

Item-
ML-17. 01-05-2023

sg Ct. 8

FAT 102 of 2018
CAN 3 of 2019 (old CAN 11218 of 2019)

Kashi Nath Roy
Versus
Manikona Roy

Mr. Rwitendra Banerjee, Adv.
Mr. Sujit Banerjee, Adv.
Mr. Nilay Sengupta, Adv.
Mr. Devdutta Pathak, Adv.

...for the appellant

We have heard Mr. Probal Kumar Mukherjee, learned Senior Counsel as Amicus and the learned Counsel for the appellant.

The suit for divorce was filed under Section 13(vii) of the Hindu Marriage Act, 1955. The learned Trial Judge dismissed the suit on the ground that the husband was unable to produce any evidence to show that, for the entire seven years' period attempts were made to trace out the wife and there is no evidence near to filing of the suit which would show that any attempt was made to ascertain the whereabouts of the wife.

We have read the evidence carefully. It appears that the suit was filed on the basis of the attempts made by the husband in the year 2007 only and not thereafter. It is true that an advertisement was made in the year 2007 and a missing diary was also lodged but it seems to have not been pursued. The divorce under Section 13(vii) will be on a presumption that a person is not alive.

The court has to be extremely careful in deciding the said matters unless the court is satisfied that the ingredients of the said section are fulfilled, namely, that the person is not alive for a period of seven years or more and such fact is established by

those persons who would naturally heard of it. The court cannot mechanically allow the divorce under the said provision. During the pendency of the appeal, advertisements were issued and attempts were made to serve the wife at her last known address and, in fact, notices were sent in the name of the father-in-law of the petitioner.

A report has come that the brother-in-law of the petitioner accepted the said notice and has presumably stated the father-in-law that her sister has been missing for last several years. These evidences were, however, not available that the suit was originally tried. The report of the CID would also be relevant in deciding the said issue.

Under such circumstances, we remand the matter to the learned Trial Court with a direction to reconsider the matter and rewrite the judgment on consideration of additional evidence to be adduced by the appellant.

The appellant shall be entitled to obtain certified copy of the relevant documents filed in this proceeding that may be relied upon in the Trial Court.

It is needless to mention that the appellant shall establish that, in spite of due diligence, the appellant was unable to trace out his wife and would be required to produce those persons who would have naturally heard of the wife had she been alive.

The appellant shall also be entitled to adduce further evidence and any other evidence over and above indicated above to prove its case.

The Officer-in-Charge of the concerned police station has filed a report on 9th September, 2022 to the following effect:

*“To
The Ld. Second Assistant Registrar,
Hon’ble High Court at Calcutta.*

*FAT 102 of 2018
CAN 3 of 2019
In the matter of: Kashi Nath Roy*

Sir,

Beg to submit before your Honour that in compliance with the order passed by Hon’ble Justice Soumen Sen and Hon’ble Justice Siddhartha Roy Chowdhury in FAT 102 on 29.08.2022 necessary efforts had been made to serve the notice to Manikona Roy and her father Pankaj Mukherjee at P-131, Parnasree Pally, Kolkata-700060 but the notice was not served due to non-availability of them.

Mr. Indranil Mukherjee (62y), S/o Pankaj Mukherjee of P-131, Parnasree Pally, Kolkata-700060 reported that in the year of 1991 his father Pankaj Mukherjee left the house and nobody knows his present whereabouts. He also informed that Manikona Roy was missing from more than 13 years and remain untraceable despite of best efforts of them. So the notices were not served.

This is for your kind perusal.”

The said report was taken on record in order dated 12th September, 2022.

The evidences of the Officer-in-Charge of the concerned police station and Mr. Indranil Mukherjee may also be relevant.

In view of the subsequent developments, the impugned judgment is set aside.

The Trial Court shall rewrite the judgment taking into consideration the aforesaid observations and permit the appellant to adduce fresh evidences.

The appeal and the application stand disposed of.

LCR shall be sent down to the Trial Court immediately.

We record our appreciation for the assistance of the Amicus.

(Uday Kumar, J.)

(Soumen Sen, J.)