evidence of the appellant is that he never even bothered to find out about his child nor has been providing any maintenance for the child.

The learned counsel for the respondent next draws the attention of the Court to Exhibits A, A/1 and A/2 to submits that the appellant was leading a colourful life and thus never actually wanted the respondent to accompany him. It is next submitted that the present matrimonial suit was filed during pendency of Matrimonial Case No. 457 of 2007 which further reflects the conduct of the appellant. It is thus submitted that the desertion was not wilful and the learned Additional Principal Judge, Family Court, Patna rightly negated the same along with the allegation of adultery.

The learned counsel for the respondent next submitted that the grounds raised by the learned Senior counsel for the appellant that the marriage has been irretrievably broken down is only fit to be rejected as Section 13 of the Hindu Marriage Act does not stipulate



irretrievable break down of marriage as a ground for dissolution of marriage. For this proposition, the learned counsel relies on a judgment of the Hon'ble Supreme Court in the case of **Anil Kumar Jain Vs. Maya Jain reported in (2009) 10 SCC 415** wherein the Supreme Court at Paragraph Nos. 28 and 29 of the Judgment has recorded as follows:

"28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion thrown up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13-B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated



in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.”

After considering the submissions made by the parties, we are in complete agreement with the judgment and the decree passed by the learned Additional Principal Family Judge, Patna which requires no interference.

The appeal is thus dismissed.

(Satyavrat Verma, J)

I agree-

(Ashutosh Kumar, J)

Rishabh/-

AFR/NAFR	A.F.R.
CAV DATE	N/A
Uploading Date	05.05.2023
Transmission Date	N/A

